

EXECUTIVE OVERREACH: THE HHS MANDATE VERSUS RELIGIOUS LIBERTY

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS SECOND SESSION

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EXECUTIVE OVERREACH: THE HHS MANDATE VERSUS RELIGIOUS LIBERTY

TUESDAY, FEBRUARY 28, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 2:35 p.m., in room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbrenner, Coble, Goodlatte, Lungren, Chabot, Issa, Forbes, King, Franks, Jordan, Poe, Gowdy, Adams, Quayle, Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Quigley, Chu, Deutch, and Sanchez.

Staff Present: (Majority) Zach Somers, Counsel; Travis Norton, Counsel; (Minority) Heather Sawyer, Counsel; and Danielle Brown, Counsel.

Mr. SMITH. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone who is with us today, both our witnesses and those in the audience, and of course Members. I am going to recognize myself and the Ranking Member for an opening statement, and then I will introduce the witnesses, and we will look forward to your testimony.

This is a hearing on Executive Overreach: The HHS Mandate Versus Religious Liberty. Religious liberty and freedom of conscience occupy an essential place among our unalienable rights. As James Madison observed, "The religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."

However, recent Obama administration policy decisions have shown a pattern of open hostility to religious organizations and religious liberty. The Administration has denied Federal grants to religious groups engaged in serving the poor and vulnerable. It has deleted religious organizations from the list of nonprofit employers that qualify for Federal student loan forgiveness programs. And the Administration even argued before the Supreme Court that the Federal Government should determine when a church can fire one of its religious ministers. All nine justices rejected their argument.

The Administration is treating the First Amendment right to the free exercise of religion as nothing more than a privilege arbitrarily granted by the government. Nowhere has this been more true than

with the Administration's decision to mandate that religious organizations pay for abortion inducing drugs, sterilizations, and contraception that they find morally objectionable. Such a mandate cannot exist within a free society.

The Administration and its supporters have tried to cast this as a women's health issue to deflect attention away from the mandate's effect on religious freedom. They assert that religious groups are attempting to deny access to drugs and services to which most people have no objection. This assertion is false. Religious institutions do not seek to dictate what their employees can purchase or use. They seek to avoid a mandate that would force them to violate their religious convictions.

Others have pointed to the Administration's so-called accommodation to argue that the mandate no longer infringes on religion. The accommodation is nothing more than an accounting gimmick. Insurance companies aren't going to give the mandated drugs and services away for free. Religious employers will still end up paying for them through higher premiums. Moreover, religious employers continue to be obligated to provide their employees with insurance plans that facilitate actions that violate their tenets, and religious organizations that self-insure, such as the Archdiocese of Washington, are required to pay for the mandated drugs and services directly.

The objection to the mandate is not about political party ideology or eliminating women's access to abortion or contraception. It is about the respect for the religious liberty guaranteed to all Americans by the Constitution.

Thomas Jefferson's bill for establishing religious freedom proclaimed, "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." This is exactly what the HHS mandate has done. Religious employers who object to the mandate are compelled to either violate their sincerely held beliefs or be penalized.

The Federal Government does not have the power to dictate what health services religious groups must provide. The HHS mandate is a clear violation of religious freedom and a direct attack on the personally held views of many Americans. It is an erosion of religious freedoms. If allowed to stand, the HHS mandate will set a dangerous precedent for future Administrations that seek to impose their political views on churches and religious institutions.

That concludes my opening statement, and the gentleman from Michigan, the Ranking Member of the full Committee, is recognized, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman. I am pleased to join this discussion today, but I must observe that it is a little bit unusual, maybe unfortunate, that in the year 2012 we are still debating how and when women can have access to birth control. Today we will engage in a discussion at how a Nation committed to protecting individual liberties, the greatest Constitution ever created, can achieve a principled and meaningfully balance those rights that are in conflict.

Now, the Court hasn't wavered in recognizing a woman's right to family planning services, citing the right to privacy in several rulings, starting with *Griswold v. Connecticut* and *Roe v. Wade*. Most

of this Committee is made up of lawyers who studied this before they were admitted to the bar, and these cases rule that a woman's right to access birth control cannot be limited by the government and that the choice to have an abortion is protected under the due process clause of the Fifth and 14th Amendments. So the President's decision and the Administration's action is fully supported by legal precedent.

Now, in 1990 the Supreme Court decision in *Employment Division v. Smith* established that religious exemptions are not constitutionally required for religiously motivated conduct that violates a generally applicable law, and so it seems to me that the President and the Health and Human Services Secretary, Kathleen Sebelius, have diligently crafted a reasonable and balanced approach that respects the rights of conscience and the right to equality under the law. The Administration's rule, published on February 15, 2012, ensures that all women have access to contraceptive services as part of their no-cost preventive care and also ensures that nonprofit employers who object to these services on religious grounds do not have to provide or pay for contraceptive coverage. Instead, insurers will contact employees directly and offer them this coverage.

The Department's rule touches the lives of millions of women and their families who need the full package of preventive health care services. And while there have been many who will choose to ignore this aspect of the debate, the fact remains that the science and the scientific recommendations required by legislation enacted into law demonstrates the need for women to have access to these services.

Now, secondly, the science presented backs up the policy of the Administration. So what they are doing isn't just good or acceptable law, but it is also good science. The Independent Institute of Medicine, which is part of the National Institutes of Health, after a lot of study determined that contraception is a key preventative health service for women. Ladies and gentlemen, Members of the Committee, this is established science.

In addition to promoting planned pregnancies, including healthy spacing of pregnancies, certain contraceptives have other benefits as well. Here are a few observations. Over 200,000 cases of ovarian cancer and 100,000 deaths were prevented because of the health benefits of contraception. Over 10 percent of infant deaths could be prevented if pregnancies were planned and if women had better access to family planning. Women without access to contraception usually are at an increased risk of unhealthy infants due to lack of initial prenatal care, or bear significant financial strains on their family if the pregnancy was unplanned or unintended. So research demonstrates that many women have significant financial barriers to accessing contraceptive coverage.

Oral contraceptives can cost from \$180 to \$600 a year. In order to obtain a prescription, a woman needs to arrange a visit with an ob/gyn. Nearly one in four women with household incomes of less than \$75,000 a year have put off gynecological care or birth control for financial reasons. The Center for Disease Control and Prevention named family planning as one of the 10 most important public health achievements of the 20th century because of its contribution

to the better health of infants, children, and women. And so these studies confirm that failure to cover contraceptives exposes women to additional health care costs as well as physical consequences of unintended pregnancies.

Mr. Chairman, I close with this observation. There are many religious leaders that are completely satisfied with this approach. The Catholic Health Association has acknowledged that it is satisfied with the accommodation because it strikes the right balance between the burdens women and religious organizations would share in implementing the HHS ruling.

In addition, close to 30 Catholic or religious affiliated universities and colleges provide plans and benefits that include contraceptives and family planning. Melissa Rogers, the director of the Center for Religion and Public Affairs at Wake Forest University Divinity School, chair of President Obama's inaugural advisory council on faith-based neighborhood partnerships, who had previously criticized the rule, commended the revised rule saying, "it both resolves religious liberty concerns and respects the interests of Americans who would like to have these important health benefits."

And so I thank you for the additional time, and I put the rest of my statement in the record. Thank you.

Mr. SMITH. Without objection, thank you, Mr. Conyers.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

It is unfortunate that in 2012 we are still debating how and when women can have access to birth control. Today we will engage in a discussion at how a nation committed to protecting individual liberty can achieve a principled and meaningful balance with those rights are in conflict.

First, the President's decision and the Administration's action is supported by legal precedent.

The Supreme Court's 1990 decision in *Employment Division v. Smith* established that religious exemptions are not constitutionally required for religiously motivated conduct that violates a generally applicable law.

The Court has not wavered in recognizing a woman's right to family planning services, citing the right to privacy in several rulings—including *Griswold v. Connecticut* and *Roe v. Wade*—which ruled that a woman's choice to have an abortion was protected as a private decision between her and her doctor.

I believe that the President, and Department of Health and Human Services Secretary Kathleen Sebelius have crafted an reasonable and balanced approach that respects the rights of conscience and the right to equality under the law.

The Department's rule touches the lives of millions of women and their families who need the full package of preventive health care services, including contraception. While there have been many who would choose to ignore this aspect of the debate, the fact remains that the science—and the scientific recommendations required by legislation we enacted into law—demonstrates the need for women to have access to these services.

Secondly, the science presented backs up the policy of the Administration—it is not just good law but good science.

The Independent Institute of Medicine, which is part of the National Institutes of Health, after much study, determined that contraception is a key preventative health service for women.

In addition to promoting planned pregnancies, including the healthy spacing of pregnancies, certain contraceptives have other benefits as well. **Here are the facts:**

- Over 200,000 cases of ovarian cancer and 100,000 deaths were prevented because of the health benefits of contraception;

Over 10% of infant deaths could be prevented if pregnancies were planned and if women had better access to family planning;

Women without access to contraception usually at an increased risk of unhealthy infants due to lack of initial prenatal care, or bear significant financial strains on their families if the pregnancy was unplanned or unintended.

Research demonstrates that many women also have significant financial barriers to accessing contraceptive coverage.

- Oral contraceptives can cost from \$180—\$600 per year.
- In order to obtain a prescription, a woman needs to arrange a visit with an OB-GYN. Nearly one in four women with household incomes of less than \$75,000 have put off gynecological care or birth control for financial reasons.

The Centers for Disease Control and Prevention named family planning one of the ten most important public health achievements of the 20th Century because of its contribution to “the better health of infants, children, and women.”

These studies confirm that failure to cover contraceptives exposes women to additional health care costs as well as physical consequences of unintended pregnancies.

While this basic preventive care can be prohibitively expensive for many women, it imposes no financial burden on employers.

- The National Women’s law center has cited policies that fail to provide contraceptive coverage can cost an employer 15–16% more than policies providing it.
- The Congressional Budget Office reports that family planning coverage in public programs either saves money or results in no additional costs even in the short run.

Most importantly, millions of American women are impacted by policies that single them out from receiving necessary health care.

- American women also look at birth control as a basic element of their health care. Between 2006 and 2008 approximately 62% of women of childbearing age used contraception.
- An estimated 11.2 million women of childbearing age are currently using the pill.
- A report in the Washington Post cited that nearly 99% of women and 98% of Catholic women have used contraception.

So we should keep the health care needs and the rights of the vast majority of American women who need and choose to use this vital health care service.

The modified rule put forward by the administration recognizes the importance of these health care services, but it also respect the rights of conscience protected by the First Amendment, and by the Religious Freedom Restoration Act.

It does so by ensuring that houses of worship and allied institutions will be exempt from the rule, and that non-profit organizations with religious exemptions will not have to purchase or in any way pay for contraceptive coverage. Women will still receive the services if they want them, but objecting religious institutions of all types will not have to participate in any way.

It is, a solomonic solution to a difficult problem. It balances competing rights in a respectful manner.

Lastly, While some religious objectors are not satisfied with this approach, many are.

- The Catholic Health Association has acknowledge that it is satisfied with the accommodation, because it strikes the right balance between the burdens

women and religious organizations would share in implementing the HHS rule.

- In addition, close to 30 Catholic or religious affiliated university and colleges provide plans and benefits that include contraceptives and family planning.
- Melissa Rogers the Director of the Center for Religion and Public Affairs at Wake Forest University Divinity School and the chair of President Obama's inaugural Advisory Council on Faith-Based and Neighborhood Partnerships, who had previously criticized the rule, commended the revised rule saying "it both resolves the religious liberty concerns and respects the interests of Americans who would like to have these important health benefits. President Obama and his administration deserve great credit for implementing a solution that honors free exercise rights and fairness. I deeply appreciate the fact that the White House has taken the religious community's concerns so seriously."

I look forward to the testimony of our witnesses, and I look forward to a vigorous discussion of our efforts to ensure that our values of protecting women's health and promoting and protecting the free exercise of religion are advanced.

Thank you Mr. Chairman.

Mr. SMITH. The gentleman from Arizona, the Chairman of the Constitution Subcommittee, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman. Mr. Chairman, Thomas Jefferson proclaimed that "no provision in our Constitution ought to be dearer to a man than that which protects the rights of conscience against the enterprises of civil authority." James Madison put it even more succinctly, declaring that, "conscience is the most sacred of all property."

This is why America has had a long history of providing conscientiousness objections to religious believers. From exempting those who have religious objections to war from combat, to providing exemptions to religious believers who could not work on certain days of the week, to giving religious exemptions to corrections workers who could not be involved in capital punishment, Americans traditionally have not been forced by their government to violate their sacred religious beliefs.

Yet despite this Nation's strong heritage of protecting Americans' rights of conscience and religious freedom, the Obama administration has decided to coerce religious institutions into paying for services that directly violate the teachings of their faith. Under the cloak of promoting women's health, the Obama administration has pronounced that while a religious group may teach on Sunday that contraception and abortion are wrong, on Monday they must pay for their employees to be educated, counseled, and provided with contraceptive drugs, devices, and abortion procedures in direct violation of those teachings.

Mr. Chairman, this coercion of religious groups circumvents a bedrock principle of our Constitution, our history, and our basic liberty, and it is an attack on the religious freedom of all Americans, no matter what their religious beliefs are on abortion or contraceptives.

If you hold anything sacred, you should be frightened by the complete lack of respect for religious freedom and rights of conscience the Obama administration has shown in promulgating this mandate. As the editorial board of USA Today commented, "In drawing

up the rules that will govern healthcare reform, the Obama administration didn't just cross that line, it galloped over it, requiring employers affiliated with the Catholic Church to include free birth control in their health insurance plans. That is contrary to both Catholic doctrine and constitutional guarantees of religious freedom."

Now, some have argued that the Obama administration has accommodated religion by providing an exemption for certain religious groups. That exemption, however, is so narrow that the ministries of neither Jesus Christ nor Mother Teresa would have qualified for it.

Others have argued that the mandate does not infringe on religious beliefs because it will be the insurance companies and not the religious organizations that pay for the mandated services. But unless the Obama administration has discovered a way to suspend the laws of economics and mathematics, this so-called accommodation is nothing more than an accounting gimmick.

The Obama administration's failure to provide a meaningful religious accommodation with this mandate is not only a slap in the face to millions of Americans of faith, it is patently unconstitutional. It violates both the Religious Freedom Restoration Act and the First Amendment.

First, the mandate is not neutral, is not a neutral law of general applicability because some groups, both secular and religious, are given exemptions while certain religious groups are not. Second, given the widespread availability of contraceptive services and the far less restrictive ways to increase their availability, the mandate fails both the compelling government interest and the least restrictive means tests that apply to government actions that substantially burden religion.

Mr. Chairman, the arrogance of this Administration is breathtaking, and I am hopeful that the courts will see this mandate for what it is, a blatant, unconstitutional abuse of the first magnitude. But Americans shouldn't have to resort to the courts to preserve such clearly held religious freedoms. It is the obligation of the Executive and the Congress, who swear an oath to uphold the Constitution, to protect these freedoms.

Unfortunately the Obama administration has callously and flagrantly trampled under foot this sacred obligation, and I would just remind the people under my voice, if this Administration will do something this dramatic in an election year, if they get reelected, you ain't seen nothing yet. And with that, I yield back.

Mr. SMITH. Thank you, Mr. Franks.

The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you, Mr. Chairman. The title of this hearing, Executive Overreach: The HHS Mandate Versus Religious Liberty, suggests that we need only consider the religious liberty of those who object to coverage for contraception. It does not even hint at the significant interests of the government or the millions of women and families who seek access to safe and affordable contraceptive services. Neither Congress nor the executive branch is free to ignore these interests, and far from waging war on the Constitution or/and religion, President Obama and his Administration have sought a sensible balance that ensures that all women have access

to free contraceptive services and honors the religious beliefs of those who object to providing or paying for these services. A sensible balance is exactly what is required by our laws and Constitution.

As one of the architects of the Religious Freedom Restoration Act of 1993, or RFRA, I worked hard to overturn the Supreme Court's decision in *Employment Division v. Smith*. As we explained in our findings to RFRA, the core principle to be codified by restoring the compelling interest test for laws that substantially burden religion was the need for sensible balances between religious liberty and competing prior government interests. RFRA was supported by a broad coalition, ranging from the ACLU to the National Association of Evangelicals, and both Chambers of Congress passed it with overwhelming bipartisan majorities.

The Constitution also demands a sensible balance. Where, as is the case here, the government chooses to accommodate religious beliefs even if doing so is not constitutionally required, the government must also take into account the interests of those who do not benefit from the accommodation.

In striking down Connecticut's law allowing Sabbath observers to take their Saturday, their Sabbath day off work, in the state of *Thornton v. Caldor*, for example, the Supreme Court found that because, "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," it constitutes, "unyielding weighting, unquote, in favor of religion that violates the First Amendment. In the 2005 case of *Cutter v. Wilkinson*, the Court made clear that an accommodation for religion must be measured so that it does not override other significant interests."

In addressing the exact question at issue here, the California Supreme Court upheld application of a contraceptive coverage requirement, finding that exempting religiously affiliated charities would, "increase the number of women affected by discrimination in the provision of healthcare benefits," whose interests could not be overlooked. As the California Supreme Court explained, "strongly enhancing the State's interest is the circumstance that any exemption from the State contraceptive coverage requirement sacrifices the affected women's interests in receiving equitable treatment with regard to health benefits."

The Administration's policy is an attempt to balance competing rights, and in seeking a sensible balance at the Federal level, the Administration understandably looked to California's experience and modeled its initial 2011 exemption for religious employers on laws like California's and New York's, both of which have been upheld as constitutional by their States' highest courts.

This original exemption for religious employers was criticized as too narrow because it would not include religiously affiliated hospitals, universities, and charities that serve and employ persons from a variety of faiths, many of whom may not share the religious beliefs of their employers.

Responding to these concerns, President Obama and Secretary of HHS Kathleen Sebelius crafted an additional accommodation that establishes a safe harbor for a year until August 2013. During this time a final rule will be promulgated that still ensures that all

women have access to contraceptive services. But objecting religious organizations will not have to provide for or pay for these benefits. Instead, insurance companies will contact employees and offer these benefits to them directly and free of charge. The Administration said that this is workable because covering contraception saves money and that insurance companies will not be permitted to increase premiums of objecting employers to cover the cost of contraceptive services.

Many who objected to the original rule as too narrow support this approach. For example, the Catholic Health Association said it was very pleased with the White House announcement and it looked forward to reviewing the specifics. The Association of Jesuit Colleges and Universities, “commended the Obama administration for its willingness to work with us on moving toward a solution and look forward to working out the details of these new regulations with the White House.”

Others are not satisfied. The United States Conference of Catholic Bishops, for example, initially called the plan a step in the right direction, but later condemned it, taking the position that the only complete solution to this religious liberty problem is for HHS to rescind the mandate of these objectionable services.

Some Members of Congress have also called for rescission of the requirement or, in the alternative, for legislation that would exempt any employer or insurer from providing any services to which they object on religious and moral grounds.

These proposals, like H.R. 1179, the “Respect for Rights of Conscience” Act, cause grave constitutional concerns by granting an unyielding weight to the interest of religious objectors at the expense of all others. Where in these demands for complete removal of or exemption from the requirement for preventive contraceptive services is there any acknowledgment of protection of the religious health and economic rights of women or the significant public health interest that the government shares in improving the well-being and health of women and their families?

Ninety-nine percent of all women who are sexually active in their lifetimes use contraceptives and 38½ million women are currently using some method of contraception. The interest of these women and their families cannot be ignored or set aside.

We are likely to hear that requiring access to cost-free contraceptive services and making those services part of routine preventive care is not necessary, women can easily get contraception at a local clinic or over the Internet, that care is inexpensive and removing the requirement of coverage will not really harm women or their families. Most of the people making these claims are not public health experts, they are not doctors, they are not Sandra Fluke’s friend at Georgetown Law who cannot afford the out-of-pocket costs required to continue prescription birth control to stop cysts from growing on her ovaries. Without this medicine she lost an ovary.

Today we have a doctrine of public health expert with us. Dr. Rosenstock is the dean of the public—School of Public Health at UCLA. She also chaired the committee on preventive services for women, convened at HHS request by the Institute of Medicine, to study and make recommendations regarding preventive services that should be provided for women at no cost, as is required by

Congress in the Affordable Care Act. HHS accepted all of the IOM's eight recommendations, one of which was to include FDA-approved contraceptive service as part of routine preventive care for women because of the tremendous benefits that family planning provides women and their families. I look forward to hearing from her about this decision.

I also urge all of my colleagues to set partisan politics aside for a moment to consider carefully the accommodations that the Administration has proposed. I believe the Secretary and the President can and will achieve a workable balance. They already have gone beyond what I believe is required as a purely legal matter to accommodate religious belief, although I support their laudable work to ensure that any burden on religion will be minimal, which the proposed rule ensures by removing objecting employers from the equation.

I fear that those who continue to object and do so despite the fact that their right to decline to participate in the provision of preventive contraceptive services has been respected, really seek to block women's access to contraceptive services altogether, but the Constitution does not grant them that right and in fact guards against that risk. As Judge Learned Hand once explained, the First Amendment, "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

Sacrificing the rights and needs of women and of the public health by removing the requirement for these critical services or broadly exempting anyone who might object is neither wise nor is it constitutional. It would, in fact, constitute enabling one group to impose their religious views on others who do not share them, and that is not permitted by our Constitution.

With that, I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Nadler.

Our first witness is Bishop William Lori, the Bishop of Bridgeport, Connecticut, and the chair of the U.S. Conference of Catholic Bishops Committee on Religious Liberty. Bishop Lori was ordained to the priesthood in 1977, became Auxiliary Bishop of Washington, D.C. in 1995, and was installed as the Bishop of Bridgeport in 2001. Bishop Lori is chairman of the board of trustees of Sacred Heart University and is the past chairman of the board of trustees of the Catholic University of America.

Our second witness is Asma Uddin, an attorney with the Becket Fund for Religious Liberty. She is the primary attorney for the fund's Legal Training Institute, which is dedicated to training lawyers, judges, religious leaders, journalists, and students around the world in religious freedom law and principles. Prior to joining the Becket Fund, Ms. Uddin was an attorney with two prestigious national law firms. She is a graduate of the University of Chicago Law School where she was a member of the University of Chicago Law Review.

Our third witness is Dr. Linda Rosenstock, dean of the School of Public Health at the University of California, Los Angeles, and chair of the Preventive Services for Women Committee of the Institute of Medicine. Prior to going to UCLA in 2000, Dr. Rosenstock served for nearly 7 years as the director of the National Institute

for Occupational Safety and Health. Dr. Rosenstock received her medical degree and a master's degree in public health from the Johns Hopkins University.

Our final witness is Jeanne Monahan, the director of the Center for Human Dignity at the Family Research Council. Prior to joining Family Research Council, she worked for the Department of Health and Human Services, where she focused on subjects including global health policy and domestic and international healthcare issues. Ms. Monahan is an alumnus of James Madison University and has a master's degree from the Pope John Paul II Institute for Studies on Marriage and Family.

We welcome you all and look forward to your 5 minute testimony. Bishop Lori, we will begin with you.

TESTIMONY OF THE MOST REVEREND WILLIAM LORI, CHAIRMAN, AD HOC COMMITTEE ON RELIGIOUS LIBERTY, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Bishop LORI. Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today. I would like to discuss the various absurd consequences that have flowed from the HHS mandate.

First, "without change" suddenly means "with change." On February 10, HHS finalized—as the rule itself says four times, "without change"—the interim final rule imposing the mandate initially announced last August. Despite this, a surprising number of those who objected vociferously to the initial rule were suddenly and completely satisfied. The reason for this confusion is that the finalized rule also announced what it described as an "accommodation." But this "accommodation" would not change the scope of the mandate and its exemption, which, as noted above, have now been finalized as is. Instead, it would take the form of additional regulations whose precise contours are yet unknown and may not issue until August 2013.

In sum, for present purposes, the "accommodation" is just the legally unenforceable promise to alter the way the mandate would still apply to those who are still not exempt from it. Moreover, the promised alteration appears logically impossible, for reasons detailed in my written testimony. Meanwhile, the mandate itself is still finalized without change, excluding in advance any expansion of the religious employer exemption. Somehow this situation of no change is heralded as great change, for which the Administration has been widely congratulated.

Second, "choice" suddenly means "force." Let me quote from a letter I issued in my own diocese: "HHS announced last week that almost all employers, including Catholic employers, will be forced to offer their employees health coverage that includes sterilization, abortion-inducing drugs, and contraception. Almost all health insurers will be forced to include those 'services' in the health policies they write. And almost all individuals will be forced to buy that coverage as part of their policies."

I emphasize the word "force" precisely because it is one of the key differences between a mere dispute over reproductive health policy and a dispute over religious freedom.

This is not a matter of whether contraception may be prohibited by the government, not a matter of whether contraception may be supported by the government. Instead, it is a matter of whether religious people and institutions may be forced by the government to provide coverage for contraception and sterilization even if that violates their religious beliefs. And it is not a matter of repackaging or framing this as a religious freedom dispute. It is a matter of acknowledging the basic fact that government is forcing religious peoples and groups to do something that violates their consciences.

Third, liberalism has suddenly become illiberal. When the mandate was first proposed in August and then reiterated in January, people and groups of all political stripes—left, right, and center—came forward to join us in opposing this. But now, the mere prospect of the accommodation described above has caused some simply to abandon their prior objection. In so doing they undermine the basic American values they would otherwise espouse.

Only in the post-mandate world might it be considered “liberal” for the government to coerce people into violating their religious rights, to justify that coercion based on the minority status of those beliefs, to intrude into the internal affairs of religious organizations, to crush religious diversity in the private sector, and to incentivize religious groups to serve fewer of the needy.

Fourth, and finally, sterilization and contraception and abortifacients are essential, but “essential health benefits” are not. In December HHS acted to define the “essential health benefits” mandate, which encompasses categories of services so important that they must be included in health plans—things like prescription drugs and hospitalization. But notably, HHS handed off to each State the decision of what particular benefits should be mandated.

Thus, although HHS will brook no dissent regarding whether sterilization, contraception, or abortifacients must be covered as “preventive services,” HHS is essentially indifferent regarding what is or is not mandated as an essential health benefit. As a result, genuinely beneficial items may well be omitted from coverage State by State. By contrast, States have no such discretion with regard to abortifacients, sterilization, and contraception.

In conclusion, the Respect for Rights of Conscience Act, H.R. 1179, would help bring the world aright again. This legislation would not expand religious freedom beyond its present limits but simply retain Americans’ longstanding freedom not to be forced by the Federal Government to violate their convictions.

Thank you very much.

Mr. SMITH. Thank you, Bishop Lori.

[The prepared statement of Bishop Lori follows:]

Prepared Statement of the Most Reverend William E. Lori, Bishop of Bridgeport, on behalf of the United States Conference of Catholic Bishops

Mr. Chairman and members of the Committee. Thank you for the opportunity to testify today on this matter of utmost importance to our Nation—religious liberty.

When I testified recently before the House Committee on Oversight and Government Reform, I drew an analogy between the HHS mandate—which forces virtually all healthcare policies nationwide to cover sterilization and contraception, including abortifacients—and a hypothetical mandate forcing virtually all restaurants nationwide to serve pork. I concluded this way:

“[I]t is absurd for someone to come into a kosher deli and demand a ham sandwich; ... it is beyond absurd for that private demand to be backed with the coercive power of the state; [and] ... it is downright surreal to apply this coercive power when the customer can get the same sandwich cheaply, or even free, just a few doors down.”

Today, I would like to continue to develop the theme of the various absurd and surreal consequences that have flowed from the HHS mandate.

In short, ever since the mandate has been announced, fair is foul, and foul is fair. For my testimony, I would like to survey briefly some of the ways in which the HHS mandate has suddenly turned the world upside down.

FIRST: “Without change” suddenly means “with change”

On Friday, February 10, 2012, the Administration finalized—and I quote from the rule itself, “without change”—the interim final rule imposing the mandate, which was announced initially in August 2011. In fact, the February 10 action uses the phrase “without change” four separate times.

That means that the mandate still classifies ways to prevent births as among ways to avoid disease; it still forces the various stakeholders in the process, who may have moral and religious objections to this coverage, to facilitate and fund it; and it still applies the same exceedingly (and offensively, and unconstitutionally) narrow definition of “religious,” to specify which religious organizations are “religious enough” to warrant the government’s respect for their religious freedom.

Despite this, a surprising number of those who objected vociferously to the August 2011 rule were suddenly and completely satisfied. Indeed, based on their reaction—rather than on the text of the rule itself—one could be forgiven the impression that there was a major change in the rule, rather than none at all.

The reason for this confusion is that the finalized rule also announced what it described as an “accommodation.” But this “accommodation” would not change the scope of the mandate and its exemption, which, as noted above, have now been finalized with the same language as in August 2011. Instead, it would take the form of additional

regulations whose precise contours are yet unknown, and that may not issue until August 2013, about eighteen months from now.

And even in broad outline, this possible future “accommodation” seems logically impossible to achieve. On the one hand, the Administration has emphasized that the “accommodation” would shift the burden of the mandate to insurers. This is no accommodation at all, since the “services” will still be paid for by virtue of enrollment in an insurance policy provided by and paid for by the objecting employer. On the other hand, the Administration occasionally suggests that it might like to lift the burden from insurers who are also employers (*i.e.*, the self-insured).

If we are looking for signs as to which way this dilemma will be resolved—and indeed, it must be resolved one way or the other, there is no in-between—we take no comfort from the recent comments of the Secretary of HHS, who is widely quoted as saying: “Religious insurance companies don’t really design the plans they sell based on their own religious tenets.” This is plainly false—for example, Congress has long exempted religious insurers specifically (and other insurers with religious objections) from having to include contraceptive coverage health plans offered to federal employees. The Secretary’s statement also bodes ill for the possibility of religious insurance companies’ getting whatever limited “accommodation” may ultimately be offered to religious self-insurers. But more to the point, it reflects the mindset that will inform any promised future accommodation for religious insurers.

In sum, for present purposes, the “accommodation” is just a legally unenforceable promise to alter the way the mandate would still apply to those who are still not exempt from it; moreover, the promised alteration appears logically impossible. Meanwhile, the mandate itself is still finalized “without change,” excluding in advance any expansion of the “religious employer” exemption. In the world-turned-upside-down that we have all entered since the mandate issued, this is not merely “no change,” but is heralded as “great change,” for which the Administration has been widely congratulated.

SECOND: “Choice” suddenly means “force”

Let me quote from the letter that I issued in my own Diocese of Bridgeport in late January. The letter is typical of many that were read in churches across the country:

The U.S. Department of Health and Human Services announced last week that almost all employers, *including Catholic employers*, will be forced to offer¹ their employees health coverage that includes sterilization, abortion-inducing drugs, and contraception. Almost all health insurers will be forced to include those “services” in the health policies they write. And almost all individuals will be forced to buy that coverage as a part of their policies.

¹ If the future “accommodation” of February 10, 2012, eventually delivers on its stated intention—which is far from assured—the word “offer” in this sentence should perhaps be changed to “fund and facilitate.” In any event, the conflict with our religious convictions remains.

I emphasize this word—“force”—precisely because it is one of the key differences between a mere dispute over reproductive health policy and a dispute over religious freedom. Those who would try to conceal that religious freedom aspect have done all in their power to conceal the key element of government coercion.

This is not a matter of whether contraception may be prohibited by the government—that question was asked and answered by the U.S. Supreme Court about two generations ago. This is not even a matter of whether contraception may be supported by the government—to our great dismay, there is already widespread government funding of contraception, at all levels of government, across the country. Instead, it is a matter of whether religious people and institutions may be forced by the government to provide coverage for contraception or sterilization, even if that violates their religious beliefs.

It is precisely that element of government coercion—of government’s conscripting unwilling religious people and groups in its effort to increase the usage of contraception nationwide—that makes this a religious freedom dispute. This is not a matter of “repackaging” or “framing” the dispute as one of religious freedom, as some have suggested. It is a matter of acknowledging the basic fact that government is forcing religious people and groups to do something in violation of their consciences.

And yet, listening to the public discourse about the mandate, it is easy to get the impression that the Catholic bishops were somehow on the cusp of prohibiting the use of contraceptives nationwide. Only in our new world-turned-upside-down does freedom require the denial of freedom; only in the post-mandate world is access to contraceptives somehow prohibited unless government begins forcing religious people and groups to fund and facilitate it.

THIRD: Liberals have suddenly abandoned liberalism

It is well known that the bishops of the United States routinely work with those on both sides of the aisle, in the service of the foundational moral principles that flow from our faith.

And so it is here. When the mandate was first proposed in August, people and groups of all political stripes—left, right, and center—came forward to join us in opposing it. And when it was announced in January that the rule would be finalized without change, there was an uproar from that same politically diverse group, and then some.

But now, the mere prospect of the indeterminate, inconsistent, inadequate future “accommodation” described above has caused some—usually those who would self-identify as “liberal”—to simply abandon their prior objection. In so doing, they undermine the values that they would otherwise espouse as good liberals:

- Freedom of choice—people and groups that are still forced by government to fund and facilitate sterilization and contraception over their religious objections have no choice.
- Separation of church and state—the mandate has the government both interfering with the internal affairs of religious organizations, and favoring some religious organizations over others by means of the restrictive 4-part test.
- Religious diversity—the mandate means that private-sector employers can no longer order themselves according to Catholic values regarding human sexuality; all are forced to reflect the government’s values on that subject instead.
- Minority rights—the Administration has repeatedly cited (in a misleading way, no less²) statistics designed to cast the Catholic Church’s teaching against contraception as the view of a small minority—as if government’s forcing people to violate their religious beliefs is justified, so long as the beliefs are unpopular enough.
- Gender equality—because the mandate only pertains to preventive services for women, it requires coverage of tubal ligations, but not vasectomies.
- Service to all in need—religious organizations lose their exemption under the 4-part test if they primarily serve those outside their faith, giving the organizations a strong incentive to curtail their work for the neediest in society.

Only in a world turned upside-down by the HHS mandate might it be considered “liberal” for the government to coerce people into violating their religious beliefs, to justify its intrusion based on the minority status of those beliefs, to intrude into the internal affairs of religious organizations, to discriminate blatantly based on sex, to crush out religious diversity in the private sector, and to incentivize religious groups to serve fewer of the needy.

FOURTH: Sterilization, contraception, and abortifacients are essential, but “essential health benefits” are not

In December of last year, it was widely overlooked that HHS acted to define another important mandate under the health care reform law—the “essential health benefits” mandate. As its name suggests, this mandate encompasses categories of services so important that they must be included in health plans, such as prescription drugs, emergency services, hospitalization, laboratory services, pediatric services, and others. But notably, in December, HHS punted on defining these most important

² See Glenn Kessler, “The claim that 98 percent of Catholic women use contraception: a media foul,” *The Washington Post* (Feb. 17, 2012) (available at http://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-98-percent-of-catholic-women-use-contraception-a-media-foul/2012/02/16/pIQAkPeqIR_blog.html).

benefits, handing off to each state the decision what particular benefits should be mandated.³

Thus, although HHS will brook no dissent regarding whether sterilization and contraception, including abortifacients, must be covered as “preventive services,” HHS is essentially indifferent regarding what is—or is not—mandated as an “essential health benefit.” As a result, genuinely indispensable items under the important rubrics listed above may well be omitted from coverage, depending on the policy preferences of each state. By contrast, states have no such discretion with respect to sterilization, contraception, and abortifacients—these must be covered, even over religious objections in many cases.

Taking just one example of “essential health benefits”—prescription drugs—the state may define this category to require coverage of cancer drugs, AIDS drugs, and other life-saving treatments. But HHS has no quarrel with a state that decides not to require coverage of drugs like these. By contrast, HHS requires that state to cover drugs that, according to respected medical studies and the drugs’ manufacturers, may increase women’s risk of suffering from breast cancer, stroke and AIDS.⁴

In this context, the rigid mandate to cover sterilization, contraception, and abortifacients is especially absurd. How would HHS respond to the claims of cancer patients that they are entitled to “free access” to cancer drugs, which can mean the difference between life or death? How would HHS respond to a state that did not include such life-saving drugs as an “essential health benefit”? Whatever HHS’s response is, we know it would have to be something far less than HHS’s full-throated demand for “free access” to contraceptives in every state and in every plan. Again, under the mandate, the world is turned upside down.

In conclusion, the Respect for Rights of Conscience Act (H.R. 1179, S. 1467)—which allows those who sponsor, provide or purchase health plans the freedom to follow their moral and religious convictions in the face of new mandates under the health care reform act—would help bring the world aright again. This legislation would not expand

³ See HHS Essential Health Benefits Bulletin (Dec. 16, 2011) (available at http://ccio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf).

⁴ For example, the manufacturer’s insert for Ortho Tri-Cyclen Lo Tablets, a commonly used contraceptive, states: “The use of oral contraceptives is associated with increased risks of several serious conditions including myocardial infarction, thromboembolism, stroke, hepatic neoplasia, and gallbladder disease.... The risk of having breast cancer diagnosed may be slightly increased among current and recent users of combination oral contraceptives,” with the excess risk decreasing over time once the drug is discontinued.

Regarding AIDS see P. Belluck, “Contraceptive Used in Africa May Double Risk of H.I.V.,” *The New York Times* (Oct. 3, 2011) (available at www.nytimes.com/2011/10/04/health/04hiv.html?). The *Times* article, in turn, cites Heffron, *et al.*, “Use of hormonal contraceptives and risk of HIV-1 transmission: a prospective cohort study,” 12 *The Lancet Infectious Diseases* 19-26 (2012) (available at [www.thelancet.com/journals/laninf/article/PIIS1473-3099\(11\)70247-X/abstract](http://www.thelancet.com/journals/laninf/article/PIIS1473-3099(11)70247-X/abstract)), which states that women using hormonal contraceptives have an increased risk of contracting and transmitting HIV, with that risk doubled among those using injectable contraceptives.

such freedom beyond its present limits, but simply retain Americans' longstanding freedom not to be forced by the federal government to violate these convictions.

Thank you for your attention.

Mr. SMITH. Mrs. Uddin.

**TESTIMONY OF ASMA T. UDDIN, ATTORNEY,
THE BECKET FUND FOR RELIGIOUS LIBERTY**

Mrs. UDDIN. Mr. Chairman and distinguished Members of the Committee, allow me to thank you for the opportunity to be with you today to discuss the religious liberty issues related to the HHS mandate. I am here today on behalf of the Becket Fund for Religious Liberty, a nonprofit, nonpartisan law firm where we work to defend religious liberty for people of all faiths. I would ask that my full remarks are submitted into the record.

As my co-panelist from IOM will point out shortly, there are many important health concerns affecting women today. I am not here to dispute any of these claims or women's access to them.

Last fall the Becket Fund represented a small Lutheran school that the Federal Government wanted to say had no right to higher and fire its religious teachers. This Administration's position was so extreme that the U.S. Supreme Court unanimously rejected their reasoning and decided in our client's favor and in defense of the First Amendment.

I am here today because this Administration has taken another extreme position, arguing as it did in the Hosanna-Tabor case that the First Amendment offers no special protections to religious employers. This unconstitutional assault on religious liberty led the Becket Fund to bring four lawsuits against the Federal Government.

Two weeks ago the Administration responded to our first case on behalf of Belmont Abbey College, a Catholic college founded by Benedictine monks. We were shocked to read that they asked the Court to dismiss the case because of a promise to shift the cost to insurance companies at some point in the future.

To add further insult to injury, last night the Administration responded to our second case on behalf of Colorado Christian University, again failing to respond to any of our client's legitimate constitutional claims and instead asking for dismissal based on their promise.

One can only imagine how the government intends to respond to our other clients, Eternal Word Television Network, started by Mother Angelica from her garage, and Ave Maria University.

Let me be clear. None of these organizations qualify for HHS's exceedingly narrow religious employer exemption nor are these organizations exempt under the Administration's proposed compromise.

On February 10th the President promised to develop a rule that would require insurers of nonprofit organizations with religious objections to pay the cost of the mandated coverage for abortion-inducing drugs, sterilization, and contraception. The press conference was merely a smokescreen that sadly fooled much of the American public who are rightly concerned by the mandate.

For those of you who thought the President's promise resolved the problems in the mandate, consider this:

First, it is unclear when and if the President will issue the promised rule.

Second, if and when such a new rule is introduced, it is unlikely that insurance companies will offer these services for free when they can simply spread the cost through higher insurance premiums.

Third, hundreds if not thousands of religious organizations have self-insured plans where the religious organization itself is the insurance company.

Fourth, the new proposal does nothing to address the concerns of for-profit organizations and individuals with religious objections.

At this point, the rule published by the President following his speech is exactly the same as the one issued in August which our cases are based upon. Nothing has changed but the promise of a potential shift to insurers at some point in the future which, as I have explained, would be problematic for a number of other reasons. That is why our clients remain concerned. This mandate is simply unconstitutional. It violates the free exercise clause, establishment clause, free speech clause, and the Religious Freedom Restoration Act. In each of our lawsuits we claim that the mandate is not neutral and generally applicable, as required by law, because it specifically discriminates against conscientious objectors while many other types of groups get exemptions.

Second, we claim the mandate imposes a substantial burden on our clients. In fact, it is so severe that our clients will be forced to stop providing health insurance altogether and pay penalties up to \$620,000 per year for noncompliance.

Third, the mandate intentionally discriminates against the religious beliefs of our clients since the exemption is so narrowly defined that, as many have stated, not even Jesus's ministry would apply.

Fourth, the mandate compels our clients to provide counseling and education on subjects that contradict the religious beliefs their institution stands for.

Finally, despite the severe burdens on our clients' constitutional rights, the government in its response last night continues to provide no compelling interest that justifies forcing monks and nuns to hand out abortion drugs. Our clients are acting because of what is being asked for rather than who is doing the asking. They do not seek to prevent women from accessing these abortion drugs, but they do object to having to provide them against their conscience.

Women, too, seek the freedoms to live in accordance with their sincerely held religious beliefs. Religious freedom is a right enjoyed by everyone, and it is just as much in women's interests to protect that right as it is in men's. As a Muslim American woman and an academic, I have spent my career fighting for women's and minorities' rights, and the fact that I must be here today to explain why our constitutional rights exist is extremely offensive to me personally. Thank you.

Mr. SMITH. Thank you, Mrs. Uddin.

[The prepared statement of Ms. Uddin follows:]

**Prepared Statement of Asma T. Uddin, Attorney,
The Becket Fund for Religious Liberty**

Mr. Chairman and distinguished members of the Committee, allow me to thank you for the invitation and opportunity to be with you today to offer testimony on the religious liberty issues related to the recent Department of Health and Human Services mandate on women's preventive services.

I am here today representing the Becket Fund for Religious Liberty, where I work as an attorney specializing in domestic and international religious freedom. I will summarize my remarks and ask that my full written testimony be entered into the record.

I. INTRODUCTION

Under the Affordable Care Act of 2010 ("the ACA"),¹ all employer health care plans must provide—at no cost to the employee—certain preventive services for women.² The inclusion of contraceptives—including abortion-causing contraceptives—in this mandated coverage has caused a public uproar, with religious groups opposed to contraception and/or abortion decrying the violation of their religious freedom. Supporters of the mandate, in contrast, see this as a civil rights issue—specifically, one involving women's rights—that should not be trumped by religious concerns. At the heart of this position, however, lies a profound misunderstanding about the nature of religion and the scope of constitutional protections for religious liberty.

A. Background

One provision of the ACA, signed into law by President Barack Obama on March 23, 2010, mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("Mandate"). However, when the Department of Health and Human Services ("HHS") published an interim final rule on July 19, 2010, it had not yet defined "contraceptive preventative services for women"; instead, it delegated that decision to the Health Resources and Services Administration ("HRSA"), a division of HHS. HRSA, in turn, directed a private policy organization, the Institute of Medicine ("IOM"), to suggest a list of recommended guidelines describing which preventive drugs, procedures, and services should be covered by all health plans.³

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

Despite the stated concerns of these religious entities, on July 19, 2011—one year after the first interim final rule was published—the IOM issued its recommendation that preventive services include well-woman visits; screening for gestational diabetes; human papillomavirus (HPV) DNA testing for women 30 years and older; sexually-transmitted infection counseling; human immunodeficiency virus (HIV) screening and counseling; FDA-approved contraception methods and contraceptive counseling; breastfeeding support, supplies, and counseling; and domestic violence screening and counseling.⁴ FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures.

¹The Affordable Care Act is actually two laws: the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010).

²42 U.S.C. § 300gg-13(a)(4).

³In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Institute, the American Congress of Obstetricians and Gynecologists (ACOG), John Santelli, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America, and Sara Rosenbaum. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.

⁴Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).

On August 1, 2011, thirteen days after the IOM issued its recommendations HRSA issued guidelines adopting the IOM recommendations.⁵ These guidelines make clear that the HHS Mandate includes not just FDA approved contraceptive methods and sterilization procedures, but also “patient education and counseling” concerning those methods. On the same day that HRSA adopted the IOM regulations, HHS issued an amended interim final rule, adding an exemption from the contraceptive Mandate for “religious employers.”

Separate from the issue of contraception, as mentioned above, included in “FDA-approved contraceptive methods” are the drugs Plan B and ella. Many religious individuals and organizations that have conscientious objections to abortion object to the use of Plan B and ella because they believe, and scientific evidence supports their belief, that these drugs constitute abortifacients. That is, Plan B and ella can prevent a human embryo, which these religious groups understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus thereby causing the death of the embryo.

It was precisely these sorts of concerns that were repeatedly articulated by religious groups in the more than 200,000 public comments submitted in response to the amended interim rule. HHS created an exceedingly narrow religious exemption—one that is narrower than any other religious exemption in federal law.⁶ Under the regulations, the only organizations religious enough to receive an exemption are those that are not already exempt from the ACA for having fewer than fifty employees and meet *all* of the following criteria:

- (1) its purpose is the inculcation of religious values,
- (2) it employs “primarily” persons who share its religious tenets;
- (3) it serves “primarily” persons who share its religious tenets; *and also*
- (4) it qualifies under the IRS code as a church or religious order.⁷

This exemption is of little solace to religious employers for two primary reasons. First, because the regulation merely states that HRSA “*may* establish exemptions,”⁸ it is possible that the federal government will decide not to provide any religious exemptions at all.

Second, HRSA has this discretion with respect to only a vanishingly small class of religious employers. Under this definition, most, if not all, religious colleges or universities would not qualify for any exemption, because these institutions exist not just to inculcate religious values, but also to teach students. The nature of many religious institutions is in fact to serve those outside their community, conditioning their help on a person’s need rather than their chosen faith. As many Christian objectors to the Mandate have made clear, not even Jesus’ ministry would qualify for the exemption as he served both Christians and non-Christians. No homeless shelter, soup kitchen, or adoption agency would qualify, because these organizations exist to serve anyone in need, not just those that profess a certain religious creed.⁹

⁵ See <http://www.hrsa.gov/womensguidelines> (last visited February 11, 2012).

⁶ Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health care sector. For example, for 25 years, Congress has protected religious institutions from discrimination (based on their adherence to natural family planning) in foreign aid grant applications. For 12 years, Congress has both exempted religious health plans from the contraception mandate in the Federal Employees’ Health Benefit Program and protected individuals covered under other health plans from discrimination based on their refusal to dispense contraception due to religious belief.

The HHS mandate is not only unprecedented in federal law, but also broader in scope and narrower in its exemption than all of the 28 State’s comparable laws. Almost half the States do not have a state contraception mandate at all, so there is no need for an exemption. Of the States that have some sort of state contraception mandate (all less sweeping than the federal one here), 19 provide an exemption. Of those 19 States without an exemption, only three (California, New York, and Oregon) define the exemption nearly as narrowly as the federal one, although the federal exemption is still worse because of the regulation’s discretionary language that the government “*may*” grant an exemption. Moreover, religious organizations in States with a mandate—even those where there is no express exemption—may opt out by simply dropping prescription drug coverage or offering self-insured plans, which are governed by federal ERISA law rather than state law. The federal mandate permits none of these alternatives, and therefore is less protective of religious liberty than any of the States’ policies.

⁷ 76 Fed. Reg. 46623 (Aug. 3, 2011).

⁸ 76 Fed. Reg. 46626 (Aug. 3, 2011).

⁹ The only other exemption available under the ACA is for “grandfathered” plans. However, here too the law is terribly misleading. Under the new regulations, any one of a number of changes, *even if immaterial*, will cause a plan to lose its grandfathered status. Thus, although President Obama promised throughout the health reform debate that “if you like your health plan, you can keep it,” religious organizations will soon be forced to abandon health plans that

And few, if any, of these organizations qualify as a church or religious order under the tax code.

The Obama Administration's "Accommodations"

Given the Mandate's lack of protection for religious liberty, religious organizations and individuals voiced their concerns vociferously. In an effort to respond to these concerns, on January 20, 2012, the Administration announced it would not expand the exemption to protect religious schools, colleges, hospitals, and charitable service organizations, but it would give them one extra year to comply with the Mandate. This, of course, was no accommodation at all, as it ignored the underlying religious liberty concerns. Also, the one year extension applied only to employee health plans, not student health plans. In essence, religious organizations still had no choice but to comply with the Mandate or drop their health insurance coverage altogether and pay the resulting hefty fines.

This "accommodation" was of course deemed insufficient by religious objectors to the Mandate, as it did nothing to address the substance of their concerns. Indeed, the blatant disregard for the First Amendment rights at issue created a firestorm of opposition from across the political and religious spectrum. Thus, within three weeks, on February 10, 2012, the President held a press conference to announce a *second* compromise. But this compromise also did not change any of the provisions of the August 2011 Mandate, nor did it make any changes to the Mandate's narrow religious exemptions.

Instead, for non-exempt religious organizations, the president made two promises. First, he reiterated that enforcement of the Mandate on employee health plans would be delayed by one extra year. Second, the president promised that the administration would work to develop—at some unspecified time in the future—a rule that would require insurers of *non-profit* organizations with religious objections to pay the costs of the mandated coverage for abortion-inducing drugs, sterilization, and contraception.

The problems with this proffered compromise are many. First, it is unlikely that insurance companies will offer these services for free; religious employers would still ultimately be paying for these services against their conscience, with the costs spread through higher insurance premiums for their employees. Although some argue that insurance companies would cover these services for free because it helps their bottom line, such an argument is tenuous at best—after all, if that were the case, insurance companies would have arguably already provided contraception for free. Moreover, the provision of these so-called free contraceptives still depends on the religious employer purchasing insurance for its employees. While they might not be paying for the drugs, they are still facilitating their use by employees. Religious organizations should not be forced to turn a blind eye to the inclusion of something in their insurance plan that violates their conscience.

Second, hundreds if not thousands of religious organizations have self-insured plans, where the religious organization itself is the "insurance company." Although the preamble to the final rule does state an intent to achieve the same "goals" for self-insured religious organizations, it is unclear how the proposed compromise would resolve the concerns of these entities.

Third, the new proposal does nothing to address the concerns of for-profit organizations and individuals with religious objections. Rather, the proposed compromise simply underscores how the government's policy discriminates between various categories of religious groups and individuals, with churches receiving the greatest protection, non-profit religious organizations potentially receiving a lower level of protection, and individuals and for-profit entities receiving no protection at all. This picking and choosing of who is entitled to First Amendment protections is unconstitutional.

If an employer with moral objections to the HHS Mandate is not covered by the Administration's compromise solution, the employers final alternative is to stop providing health care benefits altogether. But this too places religious employers in an unacceptable double bind: either they must pay for contraception, sterilization, and abortion-inducing drugs, or they must stop providing their employees with health care and pay a stiff civil penalty. The first option forces religious employers to violate their moral convictions. The second option forces them to pay steep fines for exercising their religion and creates enormous hardships for their employees, some

reflect their deepest convictions unless they: (1) stopped modifying their health care plans nearly a year and a half *before* the HHS mandate was announced; and (2) henceforth avoid any triggering condition. These conditions, of course, may have already been violated, will become increasingly difficult to meet, and in any case are unacceptable.

of whom have limited means to purchase health insurance on their own. And the burden does not end there. Without employer health plans, many religious institutions would find themselves at a serious competitive disadvantage vis-à-vis other employers. Some religious institutions could find that without a group health plan, they could not attract sufficient staff and would be forced to close their operations altogether.

The fines imposed on religious employers that refuse to violate their consciences are significant. For example, a charitable organization with 100 employees will have to pay the federal government \$140,000 per year for the “privilege” of not underwriting medical services it believes are immoral.¹⁰

B. Legal Claims

Given these coercive burdens on the religious freedom of organizations and individuals that hold religious beliefs against contraception and/or abortion, the Becket Fund for Religious Liberty has brought several lawsuits. The lawsuits, each of which make the same claims, are on behalf of (1) Belmont Abbey College (BAC), a Catholic liberal arts college founded by Benedictine monks; (2) Colorado Christian University (CCU), an interdenominational Christian college; (3) Eternal Word Television Network (EWTN), a television network that serves to spread Catholic teachings; and (4) Ave Maria University, a Catholic University dedicated to transmitting authentic Catholic values to students. For failing to comply by the Mandate, BAC would pay approximately \$340,000 annually, CCU would pay \$500,000; EWTN would pay \$620,000; and Ave Maria close to \$340,000.

These lawsuits challenge the government Mandate as a violation of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedures Act (APA). The religious freedom claims turn on the fact that the burden placed on these organizations is not justified, as is required by law, by a compelling government interest that is narrowly tailored to serve that interest. There is also a free exercise claim of intentional discrimination because the Mandate protects certain religions and religious groups, such as those that serve and employ members of their own faith, while penalizing other religions. This sort of discrimination also raises Establishment Clause issues as it prefers some denominations to others and places a selective burden on the plaintiffs.

The lawsuits seek a declaration from the court that the Mandate violates the First Amendment, RFRA, and the APA. They also seek an order prohibiting the government from enforcing the Mandate against our clients and any other religious group that cannot provide access to these drugs and services because of their religious convictions.

Thus far, the Administration has responded to only one of the four lawsuits, and fails to address in its brief any of our client’s constitutional claims. Instead, it calls on the court to dismiss the case altogether in light of their “promise” to pass the costs onto insurance companies. As I’ve already articulated, this is not a valid solution for our clients’ legitimate claims.

II. THE CONTRACEPTION MANDATE AND WOMEN’S RIGHTS

Some have framed the controversy surrounding the Mandate as a women’s rights issue. At the outset, the point must be made that our clients are acting because of what is being asked for (an act that violates their deeply held beliefs), rather than who is doing the asking. That is, religious organizations are not objecting to the Mandate because it is targeted toward preventive care for women; rather, they object to paying for, or providing access to, contraception, sterilization, and/or abortion-inducing drugs, regardless of gender. Indeed, the relevant employee might be male, with a female dependent.

Moreover, including a robust exemption protecting the deeply held religious beliefs of those who oppose contraception and abortion would not harm women or women’s health. Access to these contraceptives is widespread: Nine out of ten employer-based insurance plans in the United States already cover contraception. The government admits these services are widely available in “community health centers, public clinics, and hospitals with income-based support.”¹¹ In fact, the federal government already spends hundreds of millions of dollars each year funding free or nearly free family planning services under its Title X program. Therefore, the issue is not really about access to contraception but rather about who pays for it.

¹⁰ See Nat’l Fed’n of Indep. Business, *The Free Rider Provision: A One-Page Primer*, available at <http://www.nfib.com/Portals/0/PDF/AllUsers/Free%20Rider%​20Provision.pdf>.

¹¹ See *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

Finally, one of the issues that is consistently overlooked when the issue is framed as “women’s rights versus religious freedom” is that women, too, seek the freedom to live in accordance with their sincerely held religious beliefs. Not all women agree with the Mandate; in fact, 41% of Catholic women do not support the Mandate.¹² Religious freedom is a right enjoyed by everyone, men and women, and it is just as much in women’s interest to protect that right as it is in men’s. As a female member of religious minority, I hold this right to religious freedom particularly dear, as, for example, a Muslim woman’s right to dress as she pleases is restricted by many governments across the world.

IV. CONCLUSION: LOOKING FORWARD

As it turns out, this conflict is entirely unnecessary. A robust exemption from the HHS Mandate would be a workable way for the federal government to advance both its interest in women’s health and its commitment to respecting the legitimate autonomy and convictions of religious institutions.

In particular, expanding the existing “religious employer” exemption into a “religious conviction” exemption would eliminate the conflict entirely. Specifically, the exemption should be expanded to include all individuals and organizations—whether nonprofit or for-profit—that have a sincere religious conviction prohibiting them from purchasing or providing access to the mandated goods and services. In addition, any limitations over how, by whom, and for whom these individuals and organizations carry out their missions should be eliminated. And finally, the exemption should be expanded to include affected student health plans in addition to employee health plans.

These changes to the existing exemption would also help carry out the purposes of the Affordable Care Act by ensuring that employees and students can remain part of their existing healthcare plans.

Mr. SMITH. Dr. Rosenstock.

TESTIMONY OF LINDA ROSENSTOCK, M.D., M.P.H., DEAN, SCHOOL OF PUBLIC HEALTH, UNIVERSITY OF CALIFORNIA, LOS ANGELES

Dr. ROSENSTOCK. Thank you. Since no one else is bothered by the rumbling, I will continue. Good afternoon, Mr. Chairman, and Members of the Committee. As mentioned, I served as chair—

Mr. ISSA. Ma’am, we can’t hear anything you are saying. Can you pull the mike close and turn it on?

Mr. SMITH. Turn on the mike there. The rumblings, by the way, was the train going back and forth to the Capitol.

Dr. ROSENSTOCK. I am from California, we worry about these things.

Mr. SMITH. Not an earthquake.

Dr. ROSENSTOCK. As mentioned, I served as chair of the Institute of Medicine’s Committee on Preventive Services for Women. The Institute of Medicine, or IOM, is the health arm of the National Academy of Sciences, an independent, nonprofit organization that provides unbiased and authoritative advice to decision-makers and the public. At the request of the U.S. Department of Health and Human Services, IOM assembled a diverse expert committee to identify critical gaps in preventive services for women as well as recommend measures that further ensure women’s health and well-being. The committee gathered evidence, deliberated on its findings and recommendations, and met five times in a 6-month period in order to write its report.

¹²See Public Policy Polling, http://www.coalitiontoprotectwomenshealth.org/wp-content/uploads/2012/02/catholics_and_birth_control_benefit.pdf

The report underwent, as is typical for the IOM, a rigorous independent external review prior to its release in July of last year. The committee recommended that eight clinical preventive services for women be added to the services that health plans must cover at no cost to patients under the Patient Protection and Affordable Care Act of 2010. The committee defined preventive services as measures, including medications, procedures, devices, tests, education and counseling, shown to improve well-being and/or decrease the likelihood or delay the onset of a targeted disease or condition.

To guide its deliberation in determining gaps in preventive services not included in existing guidelines, the committee reviewed all current guidelines, assembled and assessed additional evidence including reviews of the literature, reviewed Federal health priority goals and objectives, and the clinical guidelines of healthcare professional organizations.

Throughout the study process, the committee repeatedly questioned whether the disease or condition was significant to women, and especially whether it was more common or more serious in women than in men or whether women experienced different outcomes or benefited from different interventions than men.

The additional preventive services recommended by the IOM Committee for Preventive Coverage consideration also met the following criteria: that the condition to be prevented affects a broad population of women; that the condition to be prevented has a large potential impact on health and well-being; and, importantly, that the quality and strength of the evidence about the effectiveness of the preventive measure supports its inclusion.

The committee took seriously its task of focusing on women's unique health needs. Women are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families. Studies have also shown that even moderate copayments for preventive services such as mammograms and Pap smears deter patients from receiving these services. The report suggested eight additional services, including, for example, screening for gestational diabetes and additional cancer screening for cervical cancer.

I was asked today to speak to our committee's recommendation 5.5, to reduce the rate of unintended pregnancies, which accounts for about half of pregnancies in the United States, of which about 40 percent result in abortion, the report encouraged HHS to consider adding the full range of Food and Drug Administration approved contraception methods as well as patient education and counseling for all women with reproductive capacity.

Unintended pregnancy is linked to a host of health problems. Women with unintended pregnancies are more likely to receive delayed or no prenatal care and to suffer from other health problems. Unintended pregnancy also increases the risks of babies being born preterm or at low birth weight, both of which increase their chance of health and developmental problems.

Family planning services are preventive services that enable women and couples to avoid unintended pregnancy and to space their pregnancies to promote optimal birth outcomes. Pregnancy spacing is a priority for women's health because of the increased

risk of adverse pregnancy, outcomes for pregnancies that are too closely spaced or within 18 months of each other.

A wide array of safe and highly effective FDA-approved methods of contraception is available. This range of methods provides options for women depending on their life stage, sexual practices, and health status. The committee noted that contraceptive coverage has become routine for most private insurance and federally funded insurance programs.

In summary, the report addressed concerns that the current guidelines on preventive services contain gaps when it comes to women's needs. As a centerpiece of the Affordable Care Act, the focus on preventive services represents a significant and welcome shift from a reactive system that primarily responds to acute problems and urgent needs to one that fosters optimal health and well-being. Women stand to benefit especially from the shift, given their longer life expectancies, their reproductive and gender-specific conditions, and their disproportionate rates of chronic disease and disability from some conditions. Because women need to use more preventive care than men, they face higher out-of-pocket costs.

Thank you very much for the opportunity to testify.

Mr. SMITH. Thank you, Dr. Rosenstock.

[The prepared statement of Dr. Rosenstock follows:]

**Prepared Statement of Linda Rosenstock, M.D., M.P.H., Dean,
School of Public Health, University of California, Los Angeles**

My name is Dr. Linda Rosenstock. I am the Dean of the School of Public Health at the University of California, Los Angeles. I also served as chair of the Institute of Medicine's Committee on Preventive Services for Women. The Institute of Medicine, or IOM, is the health arm of the National Academy of Sciences, an independent, nonprofit organization that provides unbiased and authoritative advice to decision makers and the public.

At the request of the U.S. Department of Health and Human Services' Assistant Secretary for Planning and Evaluation, the IOM assembled a diverse, expert committee to identify critical gaps in preventive services for women as well as recommend measures that will further ensure women's health and well-being.

The committee gathered evidence, deliberated on its findings and recommendations, and met five times in a six-month time period in order to write its report, *Clinical Preventive Services for Women: Closing the Gaps*. This report underwent a rigorous, independent external review prior to its release in July of last year. The Committee recommended that eight preventive health services for women be added to the services that health plans cover at no cost to patients under the Patient Protection and Affordable Care Act of 2010, commonly known as the ACA. The ACA requires plans to cover the services listed in the comprehensive list of preventive services at www.healthcare.gov.

The committee defined preventive health services as measures—including medications, procedures, devices, tests, education and counseling—shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition. To guide its deliberations in determining gaps in preventive services not included in existing guidelines, the committee developed four overarching questions:

- Are high-quality systematic evidence reviews available which indicate that the service is effective in women?
- Are quality peer-reviewed studies available demonstrating effectiveness of the service in women?
- Has the measure been identified as a federal priority to address in women's preventive services?
- Are there existing federal, state, or international practices, professional guidelines, or federal reimbursement policies that support the use of the measure?

Preventive measures recommended by the IOM committee for preventive coverage consideration met the following criteria:

- The condition to be prevented affects a broad population;
- The condition to be prevented has a large potential impact on health and well-being; and
- The quality and strength of the evidence is supportive.

The committee took seriously its task of focusing on women's unique health needs. Women are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families. Studies have also shown that even moderate copayments for preventive services such as mammograms and Pap smears deter patients from receiving those services.

Throughout the study process, the committee repeatedly questioned whether the disease or condition was significant to women and, especially, whether it was more common or more serious in women than in men or whether women experienced different outcomes or benefited from different interventions than men.

The report suggested the following additional services:

- screening for gestational diabetes
- human papillomavirus (HPV) testing as part of cervical cancer screening for women over 30
- counseling on sexually transmitted infections
- counseling and screening for HIV
- contraceptive methods and counseling to prevent unintended pregnancies
- lactation counseling and equipment to promote breast-feeding
- screening and counseling to detect and prevent interpersonal and domestic violence
- yearly well-woman preventive care visits to obtain recommended preventive services

Examples of why these services are crucial in supporting women's optimal health and well-being are listed below.

Deaths from cervical cancer could be reduced by adding DNA testing for HPV, the virus that can cause this form of cancer, to the Pap smears that are part of the current guidelines for women's preventive services. Cervical cancer can be prevented through vaccination, screening, and treatment of precancerous lesions and HPV testing increases the chances of identifying women at risk.

Although lactation counseling is already part of the HHS guidelines, the report recommended comprehensive support that includes coverage of breast pump rental fees as well as counseling by trained providers to help women initiate and continue breast-feeding. Evidence links breast-feeding to lower risk for breast and ovarian cancers; it also reduces children's risk for sudden infant death syndrome, asthma, gastrointestinal infections, respiratory diseases, leukemia, ear infections, obesity, and Type 2 diabetes.

The report recommended that HHS consider screening for gestational diabetes in pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for pregnant women identified to be at high risk for diabetes. The United States has the highest rates of gestational diabetes in the world; it complicates as many as 10 percent of U.S. pregnancies each year. Women with gestational diabetes face a 7.5-fold increased risk for the development of Type 2 diabetes after delivery and are more likely to have infants that require delivery by cesarean section and have health problems after birth.

To reduce the rate of unintended pregnancies, which accounted for almost half of pregnancies in the U.S. in 2001, the report urged HHS to consider adding the full range of Food and Drug Administration-approved contraceptive methods as well as patient education and counseling for all women with reproductive capacity.

Unintended pregnancy is linked to a host of health problems. Women with unintended pregnancies are more likely to receive delayed or no prenatal care and to smoke, consume alcohol, be depressed, and experience domestic violence during pregnancy. Unintended pregnancy also increases the risk of babies being born preterm or at a low birth weight, both of which increase their chances of health and developmental problems.

Family planning services are preventive services that enable women and couples to avoid an unwanted pregnancy and to space their pregnancies to promote optimal birth outcomes. Pregnancy spacing is a priority for women's health because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced (within 18 months of a prior pregnancy). A wide array of safe and highly effective FDA-approved methods of contraception is available. This range of methods provides options for women depending upon their life stage, sexual practices, and health status.

The committee noted that contraceptive coverage has become routine for most private insurance and federally funded insurance programs. Additionally, federal goals included in *Healthy People 2010* and later in *Healthy People 2020* strive to reduce the number of unintended pregnancies.

The report addressed concerns that the current guidelines on preventive services contain gaps when it comes to women's needs. Women suffer disproportionate rates of chronic disease and disability from some conditions. Because they need to use more preventive care than men on average due to reproductive and gender-specific conditions, women face higher out-of-pocket costs.

Positioning preventive care as the foundation of the U.S. healthcare system is critical to ensuring Americans' health and well-being. This is a shift from an historically reactive system that primarily responds to acute problems and urgent needs to one that helps foster optimal health and well-being.

Thank you very much for the opportunity to submit this testimony.

Mr. SMITH. Ms. Monahan, before you begin, let me say to Members that votes have been called, and votes are going to last about an hour. We then have a bill on the House floor that will take about 20 minutes, and so we will resume our hearing after about an hour and 15 or 20 minutes when we leave. Before we leave, though, Ms. Monahan, we are going to hear your testimony, I am going to ask my questions, and then we will recess and come back. So Ms. Monahan, if you will proceed.

TESTIMONY OF JEANNE MONAHAN, DIRECTOR, CENTER FOR HUMAN DIGNITY, FAMILY RESEARCH COUNCIL

Ms. MONAHAN. Mr. Chairman and honorable Members of the Committee, thank you for the opportunity to testify today about the significant threats to religious liberty currently facing our country. My name is Jeanne Monahan, I work at the Family Research Council, a Christian public policy organization. We represent more than 1.5 million families of different denominations around the country.

As you are aware, the Affordable Care Act requires health insurance to include preventive care services for women, and the Administration chose to mandate all FDA-approved contraceptives in the list of covered services, with a very narrow religious exemption that will essentially apply only to churches.

I speak today as a representative of Americans, particularly women, who are opposed to this mandate. Fundamentally, we believe that the President's mandate violates religious liberty, undermines conscience protections currently in place, and profoundly discriminates against people of faith.

Almost every Catholic bishop around the country has indicated that his diocese will not comply with the mandate, but this is not simply a Catholic issue. Over 2,500 evangelical church leaders recently signed a letter in opposition to the President. The National Association of Evangelicals, the Southern Baptist Convention, the Jewish Orthodox Union and other national religious groups have also formally voiced their opposition.

Religious women are also speaking out. In a recent letter signed by thousands of women of 18 different faiths, including doctors, lawyers, business owners, and scholars, women wrote, in quotes, “No one speaks for all women on these issues. Those who purport to do so are simply attempting to deflect attention from the serious religious liberty issues at stake,” unquote.

This is about religious liberty. And yet I would also like to provide context about why people like me would object to this mandate. Drugs and devices that can destroy rather than prevent life are included in this mandate. It is a scientifically valid belief that pregnancy begins at conception or fertilization and not at implantation 7 to 10 days later. But certain drugs and devices are included in this mandate that prevent implantation, and one drug included can work post-implantation.

Emergency contraceptives are included. Plan B can prevent an embryo from implanting. One extensive literature review of Plan B revealed that it possesses at least seven modes of action preventing implantation. And then there is ella. Last year the Food and Drug Administration approved ella as an emergency contraceptive, but it is chemically and functionally almost identical to the FDA-approved abortifacient RU-486. Ella can cause the demise of an embryo post-implantation. In a study of macaque monkeys, ella aborted four out of five fetuses, and there are a number of other studies that are included in my written testimony.

Many Americans believe that drugs that destroy embryos are wrong, regardless of FDA classification. Many Americans are profoundly troubled by the inclusion of these drugs in this mandate. These Americans should not be forced to participate in and cooperate with their coverage in insurance plans.

The HHS contraceptive mandate violates longstanding Federal conscience and religious protections. Even many women who are favorable toward contraception oppose this mandate.

Recently in the San Francisco Chronicle a columnist wrote, “As a believer in family planning, I suppose I should be thrilled, except that President Obama just trampled on the first part of the First Amendment. In a raw exercise of power, the Obama administration has decreed that religious organizations must reject their deeply held beliefs and hand out FDA-approved contraceptives, including the morning-after pill. Now it turns out Americans of all religious persuasions are free to choose, as long as they choose to agree with Obama.”

It has been said you can be sincere and sincerely wrong. We don’t question the President’s motives, but we think he is sincerely wrong. You might think that—you might disagree with me and think that I and thousands of women like me are sincerely wrong. Fine. But don’t force us to—don’t discriminate against us and don’t force us to violate our consciences.

We strongly urge you not to allow this President to discriminate against those with moral or religious objections to this mandate coverage of contraceptives, sterilization, and abortifacients. Thank you.

Mr. SMITH. Thank you, Ms. Monahan.

[The prepared statement of Ms. Monahan follows:]

**Prepared Statement of Jeanne Monahan, M.T.S., Director of the Center for
Human Dignity, Family Research Council**

Mr. Chairman and honorable members of the committee, thank you for the opportunity to testify before you today about the most critical issue of religious liberty facing our country.

My name is Jeanne Monahan. I work at the Family Research Council, a Christian public policy organization that since 1983 has promoted and defended human life and religious freedom in the United States. We represent more than 1.5 million people from Evangelical, Catholic, and other Christian denominations around the country. I speak today as a representative of Americans, particularly, American women, who are opposed to the President's contraceptive mandate and its profound discrimination against people of faith. Fundamentally, we believe that the contraceptive mandate violates religious freedom and undermines conscience rights protections that all Americans have enjoyed until now.

Background. In December 2009, Senator Barbara Mikulski's amendment on women's preventive services with no cost-sharing was adopted into the healthcare bill. The Affordable Care Act which became law in March 23, 2010, was followed in August 2010 by the Department of Health and Human Services (HHS) tasking to the Institute of Medicine (IOM) to study and make recommendations on specific women's preventive services to be included with no cost-sharing for patients. The IOM held three public meetings on November 16, 2010 and January 12, 2011 and March 9, 2011. The advising committee was composed of 17 members, most of whom had specialty backgrounds in the area of reproductive health. Invited presenters included representatives of the Planned Parenthood Federation of America, the Guttmacher Institute, the National Women's Law Center, National Women's Health Network, and others. No pro-life or religious liberty scholars, doctors, or public health experts were invited to make formal presentations.

Separate to the invited formal presentations during each meeting was opportunity for public comment. During the public comment period in each meeting the topic receiving the greatest attention was contraception coverage. I was among many pro-life attendees at each of the IOM committee meetings. Among my colleagues from the pro-life movement were medical doctors, lawyers, nurses, and health insurance providers, most of whom provided remarks during the public comment period. Most frequently opponents of a contraceptive mandate discussed the inclusion of abortion inducing drugs and devices.

In July 2011 the committee issued its report. It recommended coverage of the full range of FDA-approved contraceptives. The report did not include or reference any research related to abortion-inducing drugs presented in the public comment period, which, as noted above, were provided at each meeting by a variety of participants.

On August 1, 2011 HHS revised the general preventive services interim final rule, indicating that the Health Resources Services Administration (HRSA) could exempt a narrow group of religious employers. The HRSA guidance, which is binding, included the full range of FDA-approved contraceptives as a mandatory preventative service for women in all health plans.

FRC is not opposed to many of the IOM recommended services, including domestic violence screenings, gestational diabetes and breast-cancer screenings. However, on behalf of millions of people of faith, FRC is strongly opposed to any person or institution being forced to provide coverage for FDA-approved contraceptives and sterilizations because some of these can function as abortifacients.

Based on the HHS rule issued August 1, 2011 the vast majority of faith-based organizations do not meet the narrow government criteria for a religious organization exemption, namely, employing only members of its religion, serving primarily its own members, and having as its primary purpose the "inculcation" of religious values. Schools, homeless shelters, hospitals, and other such faith-based organizations are not religious enough to be exempt. In the words of Rabbi Soloveichik, Director of the Straus Center for Torah and Western Thought Yeshiva University and Associate Rabbi for the Congregation Kehilath Jeshurun, "[T]he administration implicitly assumes that those who employ or help others of a different religion are no longer acting in a religious capacity, and as such are not entitled to the protection of the First Amendment."¹

¹House Oversight and Governance Committee Hearing, "Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?" (February 16, 2012) (http://oversight.house.gov/images/stories/Testimony/2-16-12_Full_HC_Mandate_Soloveichik.pdf, p. 3)

Following HHS' announcement in August the Department received over 200,000² comments from the public on the contraceptive mandate. In a matter of days our own constituents filed over 15,000 comments and similarly the US Conference of Catholic Bishops (USCCB) reported that their constituents filed over 60,000 comments in protest.

Despite this groundswell of disagreement, on January 20, 2012 the Administration issued a press release announcing the government would grant a year's delay so that religious organizations not exempted could determine how to violate their consciences. The understandable uproar across the country led to a February 10, 2012 announcement by President Obama of a promised "accommodation" requiring that religious employer's health insurance companies cover the costs of contraceptives and abortifacients rather than the employers. However, no corresponding written changes were made by law or regulation.

On the same day the government issued the final regulation, again restating only the narrow religious exemption. It also re-issued binding guidance that reiterated the contraceptive mandate, with a promise of a future accounting procedure that would be issued with regard to the accommodation. However, should an accounting procedure be issued in future regulations, religious employers will still be forced to pay insurers who would in turn provide their employees the services to which they have religious objections. This is no accommodation. Religious employers would still under this scheme be violating their conscience by virtue of government fiat.

Response from religious people. What do religious people, those who will carry the burden, have to say about this mandate? As of today, most Catholic Bishops within the U.S. have stated that they will not comply. Yet this is not exclusively a Catholic issue. Recently 2,500 Evangelical church leaders signed FRC's letter in opposition sent to President Obama. The National Association of Evangelicals and the Southern Baptist Convention have also expressed their opposition.

Religious women are also speaking out. In a letter to the President and members of Congress recently signed by thousands of women of 18 different faiths and representing doctors, nurses, lawyers, teachers, mothers, community care workers, business owners, scholars and more women voiced their ardent opposition to the mandate.

The letter included these observations:

"We listened to prominent women purport to speak for us. We watched them duck the fundamental religious-liberty issues at stake. No one speaks for all women on these issues. Those who purport to do so are simply attempting to deflect attention from the serious religious liberty issues at stake. We call on President Obama, Health and Human Services Secretary Kathleen Sebelius, and our representatives in Congress to respect religious voices, to respect religious liberty, and to allow religious institutions and individuals to continue to provide witness to their faiths in all their fullness."³

It is not acceptable for the government to force religious people to violate their beliefs by compelling their participation in insurance plans that provide services to which they fundamentally object. Many religious believers oppose this narrow exemption for religious churches as well. Not all oppose contraceptives, but many do. Most strongly oppose abortifacient drugs and devices, and there is a strong consensus objecting to the way this rule purports to redefine religion and religious belief.

Abortion-inducing drugs. Drugs and devices that destroy, rather than prevent life, are included in this mandate. For example, in the list of drugs to be provided with no cost-sharing are those categorized as emergency contraceptives (EC). The first of these drugs is Levonorgestrel, or Plan B. Plan B possesses a number of mechanisms of action which can prevent a newly formed embryo from implanting in the uterine wall. One extensive review of the available medical literature on Levonorgestrel revealed as many as seven mechanisms of action that potentially could prevent implantation of an embryo.⁴ In another literature review of the mechanisms of action of Levonorgestrel, the authors concluded, "The evidence to date supports the contention that use of EC does not always inhibit ovulation even if

²Department of Health and Human Services, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" (February 10, 2012) (http://ccio.cms.gov/resources/files/Files2/02102012/psrule_508.pdf, p. 6)

³Helen Alvare and Kim Daniels, "Here We Are: Women Who Stand in Favor of Religious Liberty" National Review Online (February 21, 2012) (<http://www.nationalreview.com/articles/291590/here-we-are-helen-m-alvare>)

⁴H. Croxatto, et al., "Mechanism of Action of Hormonal Preparations Used for Emergency Contraception: a Review of the Literature," *Contraception* 63 (2001): 111.

used in the preovulatory phase, and that it may unfavorably alter the endometrial lining regardless of when in the cycle it is used, with the effect persisting for days.”⁵ Plan B’s labeling information also admits this scientific reality. “[Plan B] may inhibit implantation (by altering the endometrium)”⁶.

The second problematic FDA-approved drug covered by the mandate is ulipristal acetate, marketed as Ella[®] by Watson Pharmaceuticals. Including Ella in the mandatory category of “preventive care service for women” means that HHS is requiring each health insurance plan to cover a drug which possesses the ability to kill an implanted embryo. The demise of an embryo post-implantation is widely agreed by all, even those who define pregnancy at implantation, to constitute an abortion. The FDA approved Ella under the label of an “emergency contraceptive,” but Ella is chemically and functionally similar to the FDA-approved abortifacient, RU-486.⁷ Even Ella’s label states that the drug is contra-indicated for pregnancy.⁸

A recent article published in *Annals of Pharmacotherapy* stated “[t]he mechanism of action of ulipristal in human ovarian and endometrial tissue is identical to that of its parent compound, mifepristone.”⁹ Numerous other research studies confirm ulipristal’s abortifacient mechanism of action.¹⁰ In one such study involving ulipristal’s action in macaques (monkeys), four out of five fetuses were aborted.¹¹

In paperwork filed for the approval of ulipristal in Europe, the European Medicines Agency noted that “Ulipristal, mifepristone and lilepristone were approximately equipotent at the dose levels of 10 and 30 mg/day in terminating pregnancies in guinea-pigs . . .”¹² The authors of the *Annals* article noted: “[E]xisting studies in animals are instructive in terms of the potential abortive effects of the drug in humans.”¹³ Their analysis led them to conclude “it can be reasonably expected that the prescribed dose of 30 mg of ulipristal will have an abortive effect on early pregnancy in humans.”¹⁴ Thirty milligrams is the precise dose of ulipristal now provided in a single package of Ella when purchased as emergency contraceptive in the United States.

The IOM report ignored such scientific research and analysis. Yet many Americans are deeply troubled by the inclusion of these drugs on the mandatory coverage list. Those who oppose their inclusion on religious and moral grounds should not be forced to participate in and cooperate with their coverage in insurance plans. The government should not force people of faith to violate their religious beliefs concerning drugs they reasonably view as destroying human life.

Many Americans believe that drugs that destroy embryos are wrong regardless of FDA classification. It is a scientifically valid belief that conception occurs at fertilization and that pregnancy begins with fertilization and not with implantation. This analysis is supported by a recent survey of the four American medical diction-

⁵ C. Kahlenborn, et al., “Postfertilization Effect of Hormonal Emergency Contraception,” *Annals of Pharmacotherapy* (2002): 468.

⁶ U.S. Department of Health and Human Services Food and Drug Administration, “Plan B One Step Labeling Information” (July 2009): p. 4 http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf.

⁷ RU-486 (mifepristone; Mifeprex[®]) was approved in 2000 by the FDA as an “abortifacient.”

⁸ U.S. Department of Health and Human Services Food and Drug Administration, “Ella Labeling Information” (August 2010): p.1 (http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf).

⁹ D. Harrison and J. Mitroka, “Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health,” *Annals of Pharmacotherapy* 45 (Jan. 2011): 115–9.

¹⁰ Reel et al., “Antiovarian and Postcoital Antifertility Activity of the Antiprogestin CDB-2914 When Administered as Single, Multiple, or Continuous Doses to Rats,” 58 *Contraception* (1998): 129–136, p. 129; VandeVoort et al., “Effects of Progesterone Receptor Blockers on Human Granulosa-Luteal Cell Culture Secretion of Progesterone, Estradiol, and Relaxin,” 62 *Biology of Reproduction* (2000): 200–205, 200. In this article, ulipristal is referred to as “HRP-2000.” Hild et al., “CDB-2914: Anti-progestational/antiglucocorticoid Profile and Post-coital Anti-fertility Activity in Rats and Rabbits,” 15 *Human Reproduction* (2000): 822–829, 824; G. Teutsch and D. Philibert, “History and Perspectives of Antiprogestins from the Chemist’s Point of View,” 9 *Human Reproduction* (1994)(suppl 1):12–31; B. Attardi, J. Burgenson, S. Hild, and J. Reel, “In vitro Antiprogestational/Antiglucocorticoid Activity and Progestin and Glucocorticoid Receptor Binding of the Putative Metabolites and Synthetic Derivatives of CDB-2914, CDB-4124, and mifepristone,” *Journal of Steroid Biochemistry and Molecular Biology* 88 (2004): 277–88.

¹¹ A.F. Tarantal, A.G. Hendrickx, S.A. Matlin, et. al., “Effects of Two Antiprogestins on Early Pregnancy in the Long-tailed Macaque (*Macaca fascicularis*),” 54 *Contraception* 1996: 107–15; European Medicines Agency, “CHMP Assessment Report for EllaOne,” (Doc.Ref.: EMEA/261787/2009).

¹² European Medicines Agency, “CHMP Assessment Report for EllaOne,” (Doc.Ref.: EMEA/261787/2009): p. 10.

¹³ Harrison and Mitroka, *supra*.

¹⁴ *Ibid.*

aries showing that three of the four back this position.¹⁵ Moreover, pregnancy is not a disease. While diseases or complications *related* to pregnancy should be treated, pregnancy itself is not a disease or illness. Yet even if there is disagreement with the beliefs of religious Americans who oppose drugs that can destroy embryos before or after implantation, it is not the proper role of the government to force them to violate their religious beliefs.

Conscience and religious protection violations. The HHS contraceptive mandate violates the spirit and, in one cases, the letter of long-standing federal conscience laws meant to protect people and groups from government discrimination in health care. In the past 35 years, Congress has passed a number of laws (notably, the Church Amendments¹⁶ and the Hyde-Weldon Amendment¹⁷) related to protecting the conscience rights of healthcare workers from government discrimination with regard to abortion or any service in a federally funded or administered program. These laws forbid discrimination in such programs. The HHS contraceptive mandate extends government discrimination beyond these laws' protections by ordering insurance coverage in the private market in such a way as to violate the consciences of insurers, providers, and plan participants who have moral or religious objections. To the extent the HHS mandate includes Ella, we believe it violates the Hyde/Weldon ban on using federal funds to discriminate against health care entities that object to "abortion".

The HHS contraceptive mandate also impinges upon a person's exercise of his or her religion. In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA")¹⁸ which holds a law or regulation that imposes a "substantial burden" on a person's free exercise of religion to be allowed only when the government can demonstrate "that application of the burden" furthers "a compelling governmental interest."¹⁹ In a related hearing on this mandate Bishop William Lori was asked if he believed that the government had a "compelling interest" sufficient to warrant a contraceptive mandate that will burden Catholic or others' religious beliefs. Bishop Lori responded that if the government felt they had a "compelling interest" to burden religious liberty, it would not have provided for any kind of religious exemption. As Bishop Lori pointed out, the mandate and exemption each is arbitrary in that it is the government that decides who is and who is not religious.

As Rabbi Soloveichik testified on February 16th before Congress: "First: by carving out an exemption, however narrow, the administration implicitly acknowledges that forcing employers to purchase these insurance policies may involve a violation of religious freedom. Second, the administration implicitly assumes that those who employ or help others of a different religion are no longer acting in a religious capacity, and as such are not entitled to the protection of the First Amendment. This betrays a complete misunderstanding of the nature of religion."

This is a religious liberty issue. The Administration's imposition of its will on religious organizations is an act of gross discrimination against people of faith. Even those who are not opposed to contraceptives generally have spoken against the Government's "accommodation". Debra Saunders writes in the *San Francisco Chronicle*, "As a believer in birth control and family planning, I suppose I should be thrilled. Except that President Obama just trampled on the first part of the First Amendment, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" She eloquently refutes the argument made by some that the HHS mandate guarantees "choice". Ms. Saunders writes "But there is a 'choice' problem. In a raw exercise of power, the Obama administration has decreed that religious organizations must reject their deeply held beliefs and hand out FDA-approved contraceptives—including the morning-after pill . . . Now it turns out, Americans of all religious persuasions are free to choose, as long as they choose to agree with Obama."²⁰

Conclusion. The contraceptive mandate is an unprecedented directive which deeply conflicts with religious and conscience freedom protections the American people currently receive. In our democratic society governed by the U.S. Constitution,

¹⁵ Christopher M. Gacek, "Conceiving 'Pregnancy': U.S. Medical Dictionaries and Their Definitions of 'Conception' and 'Pregnancy,'" *National Catholic Bioethics Quarterly* (Autumn 2009): 542–557.

¹⁶ 42 U.S.C. § 300a-7.

¹⁷ Hyde-Weldon is currently contained in Section 508(d) of Division D of the Consolidated Appropriations Act, 2010 (P.L. 111–117), 123 Stat. 3280 (2009) which was renewed through the Department of Defense and Full Year Continuing Appropriations Act of 2011 (P.L. 112–10).

¹⁸ 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq.*

¹⁹ 42 U.S.C. § 2000bb-1(b).

²⁰ Debra Saunders, "Obama imposes will in contraception compromise," *San Francisco Chronicle* (February 15, 2012) (<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/14/ED6D1N70AQ.DTL>)

it is not the role of this Administration to dictate what does or does not violate another person's conscience on matters as critical as life and death. It is the job of the government to defend those rights, not trample them. This Administration's act of discrimination against people of faith, and women of faith, must be stopped. As CS Lewis said, you can be sincere, and sincerely wrong. We don't question the President's motives, but we think he is wrong. You may disagree with me, and think that I and the thousands of women like me are wrong. Fine, but do not discriminate against us and force us to violate our consciences. We urge you not to allow this President to discriminate against those with moral or religious objections to this mandate coverage of contraceptives, sterilization services, and abortifacients.

Mr. SMITH. Bishop Lori, let me direct my first couple of questions to you, and the first is this: What changes should the Administration make to the mandate to protect the religious liberties of Catholic and other religious organizations?

Bishop LORI. Mr. Chairman, we think that the mandate to provide these so-called preventive services should be rescinded. We think that is the real way out of this; and barring that, we hope there would be legislative relief.

Mr. SMITH. Okay. Second question is what religious burdens would be imposed upon religious organizations who chose not to comply with the mandate?

Bishop LORI. It is not a very nice menu. The first item on the menu would be to violate our consciences. In other words, as was said here, to teach one thing on Sunday and to do quite another thing on Monday, to be a counter witness to our own teaching. Secondly, we could be fined, and the fines would be severe and crippling. Or, thirdly, of course, we could have to cease providing services or cease providing health care, and I don't think that is in anybody's interests.

Mr. SMITH. Under the Affordable Health Care Act, wouldn't the fines be perhaps \$2,000 per person?

Bishop LORI. I am told it is such. I think it would be an untenable burden.

Mr. SMITH. On Catholic and other organizations.

Bishop LORI. Absolutely.

Mr. SMITH. If they do not comply with the mandate. Okay, thank you.

Mrs. Uddin, if the mandate stands as it is, what are the implications for the religious liberties of all Americans? In other words, what else could the Federal Government impose on religious organizations?

Mrs. UDDIN. We have to remember that religious liberty is a bedrock principle of our Constitution and of our society. It is precisely the same principle that has justified exemptions for a number of different religious groups, whether it be Quakers being exempt from going to war or a prison guard being exempt from having to partake in the death penalty because of their beliefs. And ultimately, once you open the gates for this sort of trampling on religious liberty, it is a slippery slope to a much broader violation.

Mr. SMITH. But what are other examples, what else could the government force religious organizations to provide if this mandate were to remain in effect, as is, unchanged?

Mrs. UDDIN. Well, I mean, this mandate has been justified on the basis of the fact that there are health benefits to providing contra-

ceptives, but the issue of health benefits is not the point. If the government mandates everything that has positive health benefits, it could possibly mandate that everyone drink red wine for heart health, even though it violates the religious beliefs of Muslims and Mormons; and it could mandate that everyone eat shellfish, even though that violates the religious beliefs of Jews; and it could mandate gym memberships because it is widely accepted that exercise is beneficial.

Mr. SMITH. Okay, thank you. Ms. Monahan, let me ask you a question. You testified that you speak today as a representative of Americans, particularly American women who are opposed to the President's contraceptive mandate. Can you describe how it feels to have your sincere religious objections to the mandate and your concern for its broader impact on religious liberty characterized by supporters of the mandate as, "an attack on women's health"?

Ms. MONAHAN. Well, first let me just say I am still somewhat shocked and awed just by this decision to begin with. I mean, I worked in the Office of the Secretary both during the Bush administration and the Obama administration, and I think this is a huge overreach, and I am still just shocked by it; but in terms of characterizing it against women's health, I mean, let's consider the fact that religious employers are going to be forced to withdraw health benefits for women, and obviously that won't be very good for women's health. They will lose the status quo.

Mr. SMITH. Okay, thanks, Ms. Monahan.

That concludes my questions, and we have 2 minutes left to get to the series of votes. I apologize to you all, but I would like to ask you to wait, if you could, until we return. Please feel free to take a break, leave the room, but I would expect that we might resume our hearing between 4:45 and 5:00, and we will encourage Members to return at that point. So thank you for your patience. We stand in recess until about 15 minutes after the last vote in the series of votes.

[Recess.]

Mr. FRANKS. [Presiding.] Judiciary Committee meeting will now come to order, and we will recognize Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you.

Dr. Rosenstock, you are at UCLA in California. As I mentioned in my opening statement, California requires coverage of contraceptive services, including by religious-affiliated entities. How has that worked in your State?

Dr. ROSENSTOCK. From my perspective as a physician, it is working very well. As you had mentioned in your comments, there was some initial legal testing of the exemption, which was seen as limited, but since it has been in place, there is, to my knowledge, very broad participation. I would hope—

Mr. NADLER. Have any of the Catholic-affiliated, other affiliated—

Dr. ROSENSTOCK. I am aware there are certainly many. One of the larger ones that comes to mind is Catholic Hospital West, a religious-affiliated employer, includes—

Mr. NADLER. I am asking—excuse me, have any of them refused to provide services or refused to—or refused to obey the law?

Dr. ROSENSTOCK. Not that I am aware of.

Mr. NADLER. Okay. Thank you.

And in his testimony Bishop Lori states that “it is downright surreal to apply coercive power when the customer can get the same sandwich cheaply or even free just a few doors down.” The underlying assertion and comparison is that contraceptive services are cheap, even free, for anyone who wants them. Do you agree with that assertion?

Dr. ROSENSTOCK. No.

Mr. NADLER. Because?

Dr. ROSENSTOCK. Well, some are relatively inexpensive. It turns out the ones that are most effective actually do cost more. So the implantable IUDs, for example, or the injectables are a higher cost. Even the prescribed contraceptive pills can run 60 a month. And it has been shown that those cost barriers can actually cause women not to use—either use them at all, or use them the way they are supposed to be undertaken.

Mr. NADLER. Thank you.

Ms. Uddin, the Supreme Court in the *Estate of Thornton v. Caldor* struck down a Connecticut law that did not adequately take into account the rights of those not benefiting from the religious accommodation at issue. More recently in 2005, the Supreme Court stated in *Carter v. Wilkinson*, “Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.”

First, doesn’t that mean that neither Congress nor the executive branch is free to ignore the rights of others in considering a measured, workable balance; in this case the rights of people who may want to avail themselves of contraceptive services?

Mrs. UDDIN. Well, I wanted to first start by pointing out that the most recent relevant case in the U.S. Supreme Court here is the *Hosanna-Tabor* case that—and the decision was handed down just this past January.

Mr. NADLER. Excuse me. That is a ministerial exemption. We are not talking about that.

Mrs. UDDIN. Well, it is not—

Mr. NADLER. What? That is ministerial and employment. That has got nothing to do with this. Wait a minute. That has got nothing to do with this.

Mrs. UDDIN. But the broader points about—

Mr. NADLER. No, it is not the broader points. I am asking you a specific question. The court in *Carter v. Wilkinson* said, our decisions indicate an accommodation must be measured so that it does not override other significant interests. In this case, the other significant interest is people who need contraceptive services. Doesn’t that mean that neither Congress nor the executive branch is free to ignore their rights and say all of the rights are on the side of the employer; we respect his rights, and never mind any of the rights of the employees who may need contraceptive services? We are not going to do a balancing test.

Would you agree or not agree that the Supreme Court has commanded a balancing test?

Mrs. UDDIN. The correct test in this case, both under the Religious Freedom Restoration Act, and under the free exercise clause,

in situations like this, where the law at issue is not generally applicable nor neutral, is that if they—

Mr. NADLER. Wait. First of all, it is generally applicable. Everybody has got to give contraceptives. And second of all, it is—the California and New York courts found that those laws which are identical basically were generally applicable.

Mrs. UDDIN. Well, first to start off, it is not generally applicable in this case, because they are—the mandate is riddled with individualized and categorical exemptions.

Mr. NADLER. The same argument that California and New York courts rejected, with all due respect.

Mrs. UDDIN. Now, in the case of the California and New York Supreme Court cases, there are a number of fundamental differences between that situation and the one we are dealing with right now.

Mr. NADLER. Yes.

Mrs. UDDIN. The first is that they did not make a claim under the Religious Freedom Restoration Act because that applies only to Federal law.

Mr. NADLER. I understand that. I was one of the authors.

Mrs. UDDIN. And so the compelling interest test comes into play there.

Mr. NADLER. But the—okay, go ahead.

Mrs. UDDIN. Second, there were a couple of really strong free exercise claims that are—we are making here and that they failed to make in that case.

Mr. NADLER. All right. Let me ask you finally before I go to Bishop Lori for one question, how would you strike the balance, assuming you agree there ought to be a balance, that as an executive agency you are not simply free to ignore the findings from the IOM and many professional health organizations that these services are critical to women's health, and there are cross barriers to women being able to access the contraceptive services they want and need on a consistent basis on the one hand and the religious considerations on the other? How would you strike that balance?

Mrs. UDDIN. The Becket Fund is not denying that this constitutes health care, important health care, for women.

Mr. NADLER. How would you strike the balance?

Mrs. UDDIN. The law already strikes the balance. It says there must be compelling government interests narrowly—

Mr. NADLER. You are saying the law is wrong. How would you strike the balance?

Mrs. UDDIN. Well, for instance, you know, if you are looking—a law has to be narrowly tailored, and one way—and it shouldn't be intrusive and truly disbelieved. And one way for the government to do that is to just find other avenues, and there are so many already available or that they can come up with to provide—

Mr. NADLER. Well, but the government found that there weren't. Okay. Bishop Lori.

Mr. FRANKS. The gentleman's time has expired.

Mr. NADLER. Can I have 1 additional minute?

Mr. FRANKS. Without objection.

Mr. ISSA. Mr. Chairman, can we also ensure that Mrs. Uddin would be able to fully answer her questions? She was cut off re-

peatedly. She has got half a dozen things she was never able to answer.

Mr. NADLER. As long as I can still question Bishop Lori, that is fine with me.

Mr. FRANKS. Mrs. Uddin, is there any additional things you would like to add?

Mrs. UDDIN. Well, yes. Going back to the California and New York State opinions, as I was noting, there are a number of critical differences. One is a lack of RFRA claim.

Second is the fact that a number of very strong free exercise claims were not made in that case; for instance, the fact that this is not a neutral or generally applicable law, because it is riddled with a categorical and individualized exemptions.

And third, those cases were decided in 2004 and 2006. Now we are dealing with, you know, post-Hosanna-Tabor free exercise jurisprudence, and it makes a critical difference.

Mr. NADLER. You said we are dealing with what did you say? I am sorry. Wait. You said we are dealing with what did you say?

Mrs. UDDIN. The climate of free exercise jurisprudence in the aftermath of the Hosanna case——

Mr. NADLER. Hosanna case.

Mrs. UDDIN. That came down in January. And while you might be limiting that to the ministerial exception, the broad points that case made is that religious employers have special rights by virtue of the fact that they are religious.

Mr. NADLER. Okay, Bishop.

Mr. FRANKS. Without objection, the gentleman is recognize for 1 additional minute to——

Mr. NADLER. Thank you.

The California suit, by the way, used the same compelling interest test as is required by RFRA and rejected the claim. But Justice—Bishop Lori, excuse me. In *United States v. Lee*, the Amish employer had a religious objection to paying Social Security taxes, which is a law of general applicability, and the Court ruled that he had to pay the Social Security taxes whether it violated his conscience or his religion or not because it is a general law of applicability, et cetera.

What is the limiting principle to your claim that people who conscientiously object, not just the church, but the business owner, may refuse to obey a law of general applicability, provide health care services? What is the difference between that and the Amish case, and what is the limiting—what is the limit on that? Because if there is no limit, then we have no laws, because everybody can object to every law based on his own conscience.

Bishop LORI. Well, I am not a lawyer, of course, so I probably can't give you an answer that you would regard as adequate, but I would just simply say this: That we have had the kind of conscience protection that we have needed since 1973. It has been on the books, and chaos has not ensued. Catholic entities have offered excellent healthcare plans. In fact, they are so excellent that people who have availability for their spouses' healthcare plans often opt for ours.

So our rights of conscience, which have been exercised for a long, long time, have not prevented us from offering excellent healthcare plans.

Mr. FRANKS. The gentleman's time has expired.

Now I recognize Mr. Sensenbrenner for 5 minutes.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

First of all, a matter of clarification. The Religious Freedom Restoration Act was an accommodation to religious interests, and its sponsors were Senator, then-Representative, Schumer and Senator Kennedy. So this wasn't anything stinky old conservatives like me ended up passing. It was something that was recognized by the gentleman from New York's current Senator and practically the entire Congress that was needed.

Now, I think this issue is basically framed in terms of employees as they have to choose between their faith and their job, and that should never take place in the United States of America. This is not an issue of a single religious denomination. A lot of this is centered around what the Catholic Church teaches. It is about a government entity telling the faith that it will apply its priorities notwithstanding what the faith's teaching is. And that is kind of a reverse disestablishment of religion, in my opinion. It is just as bad as an establishment of religion.

Now, since the HHS mandate was reimposed without any change from August, the exemption is a very narrow one, meaning that a church is covered, but a religious entity is not.

You know, I know that the Gospel teaches those of us who are Christian that we are supposed to serve everybody. You know, we don't ask questions about people's faith, what denomination, if any, that they belong to. But, Bishop Lori, I want to ask you, you know, given how this works, you know, say there is a soup kitchen that is run in a parish hall in the basement of the church. The church has an exemption, but, say, people come on in. Does the nun who runs the soup kitchen have to ask the people, are you Catholic, rather than, are you hungry, before serving the food, otherwise the exemption would be lost?

Bishop LORI. Well, look, I think this very, very narrow definition, this four-part test of what it means to be religious, opens us up to all kinds of challenges, because it is not just Catholic charities or hospitals that serve the general public, but indeed all of our parishes are open to serving the needs of the community. And it could not possibly serve the common good for there to be a chilling effect on religious entities from serving the general public, the common good, the neediest among us, for fear that we would lose our exemption and, therefore, be forced to violate our consciences. It shouldn't work that way.

Mr. SENSENBRENNER. Now, it has been referred to by several of the witnesses about self-insured religious entities.

Bishop LORI. Uh-huh.

Mr. SENSENBRENNER. And if the sponsoring denomination of the religious entity has a doctrinal bar to doing something, you know, whether it is in the healthcare field or something like that, using the healthcare law, so you can't pay for it directly, but you will end up having to pay for it indirectly by shutting down your self-insured plan and by buying into the exchanges, you know, number

one, isn't it just as wrong to do it indirectly as it is directly? And secondly, what is the cost involved by going from some self-insured entity to going into the exchanges? It has got to be steep.

Bishop LORI. Sure. First of all, I do not think that it passes the moral test just to say that the insurer does it. Even if you are not self-insured, as one commentator said, it is like when you are in college, and you pay the older kid to get your beer for you. It doesn't really pass the moral test.

And secondly, we are self-insured for a good reason. We are self-insured because we can afford it. It is the way we are able to provide high-quality healthcare plans for our employees. And if we are forced to buy a fully insured plan or go out into the exchanges, I think it would be, for most places, prohibitive. Like everybody else, this is, of course, a big challenge for us economically.

Let me also say that the grandfathered plans that we are talking about, even those put us in the straightjacket, because if we vary our plans a little too much either way, we lose out on being grandfathered, if I can put it in a nontechnical way.

So what is happening is we are really being put in a straightjacket here not only morally, but also economically.

Mr. SENSENBRENNER. I thank you.

Mr. FRANKS. Thank you, gentlemen.

I would recognize Ms. Lofgren for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

I have listened to this testimony with some interest, and, you know, one of the witnesses said it would be like the government requiring us to drink red wine for our health. That is absolutely incorrect. I mean, nobody is requiring anyone to use birth control. If you are against birth control, fine, don't use it. But I think it is important for the women of this country to have that choice for themselves, not for you to decide.

I think it is an astonishing situation that we are discussing this here in 2012, when I thought the decision was pretty much resolved in 1965 when I was in high school, in the *Griswold* case.

I would like to ask unanimous consent to put a couple of things in the record. One is a statement from the Leadership Conference of Women Religious, where they point out that the LCWR is grateful to President Obama's administration and believe the resolution the President made is fair and helpful. And that was issued by Sister Pat Farrell, Sister Florence Deacon, and Sister Mary Hughes, all of the association; a statement from the Association of Jesuit Colleges and Universities where they commend the Obama administration for its willingness to work with us, and look forward to working out the details with the new regulations; a statement from Sister Carol Keehan, the president of the Catholic Health Association of the United States, saying that the Catholic Health Association is pleased, very pleased, with the White House announcement; and a statement from the Sisters of Mercy saying that the Sisters of Mercy of America are pleased that the adjustments are being made, and they commend President Obama.

So I would like unanimous consent to put these statements into the record, Mr. Chairman.

Mr. FRANKS. Without objection.

[The information referred to follows:]



Contact: Annmarie Sanders, IHM
 LCWR Director of Communications
 301-588-4955 (office); 301-672-3043 (cell)
asanders@lcwr.org

Judiciary Committee Hearing:
 HHS and Preventative Care
 Submitted for the Record
 by: LCWR (2.28.12)

Public Statement from the LCWR Officers on the February 10, 2012 White House Resolution

[Silver Spring, MD] The Leadership Conference of Women Religious (LCWR) is grateful that President Obama and the administration listened to the concerns raised about providing effective healthcare coverage in a way that respects and honors the conscience rights of religious institutions. We believe the resolution the President made is a fair and helpful way for us to move forward.

We are grateful to the many individuals and organizations who courageously voiced their concerns on this critical matter and worked together to find a resolution. Such collaboration and mutual respect model an effective way for our country to deliberate on the many complex issues we face.

LCWR supports the full implementation of the Affordable Care Act so that the urgent needs of the uninsured can be met.

Issued by Sister Pat Farrell, OSF, LCWR President; Sister Florence Deacon, OSF, LCWR President-Elect; Sister Mary Hughes, OP, LCWR Past-President



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AJCU statement on change to HHS mandate for religious institutions
Washington, DC - The Association of Jesuit Colleges and Universities (AJCU) acknowledges and appreciates the compromise that President Obama has made to accommodate religious institutions in regard to the birth control mandate under the Affordable Care Act. We commend the Obama Administration for its willingness to work with us on moving toward a solution, and we look forward to working out the details of these new regulations with the White House.
February 10, 2012

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CHAUSA | Catholic Health Association is Very Pleased with Today's... http://www.chausa.org/Pages/Newsroom/Releases/2012/Catholic_He...



Catholic Health Association is Very Pleased with Today's White House Resolution that Protects Religious Liberty and Conscience Rights

WASHINGTON, DC (February 16, 2012) — The following ~~statement is being released~~ by Sr. Carol Keenan, DC, president and chief executive officer of the Catholic Health Association of the United States (CHA):

The Catholic Health Association is very pleased with the White House announcement that a resolution has been reached that protects the religious liberty and conscience rights of Catholic institutions. The framework developed has responded to the issues we identified that needed to be fixed.

We are pleased and grateful that the religious liberty and conscience protection needs of so many ministries that serve our country were appreciated enough that an early resolution of this issue was accomplished. The unity of Catholic organizations in addressing this concern was a sign of its importance.

This difference has at times been uncomfortable but it has helped our country sort through an issue that has been important throughout the history of our great democracy.

The Catholic Health Association remains committed to working with the Administration and others to fully implement the Affordable Care Act to extend comprehensive and quality health care to many who suffer today from the lack of it.

The Catholic Health Association of the United States (CHA), founded in 1915, supports the Catholic health ministry's commitment to improve the health status of communities and create quality and compassionate health care that works for everyone. The Catholic health ministry is the nation's largest group of not-for-profit health systems and facilities that, along with their sponsoring organizations, employ more than 750,000 women and men who deliver services combining advanced technology with the Catholic caring tradition.

Judiciary Committee Hearing:
HHS and Preventative Care
Submitted for the Record
by: Lofgren (2.28.12)

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Press & Resources

SISTERS OF MERCY PLEADED ADJUSTMENTS IN HEALTH INSURANCE REQUIREMENTS BEING MADE

[Print]

February 10, 2012 - The Sisters of Mercy of the Americas are pleased that adjustments are being made in the new health insurance requirements that will ensure conscience protections for religious-affiliated institutions. We commend President Obama for his openness to dialogue on this issue and his willingness to address these concerns.

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Ms. LOFGREN. I would like to ask Doctor—from UCLA, we are both Californians, and we are both aware that the State of California has had a mandate that birth control has to be provided to people in health care for quite some time. Can you describe that mandate to us here? Is it a narrower exemption that the State has or a broad one?

I can't hear you.

Dr. ROSENSTOCK. I am sorry. I think it would be considered akin to the exemption that was initially promulgated by the Administration, a narrow one. I think, as I was saying earlier, the experience in California once the law was settled was that this is working well, and that it was much less of a problem than it was predicted it would be. And I would hope and predict that the same would be true here, because it is not just California. I was starting to say California and Catholic Hospitals Western California, a large, religiously affiliated employer, has included in its insurance plan contraception and does so broadly.

I think the importance of what we are looking at here is not just what is common practice. Twenty-eight States are actually, in some form, already having this mandate. But what is different is that we are talking about a no-cost; in other words, the absence of copays and deductibles.

Ms. LOFGREN. Right.

Dr. ROSENSTOCK. By coupling the barrier of cost with the proven effectiveness of family planning, the anticipation is that the health will improve dramatically.

Ms. LOFGREN. Now, there are plenty of reasons that some women need birth control pills for other than to prevent pregnancy; are there not?

Dr. ROSENSTOCK. Oh, absolutely. So there is no question that contraception, contraceptive pills are used for a variety of medical conditions both because of their direct ability to treat the condition, reproductive disorders, ovarian cysts, acne, a range of them; also because sometimes we would have other medical conditions for which pregnancy could put them at significant risk and a wide range of conditions for which they are being used.

Ms. LOFGREN. Well, you know, I would just like to note that, you know, we all pay taxes, and our taxes are used to provide birth control to women in the military. There may be people—or, for example, our witness, the Bishop, objects to birth control, which is absolutely his right, but I don't think he would argue that he shouldn't have to pay taxes because Army women get birth control. I do think that, you know, to be against birth control is a right in America. To deny birth control to American women is way beyond what is right.

And with that, Mr. Chairman, I would yield back.

Mr. ISSA. Mr. Chairman, I believe there was a question in that for the bishop. I would ask unanimous consent he be able to respond.

Ms. LOFGREN. I had no question for the bishop. I had a statement of my opinion.

Mr. FRANKS. All right. Let me just suggest that perhaps some of the issues surrounding contraceptives might have been addressed and resolved in 1965 judicially, but the issue before us today was

addressed and resolved in 1789 and 1791 respectively when we adopted the Constitution and the Bill of Rights and later ratified them in 1791.

With that, I would recognize Mr. Lungren for 5 minutes.

Mr. LUNGREN. I thank the Chairman. I would say it was not a question that was addressed to the bishop. There was a statement of what the bishop thought according to the gentlelady from California; a nice rhetorical technique in which you allege someone thinks something without asking them what they think.

There has been a couple of comments here——

Ms. LOFGREN. Thank you.

Mr. LUNGREN [continuing]. In which reference was made to Catholic Healthcare West, which is the proper name. They removed the name "Catholic" from their operations recently. They now call themselves "Dignity." I met with them, and I told them I thought "Catholic" was a good word for the last 2,000 years, and I, for one, was not embarrassed to be Catholic.

I have been a Republican since I was adult. I have been a Catholic since I was baptized. I have been an American since I was born. I didn't think I was going to have a situation in which the question would be raised whether you can be adequately and fully Catholic and fully American.

The irony with what we have here today is that those who were anti-Catholic in the 1800's were Republicans and Know-Nothings. Unfortunately it appears that the party that defended Catholics in the 1800's and now questions whether Catholic thought is appropriate because it is antiscience, or somehow Catholics are attempting to impose their views on others.

It is crystal clear what is happening here. It is the Obama administration, which believes it has the right, perhaps, under the rubric of secular humanism or some other such concept, to impose its thoughts and its principles on those who are of the Catholic faith and other faiths. It has nothing to do with contraception; has everything to do with religious liberty.

In a letter that the Archbishop of San Francisco had published, he said this: In 1804, as a result of the Louisiana Purchase, New Orleans, formerly governed by the French Empire, passed to the jurisdiction of the United States of America. Sister Marie Therese Farjon of the Ursuline Order of Sisters serving in New Orleans wrote to President Thomas Jefferson to ask whether the sisters' property and ministries would be secure under the new government. In a remarkable letter, President Jefferson, the author of the doctrine of separation of church and state, replied, "The principles of the Constitution and the Government of the United States are a sure guarantee to you that it will be preserved to you, sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authorities. I salute you, Holy Sisters, with respect—friendship and respect. Thomas Jefferson, President of the United States."

The bishop concludes his article stating that apparently the U.S. Department of Health and Human Services is convinced that it has found a better interpretation of religious liberty than Thomas Jefferson. Now, Thomas Jefferson put it pretty well, and he talked

about the institutions that you have, in this case Catholic order of Ursuline, which do works of charity, hospitals, schools, et cetera, and we are told that they would be able to operate within their conscience without interference by the civil government. If this is not interference of the civil government, I know not what it is.

Now, I realize some on the other side would say that Thomas Jefferson was not the writer of the Constitution, he only wrote the Declaration of Independence, but I would say that if you are trying to understand the Constitution, you have to read it informed by the Declaration of Independence, as Thomas—as Abraham Lincoln said.

You know, we better call what is going on out here. This is an attack on religious liberty. There is an attempt by this Administration, first, to so confine the definition of religious liberty so that it is a right of worship. Religious liberty is so much more than the right of worship. And with all due respect, Doctor, I understand what the recommendations of your committee were, but I do not believe that you were charged with the responsibility of looking into the question of the conscience clause or the ability of religious organizations to practice religious freedom.

There is a conflict here. There is no doubt about it. And the question is whether the government has the right to basically impose its thoughts and its tenets on those who do not believe, and mandate that they take actions that otherwise are contrary to their own witness. And if that is where we have come, we better understand and say it. But to suggest that some, including the former Speaker, said that this is merely an excuse, excuse of religious liberty, belies the seriousness of what we are about.

Archbishop Niederauer also said in his article: It is about tea, British newspapers proclaimed in 1774 as Parliament passed a bill that closed Boston Harbor until the citizens of Massachusetts reimbursed East India Company for the tea that had been thrown into the Bay by American patriots. It is all about the tea. Of course, as he said, of course, it wasn't about the tea at all; it was about a fundamental diminishment of liberty that would let American colonists to refuse to comply with a law that broached—breached the freedom which was theirs by right.

With all due respect to those on the other side, who I take for their generosity of spirit and their sincerity, this is not about the issue you wish to make it. It is about the question of mandating people to act against their conscience at the punishment of the government with respect to a fine. That is pretty clear. That is pretty clear.

I wish I had time for a lot of questions, but I just heard a lot of stuff asked that—including assumptions there, and I will just say this: I may not be the best Catholic in the world, but I am not embarrassed to be a Catholic, and I am not embarrassed that my church has certain tenets that I try to follow. And I will be darned if I have to give up my Catholicism to be a good Catholic. I think you can be both a good Catholic and a good American. And frankly, I don't care if you are President of the United States, you have no right to come between me and my conscience.

Mr. FRANKS. Thank you, gentlemen.

And I now recognize Mr. Johnson for 5 minutes, sir.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Chairman, this hearing, to me, it smells more like politics than it does religion, and I think it is despicable when politicians use religion to effect a secular outcome, such as making President Obama a one-term President. And I believe that is all this is about.

But I will ask Ms. Monahan—I don't want you to feel like you have been left out of this discussion—what do you—I mean, I love Thin Mints, Girl Scout cookies. What was your gripe about Girl Scout cookies?

Ms. MONAHAN. I don't think I understand the question as it relates to this. This today is about religious liberties, that—

Mr. JOHNSON. Yeah, I know, but—so you are here.

Ms. MONAHAN. It is an infringement—

Mr. JOHNSON. You are not here for the politics, you are here for religion?

Ms. MONAHAN. Yes, sir, I am. With all due respect that is why I am here.

Mr. JOHNSON. Let me ask you then, what about your organization, the Family Research Council? Is it concerned with politics?

Ms. MONAHAN. Sir, the Family Research Council has a political action side, and it also has a policy side. Let me be clear that I am—

Mr. JOHNSON. Okay. All right.

Mr. FRANKS. Let the witness answer the question, Mr. Johnson.

Mr. JOHNSON. Well, this is my time. I will ask the questions. I want her to answer yes or no, and if I feel like she needs to explain, I will so ask her, with all due respect, Mr. Chairman.

Mr. FRANKS. With all due respect, the witness should be allowed to answer the question.

Mr. JOHNSON. Well, I can't have a witness answering a question for 4 minutes and 30 seconds, filibustering me like I am being filibustered right now. This is my time.

I mean, your organization, ma'am, sponsored a prayer-in, a prayer vigil, to stop people from buying Girl Scout cookies because you alleged that Girl Scout cookies is affiliated with Planned Parenthood; isn't that correct?

Ms. MONAHAN. Sir, I am not aware of any—

Mr. JOHNSON. You are not aware.

Ms. MONAHAN [continuing]. Vigil that my organization has organized to stop people from buying Girl Scout cookies.

Mr. JOHNSON. Well, I want to submit this document about the Family Research Council and its anti-Girl Scout cookie prayer vigil for the record, if there is no objection.

Mr. FRANKS. Without objection.

[The information referred to follows:]

Family Research Council Asks For Prayers



Judiciary Committee Hearing:
HHS and Preventative Care
Submitted for the Record
by Johnson (2.28.12)

Submitted by Michael Allen on Feb 8, 2012

In a 'prayer alert' today, the Family Research Council claimed that its campaign against the Girl Scouts was working: "Their cookie sales are suffering."

Back in January, Family Research Council president Tony Perkins told followers to boycott Girl Scout cookies because the treats allegedly fund a political agenda which includes Planned Parenthood and "promoting sexual diversity."

Although the Girl Scouts have repeatedly stated that none of their cookie sales are "given to any other group," that didn't stop Family Research Council from asking for prayers against Planned Parenthood and private organizations (Girl Scouts) that are supposedly affiliated with Planned Parenthood.

The Family Research Council prayer alert says in part:

The Girl Scouts, whose leadership has been collaborating with Planned Parenthood for years, have found out and their cookie sales are suffering. This is very sensitive for the Scouts. The Scouts had better confess their errors and make a clean break while they can. Yet Planned Parenthood doesn't let its captives go easily.

May Congress expose and defund Planned Parenthood and may private organizations refuse to submit to shakedowns by Planned Parenthood and others in the abortion advocacy industry. May the Pro-life Majority grow in America until abortion has been abolished (Ex 23:2; Dt 21:1-9; 2 Kg 24:2-4 Pr 20:11; 24:11-12; Mt 27:4-6; Eph 5:11-14).

<http://www.opposingviews.com/v/politics/abortion/family-research-council-asks-prayers-against-girl-scout-cookies>

Mr. FRANKS. I would remind you that this is a hearing about the HHS mandate, not Girl Scout cookies.

Mr. JOHNSON. But it is also a hearing about politics. That is my point. This is politics more than religion.

I want to also place into the record a—looks like a press release from Family Research Council Action that is dated February 27, and it talks, among other things, about the Heritage Foundation, which we all know to be a Republican-oriented—

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. JOHNSON. I will not yield—

Mr. SENSENBRENNER. Mr. Chairman, I am reserving the right to object.

Mr. JOHNSON [continuing]. At this time.

And I also——

Mr. SENSENBRENNER. Reserving the right to object.

Mr. FRANKS. The gentleman may be heard on his reservation.

Mr. SENSENBRENNER. What does the Heritage Foundation have to do with this hearing? There is no witness here representing the Heritage Foundation, so they can't answer it.

Mr. JOHNSON. Well, if you listen to my question, I think you will find it relevant.

Mr. SENSENBRENNER. No. Under the regular order, I have to decide whether or not to object, and I will,

Mr. JOHNSON. Well, why don't you observe your right to——

Mr. FRANKS. Objection is heard.

Mr. JOHNSON. Reserve it until I finish my question.

Then, among other things, this press release talks about the Heritage Foundation, which we all know which way they lean, and it also talks about a poll, a GOP Presidential poll. All of that is on one page. I want to put that into the record as well. This is——

Mr. SENSENBRENNER. Mr. Chairman, I object.

Mr. FRANKS. The gentleman will state his objection. I am sorry. The objection is heard, sir.

Mr. JOHNSON. Objection is heard? Well, I mean, are you objecting to me offering this for the record?

Mr. SENSENBRENNER. The answer is yes. It is irrelevant.

Mr. JOHNSON. Or what grounds?

Okay. Well, how did you rule? How does the Chair rule on that objection?

Mr. FRANKS. It can only entered by unanimous consent, and there is not unanimous consent.

Mr. ISSA. Mr. Chairman, regular order. The time has expired.

Mr. JOHNSON. Mr. Chairman, that cannot be——

Mr. FRANKS. The time is not expired. You have 45 seconds.

Mr. JOHNSON. We cannot conduct our affairs like that.

Mr. FRANKS. The gentleman will state his Parliamentary inquiry.

Mr. DEUTCH. Mr. Chairman, is it common courtesy in this Committee for Members to be able to offer things into the record?

Mr. FRANKS. That is not a Parliamentary inquiry.

Mr. DEUTCH. I am questioning the Parliamentary procedure that we use here, Mr. Chairman.

Mr. FRANKS. It is a courtesy, but not the rule, when an objection is heard. So the gentleman will proceed. The gentleman has 49 seconds.

Mr. JOHNSON. Forty-nine seconds left.

I will say that I guess you are here also to support the Family Research—the Respectful of Rights of Conscience Act of 2011. That the H.R. 1179, which would allow an employer or an insurer to refuse to provide coverage that is contrary to its religious or moral beliefs.

Do you believe that an insurance company has a—is a person that can have a religious or moral belief, Ms. Monahan? That is not possible, is it? You know, an insurance company doesn't have a soul, does it?

Ms. MONAHAN. Mr. Johnson, did you want me to answer your question?

Mr. JOHNSON. Yeah, I gave you time.

Ms. MONAHAN. We do support the Fortenberry bill.

Mr. JOHNSON. But my question is is an insurance company capable of having a moral or religious belief?

Ms. MONAHAN. To be clear, if a religious organization runs or is contracting with the insurance company, then yes, it is allowed to have certain mandates like that.

Mr. JOHNSON. So what you are trying to do is escape—or is provide an insurance company from being able to escape an obligation to afford contraceptives without a copay. Is that what you are trying to do?

Ms. MONAHAN. Congressman Johnson, I think we can agree to disagree. The real issue here is about religious liberty, and it is about people like me not having to pay \$1,000 a year for drugs and devices that are going to cause abortions. The real issue here is about religious liberty. It is not about access to contraception; it is about religious liberty.

Mr. JOHNSON. Well, why don't you—

Mr. FRANKS. The gentleman's time is expired.

With that, I would recognize the gentleman from California Mr. Issa for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman, hopefully 6 or 7 to be equally fair.

Mr. JOHNSON. Well, I am going to object to that in advance now. I reserve the point of order on that basis.

Mr. ISSA. No, that is only fair that you take 7 or 8 minutes. That is all right.

Mr. FRANKS. He did go over 1 minute, Mr. Issa.

Mr. ISSA. That is okay, I don't need it. I will be fine. I only have questions.

So, Bishop Lori, not taxing my non-Latin upbringing, *Humanae Vitae*, or *Vita*, depending upon which one, but I am not going there, *On Human Life*, 1968, excuse me, Pope Paul VI, on page—and I would ask unanimous consent this be placed in the record.

Mr. DEUTCH. I object.

Mr. FRANKS. Objection is heard.

Mr. ISSA. Okay. In that case, since they are trying to silence a legitimate document of record, on page 9 it says, The church, on the contrary, does not at all consider licit the use of therapeutic means truly necessary to cure disease of organism, even if the implement—even if an implement to procreation, which—impediment to procreation which may be foreseen should result therefor, provided such impediment is not for whatever motive directly willed.

Bishop Lori, I read it poorly; you know it well. What does that mean to you when it comes to providing any and all health provisions that are not specifically for the purpose of an abortion or specifically for the purpose of birth control, but rather for the health of the woman?

Bishop LORI. Thank you very much. That is *Humanae Vitae* number 15, and that provision, together with the Ethical and Religious Directives of the U.S. bishops at number 53, recognizes that the same drug can have more than one effect. It recognizes that some of these contraceptive drugs can also have, of course, risks, but they also have benefits not related to the conception of new life. And if it is necessary for it to be administered for those other rea-

sons, in the Catholic healthcare plans that I am aware of, they are covered.

Mr. ISSA. Sir, I just want to understand then. Anything that is not specifically for those purposes which are prohibited within your faith—and I am not Roman Catholic; I don't have a problem with contraception, but I recognize your faith does—but as long as that is not the intent, your healthcare plans would fully cover that, and you would have no problem with living under a law that said, in fact, to prevent ovarian cancer, to deal with other problems that the same medicines might do, that is all fine. That would be covered within your plans, and you have no problem with it?

Bishop LORI. That would be essentially correct.

Mr. ISSA. Okay. I only wanted to establish it because it seems like a lot of people are trying to expand beyond what the Catholic Church and perhaps other faiths are interested in.

Dr. ROSENSTOCK. I want to go to you. You have been underheard from. Clearly, as a healthcare professional, you are here for that purpose. And I want to go through a couple of things.

Clearly a number of drugs widely used by women ranging, if I understand correctly, from as few as \$9 to—at Target for generic to hundreds of dollars can, in fact, be appropriate for a woman to prevent conceiving? Is that correct, that there is a range of products, and they are individualized for various people's needs?

Dr. ROSENSTOCK. Yes.

Mr. ISSA. Okay. And if we had passed a law 2 years ago that specifically had the government simply pay for that so that it was fully covered by Federal appropriation, you would be all right with that, and you wouldn't be here today; is that right?

Dr. ROSENSTOCK. I am only here today to talk about the evidence that avoiding unintended pregnancies is healthy for women and to their care.

Mr. ISSA. So if we were paying for it federally, if it was fully paid for, guaranteed, then you would have what you came here to talk about. In other words, the health considerations, it is really a question of are they going to be fully funded so that women do not deny themselves various medicines for various purposes that might, in fact, be therapeutically good for them?

Dr. ROSENSTOCK. I can't agree with that as written. We have to go back to the Affordable Care Act. There is a long list of preventive services that—

Mr. ISSA. No, but my point is if—ma'am, no, Doctor, please, because they are not going to give me extra time. If all of these medicines that we are talking about today, any of them that possibly could be objected to by any faith, if they were covered by the government fully with no deductible so that they would be fully available through ordinary health care, if it was a government healthcare plan, you wouldn't be here today, you would be fine with it. That is what you are here saying women have a right and a need to; is that right?

Dr. ROSENSTOCK. I disagree with the way that you are construing my presence. I am sorry.

Mr. ISSA. Well, no, I am just trying to understand.

Dr. ROSENSTOCK. I would like to explain, but you have cut me off.

Mr. ISSA. No, what I am trying to understand is if it is not—if the money were—if the drugs and the treatments were all available and not in any way connected to a church paying for them, then you would have what you want; is that correct?

Dr. ROSENSTOCK. You are assuming I would want things that I don't even understand your implication. But let me just go on—

Mr. JOHNSON. Mr. Chairman—

Mr. ISSA. My time is expiring. I would ask unanimous consent that the woman be able to continue and answer the question fully.

Dr. ROSENSTOCK. I think it would make sense. My intent in being here is to provide the medical and scientific background for how a range of services—you have asked me to focus on one today—can improve women's and children's health, and why access to these have been demonstrated to do just that same thing.

Mr. ISSA. Thank you.

And, Mr. Chairman, I might note that I am a businessman. I came out of a business background, and Mark McCormack was one of the great people that I read. And he said something very profound in his books, which was that the difference between a problem and a business decision is a business decision is something money will solve; a problem is something money won't.

And I might say here today that it is very clear with over \$2 billion spent in family planning, and certainly—by the Federal Government, and certainly more money able to be spent, we are to a great extent arguing over whether or not this is a decision that Congress can make and pay for, or whether we are creating a problem by ordering people of conscience to pay for it.

I yield back.

Mr. FRANKS. I thank the gentleman, and I now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Bishop Lori, are you suggesting we can't do this, or that it is bad policy to do this?

Bishop LORI. I am sorry, say it again.

Mr. SCOTT. Is your suggestion that this is bad policy to do this, or that the Congress cannot make—this Administration cannot impose this requirement?

Bishop LORI. I would suggest that it is a violation of religious liberty, and I think a violation of religious liberty necessarily results in bad policy.

Mr. SCOTT. But there is no question that the Administration has the power to make that regulation?

Bishop LORI. I don't know that it does. I think that remains to be adjudicated, but I believe it does not.

Mr. SCOTT. Well, if the Catholic Church policy on contraception isn't the only religious exemption, religious situation we have—the Christian Scientists, for example; Jehovah's Witnesses have different healthcare, religious beliefs—should they be required to conform to the general law that applies to everybody else?

Bishop LORI. I believe that as a matter of general principle, rights of conscience should be properly accommodated unless there is a compelling government interest, and if that compelling government interest is established, then I believe it should be carried forward in the least intrusive way possible.

Mr. SCOTT. Well, does this matter of conscience go not just to churches, but to any devoutly religious person, say, running a business?

Bishop LORI. I believe it should be possible to establish and to run a business today, as it is. It is already possible to do that on Christian principles and to operate exactly that way, not only—

Mr. SCOTT. Are you suggesting—

Bishop LORI [continuing]. Believing what you believe in private, but also putting it into practice in your business life.

Mr. SCOTT. Are you suggesting that a devoutly religious businessman running a business ought to have the—ought to have an exemption to apply to the requirement although the business has nothing to do with the religious, it is not a religious organization, it is just a regular business, a sporting goods shop?

Bishop LORI. Well, I would put it this way: If the employees, the employer, and the insurer all agree to this, I don't think there is a compelling governmental interest.

Mr. SCOTT. You know, one of the problems I have is I am just too old. I am just too old, because when I was growing up, a lot of people had, as a matter of real conscience, White superiority, and they wanted exemptions. I mean, they were just offended by the civil rights laws that required restaurants to serve Blacks, hotels to have to rent rooms to Blacks. All of those were a matter of conscience; they didn't want to. And you have the same situation here, where, as a matter of conscience—now, in the church, it is different. We are talking about a regular commercial enterprise. Should people have the right to exempt themselves from Title VII, employment discrimination?

Bishop LORI. There is no law that we are talking about that allows us to discriminate against persons. If we are talking about the respect for rights of conscience, it lists specific items. It talks about items; it does not talk about classes of persons. And I would say that equating the church's teaching on the sanctity of life and the beauty of human sexuality with racism is something I reject categorically and find quite offensive.

Mr. SCOTT. The principle we have is it is a matter of conscience, and some people are devoutly—just have, as a matter of their inner soul, the racial discrimination.

The EEOC ruled at one time that failure to give contraception to women would constitute employment discrimination based on gender if you had prescriptive drugs covering everything else. Is that still a good law?

Mrs. UDDIN. No. That has actually never carried the force of law. The eighth circuit, which is the highest court to speak on this issue, ruled in 2007 that, A, the EEOC opinion does not carry the force of law; and secondly, it disagreed with the EEOC on the fact that the failure to provide contraceptives constitutes gender discrimination.

Mr. SCOTT. Even though you have provided prescriptive drugs to everybody else?

Mrs. UDDIN. That is correct.

Mr. SCOTT. I Yield back, Mr. Chairman.

Mr. FRANKS. Thank you.

And I now recognize Mr. Goodlatte for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. Uddin, am I pronouncing that correctly?

Mrs. UDDIN. Uddin.

Mr. GOODLATTE. Uddin, I apologize.

Under the Administration's compromise plan, insurance companies would be forced to pay the costs of mandated coverage. Won't those costs be passed right back onto the very religious employers who objected to this policy in the first place?

Mrs. UDDIN. Absolutely. I think it would take some sort of magical accounting to say that these drugs would somehow be provided at no cost.

Mr. GOODLATTE. Bishop Lori, could you tell us a little bit about how Catholic schools, churches, charities and hospitals operate across this country, and how this mandate will affect these Catholic institutions?

Bishop LORI. Sure. First of all, the four-part test for how religious you are in no way corresponds to the church that I represent and that I love. We are organized into dioceses, and into parishes, and into schools. They serve the general public.

Most of our institutions are self-insured; not all of them, but many of them are self-insured. So what this means is, first of all, that this mandate is reaching in and telling us that we have to provide services against our teaching, either directly or indirectly. Now, if you are self-insured, you are a provider of services, educational, pastoral, charitable services, but then as an employer you have to go on the other side of the desk, and you have to provide services that are against your teaching. So you sort of become a countersign to yourself. So on the one hand, I am teaching, I am providing services all based on the faith of the church; and then as an employer, I am being asked to contradict what I teach because I am self-insured. And because I am also the insurer, because the Diocese of Bridgeport is self-insured, that means I am also having to pay for these proscribed services.

So we are not talking about taxes here. We are not talking about government dollars. We are talking about church dollars going into this. And it is unfortunate that when the so-called accommodation was devised, nobody sat with the Catholic Church, or any other church for that matter, to ask the question, how do you actually work, and what do you actually need?

Mr. GOODLATTE. So the HHS mandate has a very narrow religious employer exemption that does not exempt religious employers who serve nonbelievers.

Bishop LORI. Uh-huh.

Mr. GOODLATTE. But for the Catholic Church, isn't part of your ministry serving all of those in need whether members of the church or nonbelievers in the Catholic faith; and if so, isn't the mandate's narrow religious employer exemption virtually meaningless?

Bishop LORI. Absolutely. For example, in an inner-city Catholic school, it would be common that over half the children would not be Catholic. In Catholic charities, we serve in our diocese per year over a million meals to the homeless and the homebound. We don't ask if they are Catholic, and we shouldn't have to ask if they are Catholic. So the answer is, of course, we serve the common good.

Mr. GOODLATTE. Ms. Monahan, the Administration is straining to portray its contraception mandate as striking the right balance between religious liberty and public health. Yet employers with religious exemptions have only two options, pay crushing fines or make available procedures they consider grievous sins. Are the options equally limited for employees who want access to such services should their health plan not provide it?

Ms. MONAHAN. The United States in fiscal year 2011 spent \$2 billion in public contraceptive services, public family-planning programs. So for these women that employers weren't providing contraceptives, they could access Title X family planning. They could go to community health clinics. Nine out of ten employers in the United States, according to the Guttmacher Institute, right now do provide contraceptive services. So I think women in the situation as you mentioned would actually have more options than someone like me, who would, in fact, be forced to violate my conscience or to lose my health insurance.

Mr. GOODLATTE. So this really is an issue of religious liberty and not of public health, and it is also an issue of the government determining the extent of that religious liberty.

Ms. MONAHAN. I think so, because it is—the government could have looked at other possible ways to increase access if that was truly the bottom line, other than forcing groups that opposed these abortifacients and contraceptives to provide them.

Mr. GOODLATTE. I agree.

Thank you, Mr. Chairman.

Mr. FRANKS. Thank you.

I will now recognize Ms. Jackson Lee for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

At the outset I want to show respect to Dr. Rosenstock, and I am so glad that it is before 6:30 so that I can pose some questions to her. But, Mr. Chairman, I understand that Dr. Rosenstock needs to leave by 6:30, so might I ask that if Members have questions for her, they would be permitted to do so, or, if not, to submit their questions in writing. And I believe you are calling on me at this point, so I am up for my questions. But if other Members—

Mr. FRANKS. We certainly welcome written questions offered by the Members, and with that, please proceed.

Ms. JACKSON LEE. Mr. Chairman, I am going to take an approach that welcomes this hearing, and I don't mind and will enjoy participating in any number of hearings over and over again. I even applaud Miss—she pronounced the name, Uddin, because there may be occasions when I will be in the courts as well because of issues that I believe groups that I cherish or religious rights that we all cherish should be challenged.

Bishop, I welcome your presence here, and welcome the fact that all of us, I think, have great respect for religious liberty. My faith is a faith that sees its challenges and welcome the opportunity to practice our faith without being fettered, in an unfettered manner.

I would like to keep this for what I believe were efforts by the Administration to find a way to respect religious liberty and as well do something, Doctor, that is so very important. So let me focus on Dr. Rosenstock.

It seems like before I came in, you mentioned ovarian cancer, and I don't want to take that lightly. Explain again the impact of this kind of access to contraception and examinations has on women and this devastation of ovarian cancer.

Dr. ROSENSTOCK. Sure. This involved a discussion about the role that contraceptive medications can play outside of preventing unintended pregnancies for a host of conditions, including its known effect on reducing risk for ovarian cancer and being a mainline treatment for women with ovarian cystic disease.

Ms. JACKSON LEE. And have you looked at the regulations that have been struck as a compromise to respond to the very valid concerns of religious liberty? Have you read those new regulations?

Dr. ROSENSTOCK. I am aware of that. I am here representing the Institute of Medicine and our committee work, so I have really focused on the science and public health benefits of the recommended added screening. I certainly have reacted as a physician to the concept of broadening these accommodations to include employers of any type.

What worries me as a provider is the potential to wreak havoc in the medical care system we now have. We are an employer-based, voluntary system largely. There are some employers who believe that vaccinations go against their beliefs; there are others who do not believe in blood transfusions. And I believe that opening the door so widely to these kinds of decisions would really have the potential of causing great ill health.

Ms. JACKSON LEE. So you are seeing it from a different perspective, but let me get you focused back on contraception and the idea. How vital is it that we equate contraception to women's general access to health care? What we are talking about here is women are constructed differently. They are blessed with the ability to procreate. How important is it that they have access to a wide breadth of health care?

Dr. ROSENSTOCK. When we as a committee looked at all of the potential gaps that women had in preventive services, and believe me, we looked at tens, and there is already a long list, we came up with a relatively small list that meet our criteria that affected a broad number of women, that it was proven to be effective in improving and increasing health, and I can tell you that when—there is no single recommendation that met the high bar that family planning does. The evidence is extraordinary. This is settled science. CDC called it, you know, one of the great achievements of the last century that we have family planning.

By the way, their top was vaccination, so I don't think it is irrelevant to think about other—

Ms. JACKSON LEE. Let me interject here for a moment because—

Dr. ROSENSTOCK. Yeah.

Ms. JACKSON LEE. Let me just interject for a moment. I appreciate your answer. But I ask unanimous consent to put into the record the revised compromise, which specifically states, Mr. Chairman, that there will be now an exemption of group health plans and group health insurance coverage sponsored by certain religious employers from having to cover certain preventative health services under the provisions of the Patient Protection and Affordable Care

Act, which is what the doctor is talking about. It may be broad, but it does, I believe, answer the question of our religious institutions, that they do not have to cover individuals. We may have an agreement or disagreement, but the government did try to adhere to religious freedom.

Mr. SENSENBRENNER. Reserving the right to object.

Ms. JACKSON LEE. Excuse me?

Mr. SENSENBRENNER. Reserving the right to object.

Mr. FRANKS. The gentleman will state his objection.

Mr. SENSENBRENNER. Does the document that the gentlewoman from Texas proffers to include in the record state what the contours of this exemption would be, or is this something that is to be determined within the next year before the exemption regulation is finalized?

Ms. JACKSON LEE. In my interpretation of the document, it is clear that it lays out some ground rules on the contours, with the allowance, as all Federal regulations do, for further discussion and amendment, and I would ask unanimous consent for this document to be added into the record.

Mr. SENSENBRENNER. Further reserving the right to object. Is what the gentlewoman proffers a final regulation that is binding on everybody, or is this just a discussion point for a final regulation between now and sometime in the future?

Mr. QUIGLEY. Will the gentleman yield? Is that proper for him to ask during this moment, Mr. Chairman?

Mr. FRANKS. Really I don't think it is. I think he has the floor to state his objection.

Mr. SENSENBRENNER. Will the gentlewoman from Texas answer my question?

Ms. JACKSON LEE. I am delighted, Mr. Sensenbrenner, because I think as a constitutionalist, as I have known you to be, this is a final rule printed in the Federal Register. It is a public document. And there will be other additions to it, but this can be considered—

Mr. SENSENBRENNER. Well, further reserving the right to object, how is this final rule published in the Federal Register different in any respect from what was an interim rule that was published last August?

Ms. JACKSON LEE. Well, I would like to pose a question in answering the question, Mr. Sensenbrenner, is that we are here in this hearing room talking about the rule. What is the objection to indicating and submitting this rule for the record?

Mr. SENSENBRENNER. Well—

Ms. JACKSON LEE. If we seek to have a clear understanding of what we are discussing—

Mr. SENSENBRENNER. Well, further reserving the right to object.

Mr. FRANKS. The gentleman will state his objection.

Mr. SENSENBRENNER. I don't think the gentlewoman from Texas has answered any of these questions, and I withdraw my reservation.

Mr. FRANKS. So without objection, it will be entered into the record.

Ms. JACKSON LEE. Mr. Chairman, let me thank the gentleman, and I conclude by saying I think I have answered them, but I

thank him for his courtesies. And I would like unanimous consent to put this into the record, sir.

Mr. FRANKS. Without objection.

[The information referred to follows:]



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TABLE I—Continued

Year	Limit	
	Auto. proj. cost limit (Col. 1)	Prior notice proj. cost limit (Col. 2)
2003 ..	7,600,000	21,200,000
2004 ..	7,800,000	21,800,000
2005 ..	8,000,000	22,000,000
2006 ..	8,500,000	27,400,000
2007 ..	9,500,000	28,200,000
2008 ..	10,250,000	29,000,000
2009 ..	10,400,000	29,600,000
2010 ..	10,500,000	29,900,000
2011 ..	10,600,000	30,200,000
2012 ..	10,800,000	30,800,000

■ 3. Table II in § 157.215(a)(5) is revised to read as follows:

§ 157.215 Underground storage testing and development.

(a) * * *

(5) * * *

TABLE II

Year	Limit
1982	\$2,700,000
1983	2,900,000
1984	3,000,000
1985	3,100,000
1986	3,200,000
1987	3,300,000
1988	3,400,000
1989	3,500,000
1990	3,600,000
1991	3,800,000
1992	3,900,000
1993	4,000,000
1994	4,100,000
1995	4,200,000
1996	4,300,000
1997	4,400,000
1998	4,500,000
1999	4,550,000
2000	4,650,000
2001	4,750,000
2002	4,850,000
2003	4,900,000
2004	5,000,000
2005	5,100,000
2006	5,250,000
2007	5,400,000
2008	5,550,000
2009	5,600,000
2010	5,700,000
2011	5,750,000
2012	5,850,000

Judiciary Committee Hearing:
HHS and Preventative Care
Submitted for the Record
by Jackson-Lee (2.28.12)

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9576]

RIN 1545-BJ60

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210-AB44

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 147

[CMS-9892-F]

RIN 0838-AQ74

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Final rules.

SUMMARY: These regulations finalize, without change, interim final regulations authorizing the exemption of group health plans and group health insurance coverage sponsored by certain religious employers from having to cover certain preventive health services under provisions of the Patient Protection and Affordable Care Act.

DATES: *Effective date.* These final regulations are effective on April 16, 2012.

Applicability dates. These final regulations generally apply to group health plans and group health insurance issuers on April 16, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration (EBSA), Department of Labor, at (202) 693-8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622-6080; Robert Innes, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS), at (410) 786-1565.

Customer Service Information: Individuals interested in obtaining

information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's Web site (<http://www.dol.gov/ebsa>). In addition, information from HHS on private health insurance for consumers can be found on the CMS Web site (<http://ccio.cms.gov>), and on health reform can be found at <http://www.HealthCare.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, was enacted on March 30, 2010 (collectively, the Affordable Care Act). The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans.

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA and the Code, requires that non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage provide benefits for certain preventive health services without the imposition of cost sharing. These preventive health services include, with respect to women, preventive care and screening provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) that were issued on August 1, 2011 (HRSA Guidelines).¹ As relevant here, the HRSA Guidelines require coverage, without cost sharing, for "[a]ll Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a provider. Except as discussed below, non-grandfathered group health plans and health insurance issuers are required to provide coverage consistent with the HRSA Guidelines, without cost sharing, in plan years (or,

¹ The HRSA Guidelines can be found at: <http://www.hrsa.gov/womensguidelines>.

in the individual market, policy years) beginning on or after August 1, 2012.² These guidelines were based on recommendations of the independent Institute of Medicine, which undertook a review of the evidence on women's preventive services.

The Departments of Health and Human Services, Labor, and the Treasury (the Departments) published interim final regulations implementing PHS Act section 2713 on July 19, 2010 (75 FR 41725). In the preamble to the interim final regulations, the Departments explained that HRSA was developing guidelines related to preventive care and screening for women that would be covered without cost sharing pursuant to PHS Act section 2713(a)(4), and that these guidelines were expected to be issued no later than August 1, 2011. Although comments on the anticipated guidelines were not requested in the interim final regulations, the Departments received considerable feedback regarding which preventive services for women should be covered without cost sharing. Some commenters, including some religiously-affiliated employers, recommended that these guidelines include contraceptive services among the recommended women's preventive services and that the attendant coverage requirement apply to all group health plans and health insurance issuers. Other commenters, however, recommended that group health plans sponsored by religiously-affiliated employers be allowed to exclude contraceptive services from coverage under their plans if the employers deem such services contrary to their religious tenets, noting that some group health plans sponsored by organizations with a religious objection to contraceptives currently contain such exclusions for that reason.

In response to these comments, the Departments amended the interim final regulations to provide HRSA with discretion to establish an exemption for group health plans established or maintained by certain religious employers (and any group health insurance coverage provided in connection with such plans) with respect to any requirement to cover contraceptive services that they would otherwise be required to cover without

cost sharing consistent with the HRSA Guidelines. The amended interim final regulations were issued and effective on August 1, 2011.³ The amended interim final regulations specified that, for purposes of this exemption, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in section 6033(a)(3) and section 6033(a)(3)(A)(i), (ii), or (iii) of the Code. Section 6033(a)(3)(A)(i) and (ii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. In the HRSA Guidelines, HRSA exercised its discretion under the amended interim final regulations such that group health plans established and maintained by these religious employers (and any group health insurance coverage provided in connection with such plans) are not required to cover contraceptive services.

In the preamble to the amended interim final regulations, the Departments explained that it was appropriate that HRSA take into account the religious beliefs of certain religious employers where coverage of contraceptive services is concerned. The Departments noted that a religious exemption is consistent with the policies in some States that currently both require contraceptive services coverage under State law and provide for some type of religious exemption from their contraceptive services coverage requirement. Comments were requested on the amended interim final regulations, specifically with respect to the definition of religious employer, as well as alternative definitions.

II. Overview of the Public Comments on the Amended Interim Final Regulations

The Departments received over 200,000 responses to the request for comments on the amended interim final regulations. Commenters included concerned citizens, civil rights organizations, consumer groups, health care providers, health insurance issuers, sponsors of group health plans, religiously-affiliated charities, religiously-affiliated educational institutions, religiously-affiliated health care organizations, other religiously-affiliated organizations, secular organizations, sponsors of group health

plans, women's religious orders, and women's rights organizations.

Some commenters recommended that the exemption for the group health plans of a limited group of religious organizations as formulated in the amended interim final regulations be maintained. Other commenters urged that the definition of religious employer be broadened so that more sponsors of group health plans would qualify for the exemption. Others urged that the exemption be rescinded in its entirety. The Departments summarize below the major issues raised in the comments that were received.

Some commenters supported the inclusion of contraceptive services in the HRSA Guidelines and urged that the religious employer exemption be rescinded in its entirety due to the importance of extending these benefits to as many women as possible. For example, one provider association commented that all group health plans and group health insurance issuers should offer the same benefits to plan participants, without a religious exemption for some plans, and that religious beliefs are more appropriately taken into account by individuals when making personal health care decisions. Others urged that the exemption be eliminated because making contraceptive services available to all women would satisfy a basic health care need and would significantly reduce long-term health care costs associated with unplanned pregnancies.

Some of the commenters supporting the elimination of the exemption argued that section 2713 of the PHS Act does not provide any explicit basis for exempting a subset of group health plans. One commenter asserted that Congress's incorporation of section 2713 of the PHS Act into ERISA and the Code indicates its intent to require coverage of recommended preventive services under section 2713 of the PHS Act in the broadest spectrum of group health plans possible.

Many commenters that opposed the exemption asked that, at a minimum, the Departments not expand the definition of religious employer. Alternatively, they asked that, if the Departments decided to base the relevant portion of the definition of religious employer on a Code section other than section 6033, the other portions of the definition of religious employer be retained to limit the exemption largely to houses of worship.

Some commenters urged the Departments not to modify the definition of religious employer. For example, some commenters asserted that the exemption is appropriately

² The interim final regulations published by the Departments on July 19, 2010, generally provide that plans and issuers must cover a newly recommended preventive service starting with the first plan year (or, in the individual market, policy year) that begins on or after the date that is one year after the date on which the new recommendation or guideline is issued. 26 CFR 54.9815-2713T(b)(1); 29 CFR 2590.715-2713(b)(1); 45 CFR 147.130(b)(1).

³ The amendment to the interim final regulations was published on August 3, 2011, at 76 FR 46821.

targeted at houses of worship, rather than a larger set of religiously-affiliated organizations. Others argued that, while the exemption addresses legitimate religious concerns, its scope is already broader than necessary and should not be expanded.

Commenters opposing any exemption stated that, if the exemption were to be retained, clear notice should be provided to the affected plan participants that their group health plans do not include benefits for contraceptive services. In addition, they urged the Departments to monitor plans to ensure that the exemption is not claimed more broadly than permitted.

On the other hand, a number of comments asserted that the religious employer exemption is too narrow. These commenters included some religiously-affiliated educational institutions, health care organizations, and charities. Some of these commenters expressed concern that the exemption for religious employers will not allow them to continue their current exclusion of contraceptive services from coverage under their group health plans. Others expressed concerns about paying for such services and stated that doing so would be contrary to their religious beliefs.

Commenters also claimed that Federal laws, including the Affordable Care Act, have provided for conscience clauses and religious exemptions broader than that provided for in the amended interim final regulations. Some commenters asserted that the narrower scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act.

Other commenters, however, disputed claims that the contraceptive coverage requirement infringes on rights protected by the First Amendment or the Religious Freedom Restoration Act. These commenters noted that the requirement is neutral and generally applicable. They also explained that the requirement does not substantially burden religious exercise and, in any event, serves compelling governmental interests and is the least restrictive means to achieve those interests.

Some religiously-affiliated employers warned that, if the definition of religious employer is not broadened, they could cease to offer health coverage to their employees in order to avoid having to offer coverage to which they object on religious grounds.

Commenters supporting a broadening of the definition of religious employer proposed a number of options, generally intended to expand the scope of the exemption to include religiously-affiliated educational institutions,

health care organizations, and charities. In some instances, in place of the definition that was adopted in the amended interim final regulations, commenters suggested other State insurance law definitions of religious employer. In other instances, commenters referenced alternative standards, such as tying the exemption to the definition of "church plan" under section 414(e) of the Code or to status as a nonprofit organization under section 501(c)(3) of the Code.

III. Overview of the Final Regulations

In response to these comments, the Departments carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer, including whether the exemption should be extended to a broader set of religiously-affiliated sponsors of group health plans and group health insurance coverage. For the reasons discussed below, the Departments are adopting the definition in the amended interim final regulations for purposes of these final regulations while also creating a temporary enforcement safe harbor, discussed below. During the temporary enforcement safe harbor, the Departments plan to develop and propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services as also discussed below.

PHS Act section 2713 reflects a determination by Congress that coverage of recommended preventive services by non-grandfathered group health plans and health insurance issuers without cost sharing is necessary to achieve basic health care coverage for more Americans. Individuals are more likely to use preventive services if they do not have to satisfy cost sharing requirements (such as a copayment, coinsurance, or a deductible). Use of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier.⁴ Further, Congress, by amending the Affordable Care Act during the Senate debate to ensure that recommended preventive services for women are covered adequately by non-grandfathered group health plans and

group health insurance coverage, recognized that women have unique health care needs and burdens. Such needs include contraceptive services.⁵

As documented in a report of the Institute of Medicine, "Clinical Preventive Services for Women, Closing the Gaps," women experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may not be as motivated to discontinue behaviors that pose pregnancy-related risks (e.g., smoking, consumption of alcohol). Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned.⁶ Contraceptives also have medical benefits for women who are contraindicated for pregnancy, and there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (e.g., treatment of menstrual disorders, acne, and pelvic pain).⁷

In addition, there are significant cost savings to employers from the coverage of contraceptives. A 2000 study estimated that it would cost employers 15 (or 17 percent) more not to provide contraceptive coverage in employee health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and the indirect costs such as employee absence and reduced productivity.⁸ In fact, when contraceptive coverage was added to the Federal Employees Health Benefits Program, premiums did not increase because there was no resulting

⁴ Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps*, Wash., DC: Nat'l Acad. Press, 2011, at p. 8. See also Scudfield, A., *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost Sharing*, 14 *Guttmacher Pol'y Rev.* 10 (2011), available at <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html>.

⁵ Gibson, J.D., et al., *The Effects of Unintended Pregnancy on Infant, Child and Perinatal Health: A Review of the Literature, Studies on Family Planning*, 2008, 39:113-38.

⁶ Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps*, Wash., DC: Nat'l Acad. Press, 2011, at p. 107.

⁷ Testimony of Guttmacher Inst., submitted to the Comm. on Preventive Servs. for Women, Inst. of Med., Jan. 12, 2012, p. 11 (citing Broun, R. & Gessen, J.S., "Promoting Healthy Pregnancies: Counseling and Contraception as the First Step", Washington Business Group on Health, Family Health in Brief, Issue No. 3, August 2000; see also Scudfield, A., *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost Sharing*, 14 *Guttmacher Pol'y Rev.* 10 (2011); Mavranoskaki, L., *Health Economics of Contraception*, 23 *Best Practice & Res. Clinical Obstetrics & Gynecology* 187-196 (2009); Trussell, J., et al., *Cost Effectiveness of Contraceptives in the United States*, 78 *Contraception* 9-14 (2008); Trussell, J., *The Cost of Unintended Pregnancy in the United States*, 75 *Contraception* 168-170 (2007).

⁸ Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps*, Wash., DC: Nat'l Acad. Press, 2011, at p. 16.

health care cost increase.⁹ Further, the cost savings of covering contraceptive services have already been recognized by States and also within the health insurance industry. Twenty-eight States now have laws requiring health insurance issuers to cover contraceptives. A 2002 study found that more than 89 percent of insured plans cover contraceptives.¹⁰ A 2010 survey of employers revealed that 85 percent of large employers and 62 percent of small employers offered coverage of FDA-approved contraceptives.¹¹

Furthermore, in directing non-grandfathered group health plans and health insurance issuers to cover preventive services and screenings for women described in HRSA-supported guidelines without cost sharing, Congress determined that both existing health coverage and existing preventive services recommendations often did not adequately serve the unique health needs of women. This disparity places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women.¹² Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. Research also shows that cost sharing can be a significant barrier to effective contraception.¹³ As the Institute of Medicine noted, owing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for

women.¹⁴ The Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

The religious employer exemption in the final regulations does not undermine the overall benefits described above. A group health plan (and health insurance coverage provided in connection with such a plan) qualifies for the exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of the organization. As such, the employees of employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans.

A broader exemption, as urged by some commenters, would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits described above. Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.

The Departments note that this religious exemption is intended solely for purposes of the contraceptive services coverage requirement pursuant to PHS Act section 2713 and the companion provisions of ERISA and the Code.

The Departments also note that some group health plans sponsored by employers that do not satisfy the definition of religious employer in these final regulations may be grandfathered health plans¹⁵ and thus are not subject to any of the preventive services coverage requirements of section 2713 of the PHS Act, including the contraceptive coverage requirement.

With respect to certain non-exempted, non-profit organizations with religious objections to covering contraceptive

services whose group health plans are not grandfathered health plans, guidance is being issued contemporaneous with these final regulations that provides a one-year safe harbor from enforcement by the Departments.

Before the end of the temporary enforcement safe harbor, the Departments will work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage. Specifically, the Departments plan to initiate a rulemaking to require issuers to offer insurance without contraception coverage to such an employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it, with no cost-sharing. Under this approach, the Departments will also require that, in this circumstance, there be no charge for the contraceptive coverage. Actuaries and experts have found that coverage of contraceptives is at least cost neutral when taking into account all costs and benefits in the health plan.¹⁶ The Departments intend to develop policies to achieve the same goals for self-insured group health plans sponsored by non-exempted, non-profit religious organizations with religious objections to contraceptive coverage.

A future rulemaking would be informed by the existing practices of some issuers and religious organizations in the 28 States where contraception coverage requirements already exist, including Hawaii. There, State health insurance law requires issuers to offer plan participants in group health plans sponsored by religious employers that are exempt from the State contraception coverage requirement the option to purchase this coverage in a way that religious employers are not obligated to fund it. It is our understanding that, in practice, rather than charging employees a separate fee, some issuers in Hawaii offer this coverage to plan participants at no charge. The Departments will work with stakeholders to propose and

⁹ Berko, John, F.S.A., M.A.A.A., Director of Special Initiatives and Pricing in the Center for Consumer Information and Insurance Oversight at the Centers for Medicare and Medicaid Services. Ghed, Sherry, Ph.D., Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services (ASPE/HHS), Miller, Erin, M.P.H., (ASPE/HHS), Wilson, Lee, (ASPE/HHS), Simmons, Adelle, (ASPE/HHS). "The Cost of Covering Contraceptives through Health Insurance," (9 February 2012), available at: <http://aspe.hhs.gov/health/reports/2012/contraceptives/fb.shtml>.

⁹ Ostlund, L., Special Analysis: The Cost of Contraceptive Insurance Coverage, *Guttmacher Rep. on Public Pol'y* (March 2003).

¹⁰ Souffield, A., et al., U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, *Perspectives on Sexual and Reproductive Health* 35(2):72-79, 2002.

¹¹ Claxton, G., et al., *Employer Health Benefits: 2010 Annual Survey*, Menlo Park, Cal.: Kaiser Family Found. and CHI, Ill.: Health Research & Educ. Trust, 2010.

¹² Testimony of Guttmacher Inst., submitted to the Comm. on Preventive Servs. for Women, Inst. of Med., Jan. 12, 2012, p.6, citing Goldin C and Katz L, Career and marriage in the age of the pill, *American Economic Review*, 2000, 90(2):461-463; Goldin C and Katz LF, The power of the pill: oral contraceptives and women's career and marriage decisions, *Journal of Political Economy*, 2002, 110(4):736-770, and Bailey MJ, More power to the pill: the impact of contraceptive freedom on women's life cycle labor supply, *Quarterly Journal of Economics*, 2006, 121(1):249-282.

¹³ Prodielhuise, T., et al., A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change, *76 Contraception* 360 (2007).

¹⁴ Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps*, Wash., DC: Nat'l Acad. Press, 2011, p.15.

¹⁵ See section 1251 of the Affordable Care Act and its implementing regulations at 26 CFR 34.9613-1251 f; 29 CFR 2590.715-1251; 45 CFR 147.140.

finalize this policy before the end of the temporary enforcement safe harbor.

Nothing in these final regulations precludes employers or others from expressing their opposition, if any, to the use of contraceptives, requires anyone to use contraceptives, or requires health care providers to prescribe contraceptives if doing so is against their religious beliefs. These final regulations do not undermine the important protections that exist under conscience clauses and other religious exemptions in other areas of Federal law. Conscience protections will continue to be respected and strongly enforced.

This approach is consistent with the First Amendment and Religious Freedom Restoration Act. The Supreme Court has held that the First Amendment right to free exercise of religion is not violated by a law that is not specifically targeted at religiously motivated conduct and that applies equally to conduct without regard to whether it is religiously motivated—a so-called neutral law of general applicability. The contraceptive coverage requirement is generally applicable and designed to serve the compelling public health and gender equity goals described above, and is in no way specially targeted at religion or religious practices. Likewise, this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to further a compelling government interest.

III. Economic Impact and Paperwork Burden

A. Executive Orders 13563 and 12866—Department of Labor and Department of Health and Human Services

Executive Orders 13563 and 12866, among other things, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13563 also states that where “appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including

equity, human dignity, fairness, and distributive impacts.” These final regulations have been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, these final regulations have been reviewed by the Office of Management and Budget.

1. Need for Regulatory Action

As stated earlier in this preamble, the Departments previously issued amended interim final regulations authorizing an exemption for group health plans and health insurance coverage sponsored by certain religious employers from certain coverage requirements under PHS Act section 2713 (76 FR 46621, August 3, 2011). The Departments have determined that it is appropriate to finalize, without change, these amended interim final regulations authorizing the exemption of group health plans and health insurance coverage sponsored by certain religious employers from having to cover certain preventive health services under the Patient Protection and Affordable Care Act.

2. Anticipated Effects

The Departments expect that these final regulations will not result in any additional significant burden or costs to the affected entities.

B. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury, it has been determined that this Treasury decision is not a significant regulatory action for purposes of Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the APA (5 U.S.C. chapter 5) does not apply to these final regulations, and, because these regulations do not impose a collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

C. Paperwork Reduction Act

These final regulations are not subject to the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) because they do not contain a “collection of information” as defined in 44 U.S.C. 3502(11).

IV. Statutory Authority

The Department of the Treasury final regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor final regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1938; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor’s Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 USC 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Chapter I

Accordingly, 26 CFR part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 54 is amended by adding an entry for § 54.9815–2713 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805. * * *
Section 54.9815–2713 also issued under 26 U.S.C. 9833. * * *

■ **Par. 2.** Section 54.9815–2713T is amended in paragraph (a)(1)(iii) by removing “; and” and adding a period in its place, and by removing paragraph (a)(1)(iv).

■ **Par. 3.** Section 54.9815–2713 is added to read as follows:

§ 54.9815-2713 Coverage of preventive health services.

(a) *Services*—(1) *In general.* [Reserved]

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of § 54.9815-2713T, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).

(2) *Office visits.* [Reserved]

(3) *Out-of-network providers.* [Reserved]

(4) *Reasonable medical management.* [Reserved]

(5) *Services not described.* [Reserved]

(b) *Timing.* [Reserved]

(c) *Recommendations not current.* [Reserved]

(d) *Effective/applicability date.* April 16, 2012.

DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Chapter XXV**

29 CFR part 2590 is amended as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161, 1168, 1169, 1181, 1183, 1181 note, 1185, 1165a, 1185b, 1185c, 1185d, 1181, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-300, 112 Stat. 649 (42 U.S.C. 651 note); sec. 512(d), Public Law 110-343, 112 Stat. 3881; sec. 1001, 1201, and 1562(a), Public Law 111-148, 124 Stat. 119, as amended by Public Law 111-152, 124 Stat. 1029; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

■ 2. Accordingly, the amendment to the interim final rule with comment period amending 29 CFR 2590.715-2713(a)(1)(iv) which was published in the *Federal Register* at 76 FR 46621-46626 on August 3, 2011, is adopted as a final rule without change.

DEPARTMENT OF HEALTH AND HUMAN SERVICES**45 CFR Subtitle A****PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS**

■ 1. The authority citation for part 147 continues to read as follows:

Authority: 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-61, and 300gg-92), as amended.

■ 2. Accordingly, the amendment to the interim final rule with comment period amending 45 CFR 147.130(a)(1)(iv) which was published in the *Federal Register* at 76 FR 46621-46626 on August 3, 2011, is adopted as a final rule without change.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved: February 10, 2012.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).

Signed this 10th day, of February 2012.

Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: February 10, 2012.

Marilyn Tavenner,
Acting Administrator, Centers for Medicare & Medicaid Services.

Noted: February 10, 2012.

Kathleen Sebelius,
Secretary, Department of Health and Human Services.

[FR Doc. 2012-3547 Filed 2-10-12; 3:45 pm]

BILLING CODE 4120-01-P

PENSION BENEFIT GUARANTY CORPORATION**29 CFR Part 4022****Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits**

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in March 2012. The interest assumptions are used for paying benefits under

terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective March 1, 2012.

FOR FURTHER INFORMATION CONTACT:

Catherine B. Klion
(*Klioni.Catherine@pbgc.gov*), Manager, Regulatory and Policy Division, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202-326-4024. (TTY/TTD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulation are also published on PBGC's Web site (<http://www.pbgc.gov>).

PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for March 2012.¹

The March 2012 interest assumptions under the benefit payments regulation will be 1.25 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for February 2012, these interest assumptions are unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the

¹ Appendix K to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes interest assumptions for valuing benefits under terminating covered single-employer plans for purposes of allocation of assets under ERISA section 4044. These assumptions are updated quarterly.

Ms. JACKSON LEE. I thank you, and I yield back. Thank you, Doctor, very much.

Mr. FRANKS. The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony. I just want to make my comment here, and that is that I am listening to the legal discussion that has taken place, and I listened to the banter that went

back and forth between the gentlelady that went to the University of Chicago whose name I can't read from here, sorry about being—but I will direct my question to you, and that is, I listened to that banter go back and forth, and you were talking about Hosanna-Tabor case, and as the discussion went back about a precedent supposedly out of the State of California, and I just wanted to express to you that I am a little troubled by us being drilled down into something like that.

When I look back in this course of history, and I think of what I recall happening, *Murray v. Curlett* that took prayer out of the public school, I was a freshman in high school, and I asked at the time, what are they going to do to stop us from praying in the public school? Are they going to close the school and chain the door shut? But we didn't have the civil disobedience to proceed with what our conscience told us was the right thing to do. We submitted and essentially capitulated to a Supreme Court decision because we deferred to them. As an American society and an American culture, we deferred to the Supreme Court because we believed they wore black robes and they were right.

A little bit later than that, and it was referenced, the 1965 case of *Griswold v. Connecticut*, at that time it was unlawful to provide contraceptives in the State of Connecticut. And it went to the Supreme Court, and the Supreme Court concluded that it was not only—that it was no longer—that it could not be prohibited to provide contraceptives to married couples in Connecticut.

And so now we have this right to privacy that was manufactured by the Supreme Court in 1965, and in 1972, the *Eisenstadt* case came out, which is everybody has got an equal right to contraceptives, not just married couples. And then of course 1973, *Roe v. Wade* and *Doe v. Bolton*, that the two of those together established this supposedly constitutional principle that everybody has a right to abortion on demand no matter what the circumstances. And the only rollback to that in all that period of time is the *Stenberg v. Carhart* case that finally, after appeal—and we sat in this Judiciary Committee and we wrote the ban on partial-birth abortion. Finally, the Supreme Court upheld at least some restraint, that you couldn't take the life of a baby that was almost ready to fill its own lungs with air and scream for its own mercy. That is what we have accomplished in this Court.

And now I am sitting here listening to this discussion and this argument, and I am thinking there was a time when it was unlawful in Connecticut to even provide contraceptives, and this discussion is about whether or not the President of the United States can step forward in a press conference and announce that he is issuing an order by Presidential edict, legislating by press conference, that he is going to compel health insurance companies all over America to provide contraceptives, abortifacients, and sterilizations without charge.

This is how far we have come in my living memory. And I am sitting here listening to this debate and discussion, and I am hearing the minutia that has been discussed between you and Mr. Nadler, and I am asking you why should I care what they think in California? In fact, why should I care about the conclusions that have been brought forward by the Supreme Court if we can race

from 1965, Connecticut having a 10th Amendment right to establish a policy, a Supreme Court that creates a right to privacy that is a foundation for mandated abortion, and here we are discussing whether we are going to mandate everybody in America——

Ms. JACKSON LEE. Would the gentleman yield?

Mr. KING [continuing]. That contraceptives——

Ms. JACKSON LEE. Will the gentleman yield?

Mr. KING. No, I will not yield. I have a question for the gentlelady, and it is posed at this point. Why should I care?

Mrs. UDDIN. The Becket Fund does not take any position on contraception. We don't seek, our clients do not seek for it to become illegal, and we ourselves absolutely have no position on whether or not contraceptives or abortion should be legal or illegal.

And one thing that I am hearing from you, that there is this bed-rock principle that protects broad liberties, and in this case we are talking about religious liberty. And so whether we are talking about general principles or we are getting into the weeds, that particular principle is consistently protected.

Mr. KING. But if I could ask you, and just certainly respectfully, that we have come this far with this giant leap of the Supreme Court from at a point when there was a statute that allowed protection for the religious liberty of the citizens of Connecticut with *Griswold* to the point now where we are actually having a discussion about whether or not the President of the United States can stand before a press conference and order that there shall be contraceptives provided by health insurance companies. The constitutional question of religious liberty is wrapped up in that, and I just ask you from your perspective, do you understand how far this country has gone with the distortion of the clear language of the Constitution in the 40 years or so that I can remember that I have noted?

Mrs. UDDIN. I understand the historical and legal trajectory that you are drawing, but I just want to focus on the issue of religious liberty without respect to the broader question of the legality of contraception and abortion, because that is what I am here to speak about.

Mr. KING. Then if the Chairman will indulge me in restating my question, and that it does come back to is there any protection for us in this Constitution? I understand the point that you are making, but my point is that there has been such a progression and distortion from the clear language of the Constitution and manufactured principles——

Ms. JACKSON LEE. Regular order, Mr. Chairman.

Mr. KING [continuing]. And the emanation and penumbras that now are before this Congress deciding whether there is a constitutional authority of the President of the United States to order a mandate by press conference. Is that constitutional, do you believe?

Ms. JACKSON LEE. Regular order, Mr. Chairman. Are you yielding him additional time?

Mr. FRANKS. You may answer the question.

Mrs. UDDIN. One thing I just wanted to point out is that this particular case dealing with the HHS mandate and its narrow religious exemption, if allowed to go forward, would open up the doors to so much more.

And earlier someone had asked me about this, and to focus the question a little bit more on the health care arena, I just wanted to point out the State of Washington recently decided to pass a healthcare mandate that would cover the cost of abortion. And so certainly we have come a long way, and depending on how the religious liberty aspects are handled here, we will continue to move in even more extreme decisions—extreme directions.

Mr. KING. I thank the witness, and I thank the Chairman. I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

We recognize that Dr. Rosenstock will have to leave very shortly, so, without objection, Members who have not been recognized for questioning thus far will be recognized for not more than 1 minute to question Dr. Rosenstock, and that time will be deducted from their 5 minutes when we resume regular order. Is there objection?

Who seeks recognition for the limited purpose of questioning Dr. Rosenstock?

Mr. Quigley, you are recognized for 1 minute.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Doctor, the question or the point was made earlier that this plan includes abortion-inducing drugs. From a medical definition point of view, does this plan include medical-inducing—abortion-inducing drugs?

Dr. ROSENSTOCK. This plan includes all FDA-approved contraception methods. I just want to say, again, the committee did not consider abortion. It was considered beyond the scope of the mandate, given the constraints within the Affordable Care Act, and the recommendations were meant to recognize that there is no one-size-fits-all for women; that it was important that the broad array of approved FDA contraceptive methods and devices be offered, recognizing that these are often decided by an individual woman with her physician.

Mr. QUIGLEY. But the American College of Obstetrics and Gynecology's definition of what a pregnancy is, the Plan B does not end a pregnancy, correct?

Mr. FRANKS. The gentlelady can answer. The gentleman's time has expired. Please feel free to answer.

Dr. ROSENSTOCK. Yes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. FRANKS. With that, I would recognize Mr. Gowdy for 1 minute.

Mr. GOWDY. Thank you, Mr. Chairman.

Dr. Rosenstock, thank you for your time, and I am going to ask these as quickly as I can. I have four.

Can the President make people exercise if HHS decides that they are obese?

Dr. ROSENSTOCK. I think, as is true of this plan, these are recommendations. No one is mandating that individuals have to use family planning. What it is saying is if an individual decides—

Mr. GOWDY. No, but they are mandating that it be provided by people when it violates their conscience. So what I am trying to get at are what are the limits of governmental authority? Can they make smokers stop because that impacts what the rest of us pay in healthcare premiums?

Dr. ROSENSTOCK. I have to disagree with the analogy. I believe the individual here is the individual patient or woman making a choice about what to do. That is different from an employer-based or religiously affiliated—

Mr. GOWDY. Well, that leads to this question. If our colleagues on the other side of the aisle are so convinced that this is a fundamental integral right, why have they not proposed a bill where Congress pays for this and not make people pay for it when it violates their conscience?

Dr. ROSENSTOCK. Well, again, if we look at the coverage in the United States, all Federal employees have this coverage, all Medicaid patients have this coverage, all Title 10 clinic users have this coverage. So, in fact, I believe Congress has over and over again made this decision.

I want to sort of remember what George H. Bush said when he was Congressman in 1972 before being President, he said if family planning is anything, it is a public health matter, and I believe that is what—

Mr. GOWDY. And that trumps the free exercise of religion; did he say that?

Dr. ROSENSTOCK. I certainly did not say that.

Mr. FRANKS. The gentleman's time has expired. The gentlelady may answer the question.

With that, I recognize Ms. Chu for 1 minute.

Ms. CHU. Thank you.

Dr. Rosenstock, in my home State of California and the State of New York, both have requirements that are essentially equal to the HHS rule with exemptions for religious employers, and in both States the laws were challenged by religiously affiliated entity Catholic Charities, which provides secular services to people of all backgrounds, and both State supreme courts upheld the contraceptive coverage requirement. In the California case, the court found that the government had a compelling interest in eliminating gender discrimination in the healthcare industry. At the time, women paid 68 percent more in out-of-pocket costs than men.

So, Dr. Rosenstock, do women still pay more in out-of-pocket costs today, and do you believe the HHS rule will help eliminate this gender discrimination in health care?

Dr. ROSENSTOCK. I certainly believe, as I tried to say, that women per service may not be paying more costs, but they use these services more because of their distinctive reproductive and gender-specific capacities. And, again, I embrace what is happening in California because I think it shows how an accommodation to religion can work side by side with an overall proven health benefit.

Mr. FRANKS. The gentlelady's time has expired.

I now recognize Mrs. Adams for 1 minute.

Ms. ADAMS. Thank you.

Dr. Rosenstock, I have been listening in great amazement here. You said that your committee met. Was that open to the public?

Dr. ROSENSTOCK. Yes, absolutely.

Ms. ADAMS. It was open to the public, and all the transcripts are available to the public?

Dr. ROSENSTOCK. We do have some closed sessions in the—which is—

Ms. ADAMS. So not all of the meetings were open to the public then?

Dr. ROSENSTOCK. Right, and that is the way the Institute of Medicine—

Ms. ADAMS. Well, I have 1 minute, so I am going to make sure you don't filibuster me.

Dr. ROSENSTOCK. Every single meeting had an open session, let me just be clear.

Ms. ADAMS. I asked you if it was completely open to the public. You said some meetings were closed-door. That is the answer I am asking for. It is just quick question and answers because I know you are leaving, and I want to get my answers in—or questions in.

So you have had some closed-door meetings, and can I ask, at anytime did you consider any conscience clause or religious exemptions when you were discussing, making—having these discussions?

Dr. ROSENSTOCK. No, we did not.

Ms. ADAMS. So you believe that it is okay to infringe upon religious liberties and violate the First Amendment based on—

Dr. ROSENSTOCK. I wholeheartedly disagree, and I find it offensive that you would put that word in my mouth. What I said was we looked at the science and the health effects that proved—

Ms. ADAMS. Okay. Let me ask you this: Can we see the closed-door documents, that information that was taking place?

Dr. ROSENSTOCK. You can certainly see whatever the Institute of Medicine and the National Academy of Sciences provides—

Ms. ADAMS. I would ask that the Chairman request those documents, transcripts of the closed meetings, be provided to this Committee, and I yield back.

Mr. FRANKS. I am going to take that under advisement. The gentlelady's time has expired.

Is there anyone else who seeks recognition?

The gentleman is recognized.

Mr. DEUTCH. Thank you, Mr. Chairman.

Dr. Rosenstock, I wonder if you are concerned; if any employer can object to the inclusion of any preventive services based on the religious liberty argument, are you concerned about the impact that that may have in limiting coverage for vaccinations, for immunizations, or prenatal care, or blood transfusions, or perhaps even hospital coverage?

Dr. ROSENSTOCK. Absolutely. I think that is the slippery slope by opening up that door.

Mr. DEUTCH. How would it do that, Doctor?

Dr. ROSENSTOCK. Well, it could do that because employers could have expressed beliefs, personal beliefs, moral objections to—

Mr. DEUTCH. And even religious beliefs?

Dr. ROSENSTOCK. That is correct.

Mr. DEUTCH. Thank you. I yield back.

Mr. FRANKS. Who else seeks recognition to question Dr. Rosenstock?

The gentlelady from California is recognized for 1 minute.

Ms. WATERS. Thank you very much.

I understand that perhaps about 14 percent of women, American women, use oral contraceptives for reasons other than preventing

pregnancy. Is this a known fact, and is it about 14 percent, or are there other reasons why American women would want to use contraceptives other than preventing pregnancy?

Dr. ROSENSTOCK. That is absolutely right. That is correct.

Ms. WATERS. And if there is exemption for all contraceptives for whatever reason, these women that would be using contraceptives for other reasons would be denied the use of them if we exempt blanket exemption?

Dr. ROSENSTOCK. I think that could certainly be a potential, depending on how that exemption was crafted.

Ms. WATERS. Thank you very much.

Mr. FRANKS. Thank the gentlelady, and, Dr. Rosenstock, thank you very much.

The gentleman from Texas is recognized for 1 minute.

Mr. POE. Dr. Rosenstock, I am probably the last one to question you. Thank you also for your attendance here today.

You mentioned slippery slope. Do you see a slippery slope when the government comes in and says, we are making this decision in the name of public health that pork is better for you than beef, and therefore we, the government, mandate pork upon the community instead of beef? I mean, you don't see a slippery slope of the government coming in, as my good friend Mr. Gowdy said, from South Carolina, starting to regulate the food we eat all in the name of the government saying we have to do this? You don't see that as a slippery slope?

Dr. ROSENSTOCK. I don't actually.

Mr. POE. Okay. Well, we disagree on that one, too.

I yield back.

Mr. FRANKS. Thank the gentleman.

Again, Dr. Rosenstock, thank you.

Dr. ROSENSTOCK. Thank you for the opportunity.

Mr. FRANKS. Since in the regular sequence it would be my turn to ask questions, I will go ahead and take that time now.

I would like to follow up, if I could, Ms. Uddin, with a question that Mr. Goodlatte formed, just for a little clarification. The HHS mandate has a very narrow religious employer exemption that does not exempt religious employers who serve people of other faiths. So the President requires that you, in a sense, discriminate in providing services to get this exemption, to get his exemption. But serving people of other faith is often a core purpose of many religious persuasions. It certainly is a core tenet of Christianity.

If a religious group changes their behavior to serve only believers, thereby meeting the President's criteria, then that group would disqualify itself from receiving most Federal money, such as money for faith-based initiatives, because the Federal funding requires that the religious recipients of funds serve all people rather than discriminate. So what we have here is a situation where the President is saying that you can either be true to your faith and be stripped of Federal faith-based funding, or you can violate your conscience and faith and continue to participate in these faith-based programs, it appears to me. In order to meet his criteria, you have to essentially make it impossible for you to qualify for other faith-based initiatives.

So am I correct in comporting that the President's exemption criteria would force the Catholic Church to stop participating in faith-based initiatives based on the faith-based initiatives criteria?

Mrs. UDDIN. I think you are correct in noting that there are a number of complicated consequences to the way that this religious exemption is laid out, and even including the safe harbor rule, which gives religious organizations with objections an additional year to comply with the mandate. But that doesn't take away the fact that there are a number of other transactions in which these same religious organizations would have to certify that they are in compliance with all Federal law, and how does that work? In the case of the safe harbor, the fact that they are both being asked to—the same way you can have the safety net, but at the same time essentially, be in violation of Federal law.

Mr. FRANKS. Well, it seems clear that you would have to kind of choose between the two. On the one hand, you couldn't serve non-believers, as it were; on the other hand, you must in order to qualify. So it is an incredibly complicated scenario.

Ms. Monahan, the President has promised an accommodation, we have heard a lot about that today, and yet you testified that no written corresponding changes have been made to the regulation to reflect this promised accommodation. So in truth the President has really not made good on his promise at all. He did a great job holding a press conference to announce that he was supposedly fixing the discrimination against religious groups with an accommodation when, in fact, the accommodation does not yet exist actually at all; is that correct?

Ms. MONAHAN. There is no accommodation. According to the Federal Register issued on February 15, it reads, Accordingly, the amendment to the interim final rule with comment period, blah, blah, blah was published in the Federal Register on August 3, 2011, is adopted as a final rule without change.

Mr. FRANKS. So there is really no accommodation at all here, which is astonishing. The President says that he promises he will follow through on this accommodation only after the election, which is not only convenient, but fascinating since he may be more prescient than the rest of us to know whether he will actually occupy the White House after the election.

So leaving aside the much-heralded accommodation that does not actually exist yet and would have little or no effect even if it did, as we have heard in the testimony, does the religious community have any reason to believe the Administration's promise in this area, given its track record so far?

Ms. MONAHAN. I think that many people of faith and a growing number of evangelical and Catholics who have supported the Administration are waking up to see that the President is—you know, to this harsh reality that he has chosen to impose a liberal ideology onto these people, and that we cannot trust this promise.

Mr. FRANKS. Thank you.

Mrs. Uddin, one argument the proponents of the mandate have used to justify this infringement of religious freedom is that the polls show that a majority of Americans are in favor of access to birth control. But, setting aside the flawed logic necessary to go from favoring access to some forms of birth control to mandating

coverage of abortifacients, in a Republic public opinion cannot or should not trump constitutional rights, and it seems a patently false and deceptive rhetorical gimmick for the President to portray this debate as one over access to contraceptives. So under our Constitution, simply because there is a majority that might want to access, can this trump the constitutional right of freedom of religion, and aren't we really talking about something that would force people to go against their conscience and actually pay for something for others?

Mrs. UDDIN. Absolutely. Our constitutional and religious liberties are based on protection of the minority views, and that is the premise of our case. That is exactly what is happening; there is a need to protect the minority view. As you note, the majority doesn't trump the minority, and the minority doesn't trump the majority. Each should be capable of being able to practice their religion as they see fit.

Mr. FRANKS. I thank the gentlelady, and I think, Mr. Quigley, we will recognize you now for 4 minutes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

We probably butchered your name all day long. Could you please make sure we pronounce it correctly.

Mrs. UDDIN. Yes. It is Uddin.

Mr. QUIGLEY. Uddin. Some of us got it right. Out of respect, and thank you for being here.

You mentioned the complications and the slippery slope that has been talked about. Can you see that there is an argument on the other side, though, especially if we go into the private sector and let private-sector employers decide because of their religious conscience they can't provide certain healthcare issues, how that could complicate matters and infringe upon the religious rights and healthcare rights of their employees?

Mrs. UDDIN. Well, I mean, there has been a number of different hypotheticals that have been posed, though earlier posed by Congressman Deutch and Congresswoman Waters that this idea of where do we draw the line, and how is this going to stop, and there will be endless amounts of conscientious objections. But it completely overlooks the fact that we have an existing jurisprudence that takes care of that and that strikes a balance and has a legal test that allows us to determine the cases in which religious rights trump other rights and vice versa.

Mr. QUIGLEY. But in the end the courts are testing something. I mean, we don't just leave out it there; there would have to be some rule promulgated that would detail what they have to cover or what they don't have to cover that would then, as you say, be tried in the courts. Someone has to make those decisions. So trusting courts throughout the land to finally go to the Supreme Court, somebody has to make this call. So just to rely upon the courts, I don't know that that necessarily makes sense.

Can't you see, though, the complications involved, and you know the diversity of our religious beliefs, and we respect all of them. Don't you see how those folks' opinions could at some point infringe upon other people's basic rights?

Mrs. UDDIN. I mean, the reality is the right to religious liberty is not something that is new. In fact, what is new is that the nar-

rowness of this exemption is unprecedented in Federal law. And we haven't seen any major slippery slope problems before, and I am not sure why we would see—

Mr. QUIGLEY. With the 28 States that have already allowed this, do you see this as causing the chaos that you describe now?

Mrs. UDDIN. No. I mean, the 28 States that allow it or demand the coverage of contraception are completely distinct from this situation. For one, the sort of primary threshold difference is the fact that the exemption language in the HHS mandate simply gives discretion to HRSA officials to determine whether or not they are going to give an exemption, whereas in States that have exemptions, they are required to give that exemption. And furthermore, the State mandates provide several avenues for religious employers to opt out of the system, I mean, if they are self-insured or they offer ERISA plans.

Mr. QUIGLEY. Well, we are going to argue—disagree on the range of what they offer, and I think, with all due respect, you take that as a definitive that is that different from the Federal mandate. But I need to, with such a short time, move on to the bishop.

Bishop, getting back to the point that you talk about the healthcare exception, when the drug is used for other purposes in the discussion you had with Mr. Issa, does that also, in your mind, include the healthcare reasons for spacing out pregnancies for healthcare reasons or not for having another pregnancy at all?

Bishop LORI. When the contraceptive is used to prevent the conception of new life, then it is against Catholic teaching, and then it would not be covered for the reason of preventing the conception of new life.

There are, of course, other ways to space out pregnancies other than contraception, and, for example, natural family planning is one of those ways to do that. You laugh at it.

Mr. QUIGLEY. I am not laughing at it.

Bishop LORI. Yes, you are.

Mr. QUIGLEY. I am respecting your opinion.

Bishop LORI. You are. And I think that our reasoning here is nuanced and, I think, solid.

Mr. QUIGLEY. And please, if I might be allowed to respond to the bishop, Mr. Chairman.

Mr. FRANKS. The gentleman, without objection, is allowed an additional minute.

Mr. QUIGLEY. Bishop, I respect your views. I just differ with the effectiveness there. And what we are talking about when somebody like this where the potential life of the mother is at stake, I would respectfully differ and have heard—what came to mind were the jokes in reference to parents who practice natural birth control and its effectiveness, but I just want you to know I meant no disrespect.

Bishop LORI. Thank you.

Mr. FRANKS. Just for the record here, sometimes I think we get lost in this debate here. On the one hand, the argument is made that everyone should have access to birth control, and the bishop is not trying to force anyone not to have access. In this case they are trying to force the bishop to pay for it. There is a difference.

So with that, I would now recognize the very patient gentleman from Texas Mr. Poe for 4 minutes.

Mr. POE. Thank you, Mr. Chairman.

I don't know how patient I have been, but thank you all. It has been a long day for you.

This country was founded on religious freedom. People came here, risked their lives from all walks of life to come here for religious freedom. And this country has religious freedom, in my opinion, like no other country. It not just one religion, it is all religions. Protection of religious freedom is in the First Amendment. I think it is in the First Amendment because the First Amendment is the most important amendment. It covers four issues, and two of those have to do with religion.

Bishop Lori, I appreciate your patience. One thing that I would like to ask you. In all of your career, in your life, in your life experiences, did you ever think you would see a situation where the government was pressing government will and denying religious freedom to the church?

Bishop LORI. That is just the point. That is just why I am here. We are crossing the Rubicon. I can never think of any other instance where the Federal Government has reached in and forced a religious organization to provide and, indeed, pay for something that violates its religious tenets. This is crossing the Rubicon. This is violating a principle in a way that it has not been violated before, and that is very much why I am here.

Mr. POE. Did you ever think it would come to a point in this country that we would be having this debate as to whether or not the Catholic Church and others would be forced by the government to do something that violates their religious beliefs? Did you ever think it would come to this in our country?

Bishop LORI. No. We have had a fine accommodation that has been a part of Federal law for a long time. I think religious groups, not just the Catholic Church, have relied on these provisions in Federal law. I think we had assurances when healthcare reform was under way that we would have those kinds of conscience protections, and now we see them going away.

Mr. POE. In your opinion, is it for the government to decide whether government action violates religious liberty, or is it for the church, or the denomination, or the religious community to decide if government action violates religious beliefs?

Bishop LORI. What is disturbing in this whole debate is the attempt on the part of government to make religion fit into its own narrow definition. That definition does not describe who we are, and any attempt to delimit the mission of the church is, in our view, a great violation of religious liberty. But we should define our own mission, and it should be for the government to accommodate that mission unless there is a compelling governmental interest not to do so, and even then it has to be done by the least restrictive means possible.

Mr. POE. My time is up. I yield back.

Mr. ISSA. Would the gentleman yield?

Mr. POE. I yielded back.

Mr. FRANKS. You use your time very well, Mr. Poe.

I now recognize the gentlelady from California Ms. Waters for 4 minutes.

Ms. WATERS. Thank you very much.

Mr. Chairman, I note that a lot of the discussion today centers around the accusation that the Administration is forcing religious institutions and organizations to violate their beliefs and forcing them to pay for contraceptive coverage. Now, if I understand it, the Administration backed off, and the Administration is not forcing the church or religious organizations to violate their religious beliefs; is that correct, Bishop?

Bishop LORI. I do not think it is correct. I believe that the rule, the HHS interim final rule, as proposed in August of 2011, remains on the Federal register unchanged. There is perhaps—

Ms. WATERS. Bishop—if I may, Bishop—

Bishop LORI [continuing]. Promise of—

Ms. WATERS. The Catholic Health Association said it was very pleased with the White House announcement that a resolution has been reached that protects the religious liberty and conscience rights of Catholic institutions. The framework developed has responded to the issues we identified that needed to be fixed. The Catholic Charities made a statement; Reverend John Jenkins, president of University of Notre Dame, made a statement; Catholics United made a statement. It is almost as if—

Mr. LUNGREN. Will the gentlelady yield on the quote from Notre Dame?

Bishop LORI. May I respond to this?

Ms. WATERS. On my time, please. I am not yielding.

Mr. LUNGREN. I wouldn't either if—

Ms. WATERS. It is almost as if nothing has happened, and the Administration has not said or done anything that is being recognized here, and I want to just put that on the record. I understand that there are some organizations that may or may not be in the description of a religious organization purely, and they have time to continue to work with the Administration to work this out.

Now, having said that, if, in fact, you have women in a religious organization that says, I want to have contraceptives, and you don't have to pay for them, the government is not making you pay for them, you are self-insured, et cetera, et cetera, but there is a third-party insurance company that is offering me and these five other women in the workplace contraceptives, would you prevent that? What would you say to that employee?

Bishop LORI. Since I am self-insured, it would be myself or, rather, the diocese of Bridgeport that would be called upon to provide the contraceptive, and therefore we would be going against our own teachings.

Ms. WATERS. No, what I am saying to you, Bishop, is this: That the women in the workplace say to you, and the government and everybody else says to you, that, okay, you are self-insured, you don't have to do that, we are not going to ask you to violate anything. But here are these women who work for you, and they are saying, there is another insurance company out there who will take care of us. You don't have to pay for it, we understand that. We are not asking you for anything. We just want the right to exercise our freedom.

Bishop LORI. If they wish to obtain those so-called preventive services in some other way apart from the church that does not in any way implicate the church, that is something I would not even

inquire about and probably not know about. For example, it was entirely possible that these so-called services are obtained through the health insurance plan of one's spouse or might be obtained through private payment. That I probably would not even know. There would be no need to ask me about that.

Ms. WATERS. That is good to know. So I feel comfortable that women in the workplace would not have their jobs jeopardized in any way if they received support for contraception from—contraceptives from a third party?

Bishop LORI. If it in no way implicates the church, I would not even know about it, and so it is really a moot question.

Mr. FRANKS. The gentlewoman's time has expired.

I now recognize Mr. Gowdy for 4 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

It strikes me that there are three overarching questions: Number one, can government force citizens to accept certain religious beliefs; number two, can government prevent citizens from holding certain religious beliefs; and thirdly, Mr. Chairman, can government decide which religious beliefs are acceptable and which are not? And I find it instructive that in what is supposed to be a legal hearing on the free exercise of religion, the Democrats offer a healthcare professional as their witness.

And then I thought some more about it, and I thought, Mr. Chairman, well, of course they did because Supreme Court law is not on their side. When a State decided to tell a church you have to pledge allegiance to the flag, the church objected, and the Supreme Court said, you are right, you don't have to. And when a State decided to tell a religious organization, you must display a license tag that has a certain phrase on it, the church objected, and the Supreme Court said, you are right, you don't have to. And when the State exercised what is a pretty compelling interest in having an educated citizenry and said, you must send your students to school to a certain age, a religious organization objected, and the Supreme Court said, you are right, you don't have to. And whether it is animal sacrifice, or whether it is working on Saturdays, or whether, Heaven forbid, it is deciding who your ministers are, and the Supreme Court ruled 9 to 0.

Mr. Chairman, can you find me another case in this fragmented state of jurisprudence that we are in, a 9-to-nothing case, that this Administration overstepped its bounds because it tried to tell a church who it can hire, fire, and retain as a minister?

This is a legal issue, and the Administration will prevail if it can prove two things: number one, that there is a compelling State interest in providing free contraceptive care to the contrary of people's religious beliefs. And you sit there and think, well, it is important, just like fighting obesity and stopping smoking and all the other things that I couldn't get Dr. Rosenstock to answer for me. It is important. Is it compelling? Well, how can it be compelling when you grandfather out so many entities and when you have so many exceptions?

But just give them that, Mr. Chairman. Give them the compelling interest part for sake of argument. Is it the least restrictive means?

Mr. Chairman, if our colleagues on the other side of the aisle want to create within the penumbra of the Fourth Amendment a constitutional right to free contraception, let them pass a bill, but do not make that man do it when it violates his religious beliefs.

So I would ask this to the two legal experts, because I am not. But you don't have to be one to look at Supreme Court law and see if you can protect a group's right to practice animal sacrifice in Florida, but you can't stand up for the Catholic Church's beliefs on when life begins.

So I would ask my two legal experts this: Does it meet the compelling interest test, and is there a least restrictive means of accomplishing this goal even assuming arguendo that it does?

Ms. Monahan?

Ms. MONAHAN. Just to clarify, I am not a legal expert, so I defer to our legal expert over here.

Mr. GOWDY. All right, Ms. Uddin.

Mrs. UDDIN. To answer your question in a nutshell, I mean, it is completely unconstitutional, and it does not satisfy the compelling government interests or the least intrusive means test.

Mr. GOWDY. And tell us in the 45 seconds I have remaining why it doesn't meet the compelling interest test.

Mrs. UDDIN. Well, I mean, you have to understand what has constituted compelling government interest in the past. It is something like national security or preventing crimes, and if you really think about the standard, it is something that is used in the context of the equal protection clause when we determine when racial discrimination is allowed and when it is not. And when that standard is met, racial discrimination is, in fact, allowed.

So if you think about it that way, you understand just how extreme or how strict the standard is. And absolutely you can say that here in this situation, the stated government interest is an increase in the access to contraception, and when applied to religious organizations, that is only a marginal increase in access to contraception, which absolutely we can all agree does not rise to the level of a compelling government interest.

Mr. GOWDY. Well, I am out of time, so I won't have a chance to ask you if the President can make people stop smoking because that is in the overall health benefit of all of us, or whether they can make diabetics diet so all of our costs go down. I will have to save that for another hearing, and hopefully the Democrats will invite a legal expert instead of a healthcare professional, Mr. Chairman, if we have another hearing.

Mr. FRANKS. Well, Mr. Gowdy can be the Chairman's lawyer anytime.

And I would now recognize Mr. Scott for purposes of—

Mr. SCOTT. Thank you, Mr. Chairman.

I ask unanimous consent to enter into the record a memo from the National Women's Law Center titled—the title is "Title VII Requires Covered Employees to Provide Contraceptive Coverage," and points out the EEOC ruling and several court decisions.

Mr. FRANKS. Without objection.

[The information referred to follows:]



Title VII Requires Covered Employers to Provide Contraceptive Coverage

EEOC Has Issued A Commission Ruling Making Title VII Obligations Explicit

Title VII of the Civil Rights Act of 1964 requires covered employers—those with fifteen or more employees—not to discriminate in pay and benefits to their employees. In December 2000, the EEOC issued a Commission Ruling explicitly stating that Title VII's prohibition against sex discrimination reaches employees whose employer-sponsored health insurance plans provide coverage of other prescription drugs and preventive services but fail to provide coverage of contraceptives.¹ The former EEOC leadership and Attorney General under the Bush Administration publicly committed to enforce this interpretation of Title VII as enforceable law.²

Several Courts Have Held that Covered Employers Must Cover Contraceptives

Erickson v. Bartell Drug Co., the first federal court to consider the issue of employer's duty under Title VII to provide contraceptive coverage after the EEOC ruling, held that an employer offering otherwise comprehensive health insurance to its employees, but failing to cover prescription contraceptives, was in violation of Title VII.³ The court found that women disproportionately bear the "adverse economic and social consequences of unintended pregnancies," rendering the defendant's exclusion of prescription contraceptives from the health plan while including a range of other preventive drugs discrimination under the Pregnancy Discrimination Act. There has been limited case law directly addressing the issue ever since, with the majority of cases finding that the exclusion of contraception from an otherwise comprehensive health insurance plan that includes preventive services constitutes impermissible sex discrimination.⁴

In Cooley v. Daimler Chrysler Corp., 281 F.Supp.2d 979 (E.D. Mo. 2003), the court held that the exclusion of prescription contraceptives from the employee insurance plan, while "seemingly neutral" placed a burden on women since only they have the capacity to become pregnant and the only prescription contraceptives available were for women. In Mauldin v. Wal-Mart, 89 Fair Empl. Prac. Cas. (BNA) 1600, 2002 WL 2022334 (N.D. Ga. 2002), the court certified the plaintiff class of women who use contraceptives and cited Erickson favorably. The case ultimately settled with the provision of contraceptives to Wal-Mart employees.

Courts' Reasoning in Adverse Decisions Was Both Incorrect and Has Been Nullified by Recent IOM Findings and their Adoption by HHS

The analysis in the court cases finding that the failure of an otherwise comprehensive health insurance plan to cover contraceptives are not relevant given the Institute of Medicine (IOM) Report on Women's Preventive Health Services and the Department of Health and Human Services (HHS) decision to adopt that report in its totality.

In a 2-1 decision, In re Union Pacific R.R. Emp't Practices Litig., 479 F.3d 936 (8th Cir. 2007), the Court basically disagreed with the EEOC decision on the grounds that it did not present a persuasive basis for comparing contraception to the broad spectrum of other preventive treatments and services.⁵ The district court in Cummins v. Illinois, No. 02-4201 (S.D. Ill 2005) used similar reasoning.

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These cases are not only at odds with the fundamental principles reflected in the 2000 EEOC Commission Ruling, but cannot stand in light of the IOM Report and HHS's endorsement of the IOM's recommendations, which leave no doubt regarding contraception's necessity as a medical treatment, nor that women bear severe and disproportionate health burdens when contraception is unavailable and unaffordable.

Religious Employers Are Currently Bound by Title VII Duty to Provide Contraceptive Coverage

Title VII does not allow religious organizations to discriminate on the basis of race, sex (including pregnancy-related conditions), national origin or religion in the provision of pay or benefits to their employees. The EEOC has addressed the issue squarely in the context of fringe benefits. It has determined that it is sex discrimination for a religious organization to deny benefits to women or to pay women less based on a religious belief, for example, that only men can be the head of a household.⁶ And, as discussed above, it is also sex discrimination to exclude contraceptives when other prescription drugs and preventive services are provided as a fringe benefit. Furthermore, the Title VII Bona Fide Occupational Qualification exemption applicable to religious employers is explicitly limited to hiring and employment only, and does not allow religious employers to discriminate in pay or benefits once an employee is hired.⁷

**For more information on contraceptive coverage please visit
<http://www.nwlc.org/contraceptivecoverage>**

¹ EEOC on Coverage of Contraception, (Dec. 14, 2000), [available at http://www.eeoc.gov/policy/docs/decision-contraception.html](http://www.eeoc.gov/policy/docs/decision-contraception.html).

² Senate Judiciary Committee U.S. Senator Patrick Leahy (D-VT) Holds Second Day of Confirmation Hearing for Attorney General-Designate John Ashcroft, 107th Cong. Sess. 1 (2001) (when asked by Sen. Maria Cantwell if he would defend the agency's December 2000 contraceptive coverage ruling, Ashcroft responded "I would defend the law and seek to uphold the law.")

³ *Erickson v. Bartell Drug Co.*, 141 F. Supp.2d 1266, 1273 (W.D. Wash. 2001).

⁴ Although in *EEOC v. United Parcel Service, Inc.*, 141 F. Supp.2d 1216 (D. Minn. 2001), the Court did not consider the applicability of the PDA because the plaintiff was not taking contraceptives to prevent pregnancy, the Court nonetheless found that the denial of insurance coverage for contraceptives to treat a hormonal disorder resulted in disparate impact discrimination under Title VII when drugs used to treat male hormonal disorders were covered. See, *Alexander v. American Airlines*, 2002 WL 731815, *2 (N.D. Tex. 2002) (plaintiff lacked standing to challenge exclusion of contraceptives from employee health benefits plan).

⁵ See also *Stocking v. AT&T*, No. 03-0421, 2007 WL 3071825 (W.D. Mo. 2007) (controlled by Union Pacific).

⁶ EEOC Directives Transmittal, Section 12: Religious Discrimination, No. 915.003, July 22, 2008, nn.46-49 and accompanying text, [available at http://www.eeoc.gov/policy/docs/religion.html](http://www.eeoc.gov/policy/docs/religion.html).

⁷ Title VII's BFOQ exemption, 42 U.S.C. §2000e-2(c)(1) states in relevant part:

[I]t shall not be an unlawful employment practice for an employer to *hire and employ* employees, ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. ... See, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986) (church owned and operated school held religious belief that only single persons and men could be the "head of household" eligible for the employee health insurance plan; court held "BFOQ exception does not apply to the discriminatory provision of benefits involved here").

Mr. ISSA. Mr. Chairman, I would ask unanimous consent.

Mr. FRANKS. Does the gentleman have an objection?

Mr. ISSA. No. Actually I want to—

Mr. FRANKS. Do you reserve an objection?

Mr. ISSA. No. I actually also want to ask unanimous consent that the earlier document first authored in 1968 by Pope Paul VI be entered in the record without objection.

Mr. FRANKS. Without objection.
[The information referred to follows:]

Judiciary Committee Hearing:
HHS and Preventative Care
Submitted for the Record
by Jssa (2.28.12)

Humanae Vitae

On Human Life

ENCYCLICAL LETTER
OF HIS HOLINESS
POPE PAUL VI

ON THE REGULATION OF BIRTH

TO THE VENERABLE PATRIARCHS,
ARCHBISHOPS AND BISHOPS
AND OTHER LOCAL ORDINARIES
IN PEACE AND COMMUNION WITH
THE APOSTOLIC SEE,
TO PRIESTS, THE FAITHFUL AND TO ALL
MEN OF GOODWILL

July 25, 1968

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augustine@columbia.edu

Humanae Vitae

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Humanæ Vitæ

Venerable brothers and beloved sons:

The Transmission of Life

1. The most serious duty of transmitting human life, for which married persons are the free and responsible collaborators of God the Creator, has always been a source of great joys to them, even if sometimes accompanied by not a few difficulties and by distress.

At all times the fulfillment of this duty has posed grave problems to the conscience of married persons, but, with the recent evolution of society, changes have taken place that give rise to new questions which the Church could not ignore, having to do with a matter which so closely touches upon the life and happiness of men.

I. New Aspects of the Problem and Competency of the Magisterium

New Formulation of the Problem

2. The changes which have taken place are in fact noteworthy and of varied kinds. In the first place, there is the rapid demographic development. Fear is shown by many that world population is growing more rapidly than the available resources, with growing distress to many families and developing countries, so that the temptation for authorities to counter this danger with radical measures is great. Moreover, working and lodging conditions, as well as increased exigencies both in the economic field and in that of education, often make the proper education of an elevated number of children difficult today. A change is also seen both in the manner of considering the person of woman and her place in society, and in the value to be attributed to conjugal love in marriage, and also in the appreciation to be made of the meaning of conjugal acts in relation to that love.

Finally and above all, man has made stupendous progress in the domination and rational organization of the forces of nature, such that he tends to extend this domination to his own total being: to the body, to psychical life, to social life and even to the laws which regulate the transmission of life.

3. This new state of things gives rise to new questions. Granted the conditions of life today, and granted the meaning which conjugal relations have with respect to the harmony between husband and wife and to their mutual fidelity, would not a revision of the ethical norms, in force up to now, seem to be advisable, especially when it is considered that they cannot be observed without sacrifices, sometimes heroic sacrifices?

And again: by extending to this field the application of the so-called "principle of totality," could it not be admitted that the intention of a less abundant but more rationalized fecundity might transform a materially sterilizing intervention into a licit and wise control of birth? Could it not be admitted, that is, that the finality of procreation pertains to the ensemble of conjugal life,

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rather than to its single acts? It is also asked whether, in view of the increased sense of responsibility of modern man, the moment has not come for him to entrust to his reason and his will, rather than to the biological rhythms of his organism, the task of regulating birth.

Competency of the Magisterium

4. Such questions required from the teaching authority of the Church a new and deeper reflection upon the principles of the moral teaching on marriage: a teaching founded on the natural law, illuminated and enriched by divine revelation.

No believer will wish to deny that the teaching authority of the Church is competent to interpret even the natural moral law. It is, in fact, indisputable, as our predecessors have many times declared, (1) that Jesus Christ, when communicating to Peter and to the apostles His divine authority and sending them to teach all nations His commandments, (2) constituted them as guardians and authentic interpreters of all the moral law, not only, that is, of the law of the Gospel, but also of the natural law, which is also an expression of the will of God, the faithful fulfillment of which is equally necessary for salvation. (3)

Conformably to this mission of hers, the Church has always provided—and even more amply in recent times—a coherent teaching concerning both the nature of marriage and the correct use of conjugal rights and the duties of husband and wife.

Special Studies

5. The consciousness of that same mission induced us to confirm and enlarge the study commission which our predecessor Pope John XXIII of happy memory had instituted in March, 1963. That commission which included, besides several experts in the various pertinent disciplines, also married couples, had as its scope the gathering of opinions on the new questions regarding conjugal life, and in particular on the regulation of births, and of furnishing opportune elements of information so that the magisterium could give an adequate reply to the expectation not only of the faithful, but also of world opinion. (5)

The work of these experts, as well as the successive judgments and counsels spontaneously forwarded by or expressly requested from a good number of our brothers in the episcopate, have permitted us to measure more exactly all the aspects of this complex matter. Hence with all our heart we express to each of them our lively gratitude.

Reply of the Magisterium

6. The conclusions at which the commission arrived could not, nevertheless, be considered by us as definitive, nor dispense us from a personal examination of this serious question; and this also because, within the commission itself, no full concordance of judgments concerning the moral norms to be proposed had been reached, and above all because certain criteria of solutions had emerged which departed from the moral teaching on marriage proposed with constant firmness

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by the teaching authority of the Church.

Therefore, having attentively sifted the documentation laid before us, after mature reflection and assiduous prayers, we now intend, by virtue of the mandate entrusted to us by Christ, to give our reply to these grave questions.

II. Doctrinal Principles

A Total Vision of Man

7. The problem of birth, like every other problem regarding human life, is to be considered, beyond partial perspectives-whether of the biological or psychological, demographic or sociological orders-in the light of an integral vision of man and of his vocation, not only his natural and earthly, but also his supernatural and eternal vocation. And since, in the attempt to justify artificial methods of birth control, many have appealed to the demands both of conjugal love and of "responsible parenthood" it is good to state very precisely the true concept of these two great realities of married life, referring principally to what was recently set forth in this regard, and in a highly authoritative form, by the Second Vatican Council in its pastoral constitution *Gaudium et Spes* (Constitution on the Church in the Modern World).

8. Conjugal love reveals its true nature and nobility when it is considered in its supreme origin, God, who is love, (6) "the Father, from whom every family in Heaven and on earth is named." (7)

Marriage is not, then, the effect of chance or the product of evolution of unconscious natural forces; it is the wise institution of the Creator to realize in mankind His design of love. By means of the reciprocal personal gift of self, proper and exclusive to them, husband and wife tend towards the communion of their beings in view of mutual personal perfection, to collaborate with God in the generation and education of new lives.

For baptized persons, moreover, marriage invests the dignity of a sacramental sign of grace, inasmuch as it represents the union of Christ and of the Church.

Its Characteristics

9. Under this light, there clearly appear the characteristic marks and demands of conjugal love, and it is of supreme importance to have an exact idea of these.

This love is first of all fully human, that is to say, of the senses and of the spirit at the same time. It is not, then, a simple transport of instinct and sentiment, but also, and principally, an act of the free will, intended to endure and to grow by means of the joys and sorrows of daily life, in such a way that husband and wife become one only heart and one only soul, and together attain their human perfection.

Then, this love is total, that is to say, it is a very special form of personal friendship, in which

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husband and wife generously share everything, without undue reservations or selfish calculations. Whoever truly loves his marriage partner loves not only for what he receives, but for the partner's self, rejoicing that he can enrich his partner with the gift of himself.

Again, this love is faithful and exclusive until death. Thus in fact do bride and groom conceive it to be on the day when they freely and in full awareness assume the duty of the marriage bond. A fidelity, this, which can sometimes be difficult, but is always possible, always noble and meritorious, as no one can deny. The example of so many married persons down through the centuries shows, not only that fidelity is according to the nature of marriage, but also that it is a source of profound and lasting happiness and finally, this love is fecund for it is not exhausted by the communion between husband and wife, but is destined to continue, raising up new lives. "Marriage and conjugal love are by their nature ordained toward the begetting and educating of children. Children are really the supreme gift of marriage and contribute very substantially to the welfare of their parents." (8)

Responsible Parenthood

10. Hence conjugal love requires in husband and wife an awareness of their mission of "responsible parenthood," which today is rightly much insisted upon, and which also must be exactly understood. Consequently it is to be considered under different aspects which are legitimate and connected with one another.

In relation to the biological processes, responsible parenthood means the knowledge and respect of their functions; human intellect discovers in the power of giving life biological laws which are part of the human person. (9)

In relation to the tendencies of instinct or passion, responsible parenthood means that necessary dominion which reason and will must exercise over them.

In relation to physical, economic, psychological and social conditions, responsible parenthood is exercised, either by the deliberate and generous decision to raise a numerous family, or by the decision, made for grave motives and with due respect for the moral law, to avoid for the time being, or even for an indeterminate period, a new birth.

Responsible parenthood also and above all implies a more profound relationship to the objective moral order established by God, of which a right conscience is the faithful interpreter. The responsible exercise of parenthood implies, therefore, that husband and wife recognize fully their own duties towards God, towards themselves, towards the family and towards society, in a correct hierarchy of values.

In the task of transmitting life, therefore, they are not free to proceed completely at will, as if they could determine in a wholly autonomous way the honest path to follow; but they must conform their activity to the creative intention of God, expressed in the very nature of marriage and of its acts, and manifested by the constant teaching of the Church." (10)

*Humanae Vitae****Respect for the Nature and Purpose of the Marriage Act***

11. These acts, by which husband and wife are united in chaste intimacy, and by means of which human life is transmitted, are, as the council recalled, "noble and worthy," (11) and they do not cease to be lawful if, for causes independent of the will of husband and wife, they are foreseen to be infecund, since they always remain ordained towards expressing and consolidating their union. In fact, as experience bears witness, not every conjugal act is followed by a new life. God has wisely disposed natural laws and rhythms of fecundity which, of themselves, cause a separation in the succession of births. Nonetheless the Church, calling men back to the observance of the norms of the natural law, as interpreted by its constant doctrine teaches that each and every marriage act (*quilibet matrimonii usus*) must remain open to the transmission of life. (12)

Two Inseparable Aspects: Union and Procreation

12. That teaching, often set forth by the magisterium, is founded upon the inseparable connection, willed by God and unable to be broken by man on his own initiative, between the two meanings of the conjugal act: the unitive meaning and the procreative meaning. Indeed, by its intimate structure, the conjugal act, while most closely uniting husband and wife, capacitates them for the generation of new lives, according to laws inscribed in the very being of man and of woman. By safeguarding both these essential aspects, the unitive and the procreative, the conjugal act preserves in its fullness the sense of true mutual love and its ordination towards man's most high calling to parenthood. We believe that the men of our day are particularly capable of seizing the deeply reasonable and human character of this fundamental principle.

Faithfulness to God's Design

13. It is in fact justly observed that a conjugal act imposed upon one's partner without regard for his or her condition and lawful desires is not a true act of love, and therefore denies an exigency of right moral order in the relationships between husband and wife. Hence, one who reflects well must also recognize that a reciprocal act of love, which jeopardizes the responsibility to transmit life which God the Creator, according to particular laws, inserted therein, is in contradiction with the design constitutive of marriage, and with the will of the Author of life. To use this divine gift destroying, even if only partially, its meaning and its purpose is to contradict the nature both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His will. On the other hand, to make use of the gift of conjugal love while respecting the laws of the generative process means to acknowledge oneself not to be the arbiter of the sources of human life, but rather the minister of the design established by the Creator. In fact, just as man does not have unlimited dominion over his body in general, so also, with particular reason, he has no such dominion over his generative faculties as such, because of their intrinsic ordination towards raising up life, of which God is the principle. "Human life is sacred," Pope John XXIII recalled; "from its very inception it reveals the creating hand of God." (13)

*Humanae Vitae****Illicit Ways of Regulating Birth***

14. In conformity with these landmarks in the human and Christian vision of marriage, we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth. (14)

Equally to be excluded, as the teaching authority of the Church has frequently declared, is direct sterilization, whether perpetual or temporary, whether of the man or of the woman. (15) Similarly excluded is every action which, either in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible. (16)

To justify conjugal acts made intentionally infecund, one cannot invoke as valid reasons the lesser evil, or the fact that such acts would constitute a whole together with the fecund acts already performed or to follow later, and hence would share in one and the same moral goodness. In truth, if it is sometimes licit to tolerate a lesser evil in order to avoid a greater evil or to promote a greater good, (17) it is not licit, even for the gravest reasons, to do evil so that good may follow therefrom, (18) that is, to make into the object of a positive act of the will something which is intrinsically disorder, and hence unworthy of the human person, even when the intention is to safeguard or promote individual, family or social well-being. Consequently it is an error to think that a conjugal act which is deliberately made infecund and so is intrinsically dishonest could be made honest and right by the ensemble of a fecund conjugal life.

Licitness of Therapeutic Means

15. The Church, on the contrary, does not at all consider illicit the use of those therapeutic means truly necessary to cure diseases of the organism, even if an impediment to procreation, which may be foreseen, should result therefrom, provided such impediment is not, for whatever motive, directly willed. (19)

Licitness of Recourse to Infecund Periods

16. To this teaching of the Church on conjugal morals, the objection is made today, as we observed earlier (no. 3), that it is the prerogative of the human intellect to dominate the energies offered by irrational nature and to orientate them towards an end conformable to the good of man. Now, some may ask: in the present case, is it not reasonable in many circumstances to have recourse to artificial birth control if, thereby, we secure the harmony and peace of the family, and better conditions for the education of the children already born? To this question it is necessary to reply with clarity: the Church is the first to praise and recommend the intervention of intelligence in a function which so closely associates the rational creature with his Creator; but she affirms that this must be done with respect for the order established by God.

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If, then, there are serious motives to space out births, which derive from the physical or psychological conditions of husband and wife, or from external conditions, the Church teaches that it is then licit to take into account the natural rhythms immanent in the generative functions, for the use of marriage in the infecund periods only, and in this way to regulate birth without offending the moral principles which have been recalled earlier. (20)

The Church is coherent with herself when she considers recourse to the infecund periods to be licit, while at the same time condemning, as being always illicit, the use of means directly contrary to fecundation, even if such use is inspired by reasons which may appear honest and serious. In reality, there are essential differences between the two cases; in the former, the married couple make legitimate use of a natural disposition; in the latter, they impede the development of natural processes. It is true that, in the one and the other case, the married couple are concordant in the positive will of avoiding children for plausible reasons, seeking the certainty that offspring will not arrive; but it is also true that only in the former case are they able to renounce the use of marriage in the fecund periods when, for just motives, procreation is not desirable, while making use of it during infecund periods to manifest their affection and to safeguard their mutual fidelity. By so doing, they give proof of a truly and integrally honest love.

Grave Consequences of Methods of Artificial Birth Control

17. Upright men can even better convince themselves of the solid grounds on which the teaching of the Church in this field is based, if they care to reflect upon the consequences of methods of artificial birth control. Let them consider, first of all, how wide and easy a road would thus be opened up towards conjugal infidelity and the general lowering of morality. Not much experience is needed in order to know human weakness, and to understand that men-especially the young, who are so vulnerable on this point-have need of encouragement to be faithful to the moral law, so that they must not be offered some easy means of eluding its observance. It is also to be feared that the man, growing used to the employment of anticonceptive practices, may finally lose respect for the woman and, no longer caring for her physical and psychological equilibrium, may come to the point of considering her as a mere instrument of selfish enjoyment, and no longer as his respected and beloved companion.

Let it be considered also that a dangerous weapon would thus be placed in the hands of those public authorities who take no heed of moral exigencies. Who could blame a government for applying to the solution of the problems of the community those means acknowledged to be licit for married couples in the solution of a family problem? Who will stop rulers from favoring, from even imposing upon their peoples, if they were to consider it necessary, the method of contraception which they judge to be most efficacious? In such a way men, wishing to avoid individual, family, or social difficulties encountered in the observance of the divine law, would reach the point of placing at the mercy of the intervention of public authorities the most personal and most reserved sector of conjugal intimacy.

Consequently, if the mission of generating life is not to be exposed to the arbitrary will of men, one must necessarily recognize unsurmountable limits to the possibility of man's domination

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over his own body and its functions; limits which no man, whether a private individual or one invested with authority, may licitly surpass. And such limits cannot be determined otherwise than by the respect due to the integrity of the human organism and its functions, according to the principles recalled earlier, and also according to the correct understanding of the "principle of totality" illustrated by our predecessor Pope Pius XII. (21)

The Church, Guarantor of True Human Values

18. It can be foreseen that this teaching will perhaps not be easily received by all: Too numerous are those voices-amplified by the modern means of propaganda-which are contrary to the voice of the Church. To tell the truth, the Church is not surprised to be made, like her divine founder, a "sign of contradiction," (22) yet she does not because of this cease to proclaim with humble firmness the entire moral law, both natural and evangelical. Of such laws the Church was not the author, nor consequently can she be their arbiter; she is only their depositary and their interpreter, without ever being able to declare to be licit that which is not so by reason of its intimate and unchangeable opposition to the true good of man.

In defending conjugal morals in their integral wholeness, the Church knows that she contributes towards the establishment of a truly human civilization; she engages man not to abdicate from his own responsibility in order to rely on technical means; by that very fact she defends the dignity of man and wife. Faithful to both the teaching and the example of the Savior, she shows herself to be the sincere and disinterested friend of men, whom she wishes to help, even during their earthly sojourn, "to share as sons in the life of the living God, the Father of all men." (23)

III. Pastoral Directives***The Church, Mater et Magistra***

19. Our words would not be an adequate expression of the thought and solicitude of the Church, mother and teacher of all peoples, if, after having recalled men to the observance and respect of the divine law regarding matrimony, we did not strengthen them in the path of honest regulation of birth, even amid the difficult conditions which today afflict families and peoples. The Church, in fact, cannot have a different conduct towards men than that of the Redeemer. She knows their weaknesses, has compassion on the crowd, receives sinners; but she cannot renounce the teaching of the law which is, in reality, that law proper to a human life restored to its original truth and conducted by the spirit of God. (24)

Possibility of Observing the Divine Law

20. The teaching of the Church on the regulation of birth, which promulgates the divine law, will easily appear to many to be difficult or even impossible of actuation. And indeed, like all great beneficent realities, it demands serious engagement and much effort, individual, family and social effort. More than that, it would not be practicable without the help of God, who upholds

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and strengthens the good will of men. Yet, to anyone who reflects well, it cannot but be clear that such efforts ennoble man and are beneficial to the human community.

Mastery of Self

21. The honest practice of regulation of birth demands first of all that husband and wife acquire and possess solid convictions concerning the true values of life and of the family, and that they tend towards securing perfect self-mastery. To dominate instinct by means of one's reason and free will undoubtedly requires ascetical practices, so that the affective manifestations of conjugal life may observe the correct order, in particular with regard to the observance of periodic continence. Yet this discipline which is proper to the purity of married couples, far from harming conjugal love, rather confers on it a higher human value. It demands continual effort yet, thanks to its beneficent influence, husband and wife fully develop their personalities, being enriched with spiritual values. Such discipline bestows upon family life fruits of serenity and peace, and facilitates the solution of other problems; it favors attention for one's partner, helps both parties to drive out selfishness, the enemy of true love; and deepens their sense of responsibility. By its means, parents acquire the capacity of having a deeper and more efficacious influence in the education of their offspring; little children and youths grow up with a just appraisal of human values, and in the serene and harmonious development of their spiritual and sensitive faculties.

Creating an Atmosphere Favorable to Chastity

22. On this occasion, we wish to draw the attention of educators, and of all who perform duties of responsibility in regard to the common good of human society, to the need of creating an atmosphere favorable to education in chastity, that is, to the triumph of healthy liberty over license by means of respect for the moral order.

Everything in the modern media of social communications which leads to sense excitation and unbridled customs, as well as every form of pornography and licentious performances, must arouse the frank and unanimous reaction of all those who are solicitous for the progress of civilization and the defense of the common good of the human spirit. Vainly would one seek to justify such depravation with the pretext of artistic or scientific exigencies, (25) or to deduce an argument from the freedom allowed in this sector by the public authorities.

Appeal to Public Authorities

23. To rulers, who are those principally responsible for the common good, and who can do so much to safeguard moral customs, we say: Do not allow the morality of your peoples to be degraded; do not permit that by legal means practices contrary to the natural and divine law be introduced into that fundamental cell, the family. Quite other is the way in which public authorities can and must contribute to the solution of the demographic problem: namely, the way of a provident policy for the family, of a wise education of peoples in respect of moral law and

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the liberty of citizens.

We are well aware of the serious difficulties experienced by public authorities in this regard, especially in the developing countries. To their legitimate preoccupations we devoted our encyclical letter *Populorum Progressio* (The Development of Peoples). But with our predecessor Pope John XXIII, we repeat: no solution to these difficulties is acceptable "which does violence to man's essential dignity" and is based only on an utterly materialistic conception of man himself and of his life. The only possible solution to this question is one which envisages the social and economic progress both of individuals and of the whole of human society, and which respects and promotes true human values. (26) Neither can one, without grave injustice, consider divine providence to be responsible for what depends, instead, on a lack of wisdom in government, on an insufficient sense of social justice, on selfish monopolization, or again on blameworthy indolence in confronting the efforts and the sacrifices necessary to ensure the raising of living standards of a people and of all its sons. (27)

May all responsible public authorities-as some are already doing so laudably-generously revive their efforts. And may mutual aid between all the members of the great human family never cease to grow: This is an almost limitless field which thus opens up to the activity of the great international organizations.

To Men of Science

24. We wish now to express our encouragement to men of science, who "can considerably advance the welfare of marriage and the family, along with peace of conscience, if by pooling their efforts they labor to explain more thoroughly the various conditions favoring a proper regulation of births. (28) It is particularly desirable that, according to the wish already expressed by Pope Pius XII, medical science succeed in providing a sufficiently secure basis for a regulation of birth, founded on the observance of natural rhythms. (29) In this way, scientists and especially Catholic scientists will contribute to demonstrate in actual fact that, as the Church teaches, "a true contradiction cannot exist between the divine laws pertaining to the transmission of life and those pertaining to the fostering of authentic conjugal love." (30)

To Christian Husbands and Wives

25. And now our words more directly address our own children, particularly those whom God calls to serve Him in marriage. The Church, while teaching imprescriptible demands of the divine law, announces the tidings of salvation, and by means of the sacraments opens up the paths of grace, which makes man a new creature, capable of corresponding with love and true freedom to the design of his Creator and Savior, and of finding the yoke of Christ to be sweet. (31)

Christian married couples, then, docile to her voice, must remember that their Christian vocation, which began at baptism, is further specified and reinforced by the sacrament of matrimony. By it husband and wife are strengthened and as it were consecrated for the faithful accomplishment of

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their proper duties, for the carrying out of their proper vocation even to perfection, and the Christian witness which is proper to them before the whole world. (32) To them the Lord entrusts the task of making visible to men the holiness and sweetness of the law which unites the mutual love of husband and wife with their cooperation with the love of God, the author of human life.

We do not at all intend to hide the sometimes serious difficulties inherent in the life of Christian married persons; for them as for everyone else, "the gate is narrow and the way is hard, that leads to life." (33) But the hope of that life must illuminate their way, as with courage they strive to live with wisdom, justice and piety in this present time, (34) knowing that the figure of this world passes away. (35)

Let married couples, then, face up to the efforts needed, supported by the faith and hope which "do not disappoint...because God's love has been poured into our hearts through the Holy Spirit, who has been given to us." (36) Let them implore divine assistance by persevering prayer; above all, let them draw from the source of grace and charity in the Eucharist. And if sin should still keep its hold over them, let them not be discouraged, but rather have recourse with humble perseverance to the mercy of God, which is poured forth in the sacrament of Penance. In this way they will be enabled to achieve the fullness of conjugal life described by the Apostle: "husbands, love your wives, as Christ loved the Church...husbands should love their wives as their own bodies. He who loves his wife loves himself. For no man ever hates his own flesh, but nourishes and cherishes it, as Christ does the Church...this is a great mystery, and I mean in reference to Christ and the Church. However, let each one of you love his wife as himself, and let the wife see that she respects her husband." (37)

Apostolate in Homes

26. Among the fruits which ripen forth from a generous effort of fidelity to the divine law, one of the most precious is that married couples themselves not infrequently feel the desire to communicate their experience to others. Thus there comes to be included in the vast pattern of the vocation of the laity a new and most noteworthy form of the apostolate of like to like; it is married couples themselves who become apostles and guides to other married couples. This is assuredly, among so many forms of apostolate, one of those which seem most opportune today. (38)

To Doctors and Medical Personnel

27. We hold those physicians and medical personnel in the highest esteem who, in the exercise of their profession, value above every human interest the superior demands of their Christian vocation. Let them persevere, therefore, in promoting on every occasion the discovery of solutions inspired by faith and right reason, let them strive to arouse this conviction and this respect in their associates. Let them also consider as their proper professional duty the task of acquiring all the knowledge needed in this delicate sector, so as to be able to give to those

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married persons who consult them wise counsel and healthy direction, such as they have a right to expect.

To Priests

28. Beloved priest sons, by vocation you are the counselors and spiritual guides of individual persons and of families. We now turn to you with confidence. Your first task—especially in the case of those who teach moral theology—is to expound the Church's teaching on marriage without ambiguity. Be the first to give, in the exercise of your ministry, the example of loyal internal and external obedience to the teaching authority of the Church. That obedience, as you know well, obliges not only because of the reasons adduced, but rather because of the light of the Holy Spirit, which is given in a particular way to the pastors of the Church in order that they may illustrate the truth. (39) You know, too, that it is of the utmost importance, for peace of consciences and for the unity of the Christian people, that in the field of morals as well as in that of dogma, all should attend to the magisterium of the Church, and all should speak the same language. Hence, with all our heart we renew to you the heartfelt plea of the great Apostle Paul: "I appeal to you, brethren, by the name of Our Lord Jesus Christ, that all of you agree and that there be no dissension among you, but that you be united in the same mind and the same judgment." (40)

29. To diminish in no way the saving teaching of Christ constitutes an eminent form of charity for souls. But this must ever be accompanied by patience and goodness, such as the Lord himself gave example of in dealing with men. Having come not to condemn but to save, (41) He was intransigent with evil, but merciful toward individuals.

In their difficulties, many married couples always find, in the words and in the heart of a priest, the echo of the voice and the love of the Redeemer.

And then speak with confidence, beloved sons, fully convinced that the spirit of God, while He assists the magisterium in proposing doctrine, illumines internally the hearts of the faithful inviting them to give their assent. Teach married couples the indispensable way of prayer; prepare them to have recourse often and with faith to the sacraments of the Eucharist and of Penance, without ever allowing themselves to be discouraged by their own weakness.

To Bishops

30. Beloved and venerable brothers in the episcopate, with whom we most intimately share the solicitude of the spiritual good of the people of God, at the conclusion of this encyclical our reverent and affectionate thoughts turn to you. To all of you we extend an urgent invitation. At the head of the priests, your collaborators, and of your faithful, work ardently and incessantly for the safeguarding and the holiness of marriage, so that it may always be lived in its entire human and Christian fullness. Consider this mission as one of your most urgent responsibilities at the present time.

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As you know, it implies concerted pastoral action in all the fields of human activity, economic, cultural and social; for, in fact, only a simultaneous improvement in these various sectors will make it possible to render the life of parents and of children within their families not only tolerable, but easier and more joyous, to render the living together in human society more fraternal and peaceful, in faithfulness to God's design for the world.

Final Appeal

31. Venerable brothers, most beloved sons, and all men of good will, great indeed is the work of education, of progress and of love to which we call you, upon the foundation of the Church's teaching, of which the successor of Peter is, together with his brothers in the episcopate, the depositary and interpreter. Truly a great work, as we are deeply convinced, both for the world and for the Church, since man cannot find true happiness-towards which he aspires with all his being-other than in respect of the laws written by God in his very nature, laws which he must observe with intelligence and love. Upon this work, and upon all of you, and especially upon married couples, we invoke the abundant graces of the God of holiness and mercy, and in pledge thereof we impart to you all our apostolic blessing.

Given at Rome, from St. Peter's, this 25th day of July, feast of St. James the Apostle, in the year 1968, the sixth of our pontificate.

PAULUS PP. VI.

NOTES

1. Cf. Pius XI, Encyclical *Qui pluribus: Pii IX P.M. Acta*, 1, pp.9-10; St. Pius X, Encycl. *Singulari quadam*, AAS 4 (1912), p. 658; Pius XI, Encycl. *Casti Connubii*, AAS 22 (1930), pp. 579-581 (C.T.S. translation, nn. 107-109); Pius XII, Address *Magnificate Dominum* to the Episcopate of the Catholic World, AAS 46 (1954), pp. 671-672; John XXIII, Encyl. *Mater et Magistra*, AAS 53 (1961), p. 457 (C.T.S. translation, n. 239).
2. Cf. Mt 28:18-19.
3. Cf. Mt 7:21.
4. Cf. Council of Trent Roman Catechism, Part II, ch. 8; Leo XIII, Encycl. *Arcanum: Acta Leonis XIII*, 2 (1880), pp. 26-29; Pius XI, Encycl. *Divini Illius Magistri*, AAS 22 (1930), pp. 58-61 (C.T.S. translation, nn. 32-41; Pius XI, Encycl. *Casti Connubii*, AAS 22 (1930), pp. 545-546 (C.T.S. translation, nn. 16-18); Pius XII, Address to the Italian Medico-Biological Union of St. Luke, *Discorsi e Radiomessaggi*, VI, pp. 191-192; to the Italian Association of Catholic Midwives, AAS 43 (1951), pp. 835-854 (C.T.S. translation, nn. 1-71); to the Association known as the 'Family Campaign' and other Family Associations, AAS 43 (1951), pp. 857-859 (C.T.S. translation, nn. 6-15); to the seventh Congress of the International Society of Haematology, AAS 50 (1958), pp. 734-735; John XXIII, Encycl. *Mater et Magistra*, AAS 53 (1961), pp. 446-447 (C.T.S. translation, nn. 188-192; Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, nn. 47-52, AAS 58 (1966), pp. 1067-1074; Code of Canon Law, Canons 1067, 1068 .1, Canon 1076.1-2.
5. Cf. Paul VI, Address to the Sacred College of Cardinals, AAS 56 (1964), p. 588; to the Commission for the Study of Problems of Population, Family and Birth, AAS 57 (1965), p. 388; to the National Congress of the Italian Society of Obstetrics and Gynaecology, AAS 58 (1966), p. 1168.
6. Cf. 1 Jn 4:8.
7. Eph 3:15.
8. Vatican Council II, Pastoral Constitutions on the Church in the World of Today *Gaudium et spes*, n. 50, AAS 58 (1966), pp. 1070-1072.
9. Cf. St. Thomas, *Summa Theologica*, I-II, q. 94, art. 2.
10. Cf. Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, nn. 50-51, AAS 58 (1968), pp. 1070-1073.
11. Cf. *ibid.*, n. 49, AAS 58 (1966), p. 1070.

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12. Cf. Pius XI, Encycl. *Casti Connubii*, AAS 22 (1930), p. 560 (C.T.S. translation, n. 56); Pius XII, Address to Midwives, AAS 43 (1951), p. 843 (C.T.S. translation, n. 24).
13. Cf. John XXIII, Encycl. *Mater et Magistra*, AAS 53 (1961), p. 447 (C.T.S. translation, n. 194).
14. Cf. Council of Trent Roman Catechism, Part II, ch. 8; Pius XI Encycl. *Casti Connubii*, AAS 22 (1930), pp. 562-564 (C.T.S. translation, nn. 62-66); Pius XII, Address to the Medico-Biological Union of St. Luke, *Discorsi e Radiomessaggi*, VI, pp. 191-192; Address to Midwives, AAS 43 (1951), pp. 842-843 (C.T.S. translation, nn. 20-26); Address to the 'Family Campaign' and other Family Associations, AAS 43 (1951), pp. 857-859 (C.T.S. translation, nn. 6-15); John XXIII, Encycl. *Pacem in terris*, AAS 55 (1963), pp. 259-260 (C.T.S. translation, nn. 8-13); Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, n. 51, AAS 58 (1966), p. 1072.
15. Cf. Pius XI, Encycl. *Casti Connubii*, AAS 22 (1930), p. 565 (C.T.S. translation, nn. 67-70); Decree of the Holy Office, 22 Feb. 1940, AAS 32 (1940), p. 73; Pius XII, Address to Midwives, AAS 43 (1951), pp. 843-844 (C.T.S. translation, nn. 24-28); to the Society of Haematology, AAS 50 (1958), pp. 734-735.
16. Cf. Council of Trent Roman Catechism, Part II, ch. 8; Pius XI Encycl. *Casti Connubii*, AAS 22 (1930), pp. 559-561 (C.T.S. translation, nn. 53-57); Pius XII, Address to Midwives, AAS 43 (1951), pp. 843 (C.T.S. translation, n. 24); to the Society of Haematology, AAS 50 (1958), pp. 734-735; John XXIII *Mater et Magistra*, AAS 53 (1961), p. 447 (C.T.S. translation, n. 193).
17. Cf. Pius XII, Address to the National Congress of the Italian Society of the Union of Catholic Jurists, AAS 45 (1953), pp. 798-799.
18. Cf. Rom 3:8.
19. Cf. Pius XII, Address to the twenty-sixth Congress of the Italian Association of Urology, AAS 45 (1953), pp. 674-675; to the Society of Haematology, AAS 50 (1958), pp. 734-735.
20. Cf. Pius XII, Address to Midwives, AAS 43 (1951), p. 846 (C.T.S. translation n. 36).
21. Cf. Pius XII, Address to the Association of Urology, AAS 45 (1953), pp. 674-675; to Leaders and Members of the Italian Association of 'corneae' donors and the Italian Association of the Blind, AAS 48 (1956), pp. 461-462.
22. Lk. 2:34.
23. Cf. Paul VI, Encycl. *Populorum progressio*, AAS 59 (1967), p. 268 (C.T.S. translation, n. 21).

Humanae Vitae

24. Cf. Rom 8.

25. Cf. Vatican Council II, Decree on the Means of Mass Communication *Inter mirifica*, nn. 6-7, AAS 56 (1964), p. 147.

26. John XXIII, Encycl. *Mater et Magistra*, AAS 53 (1961), p. 447 (C.T.S. translation, nn. 191-192).

27. Cf. Paul VI, Encycl. *Populorum progressio*, AAS 59 (1967), pp. 281-284 (C.T.S. translation, nn. 48-55).

28. Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, n. 52 AAS 58 (1966), p. 1074.

29. Cf. Pius XII, Address to the 'Family Campaign' and other Family Associations. AAS 43 (1951), p. 859 (C.T.S. translation, nn. 14-15).

30. Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, n. 51 AAS 58 (1966), p. 1072.

31. Cf. Mt. 11:30.

32. Cf. Vatican Council II, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, n. 48 AAS 58 (1966), pp. 1067-1069; Dogmatic Constitution on the Church *Lumen gentium*, n. 35 AAS 57 (1965), pp. 40-41.

33. Mt 7:14; cf. Heb 12:11.

34. Tit 2:12.

35. 1 Cor 7:31.

36. Rom 5:5.

37. Eph 5:25, 28-29, 32-33.

38. Cf. Vatican Council II, Dogmatic Constitution on the Church *Lumen gentium*, n. 35, 41 AAS 57 (1965), pp. 40-45; Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, n. 48-49 AAS 58 (1966) pp. 1067-1070; Decree on the Apostolate of the Laity *Apostolicam Actuositatem*, n. 11, AAS 58 (1966), pp. 847-849.

39. Cf. Vatican Council II, Dogmatic Constitution on the Church *Lumen gentium*, n. 25, AAS 57 (1965), pp. 29-31.

40. 1 Cor 1:10.

41. Cf. Jn 3:17.

Ms. JACKSON LEE. Mr. Chairman.

Mr. FRANKS. Without objection until everybody gets their stuff in the record without objection.

Ms. JACKSON LEE. Thank you for your courtesies.

I think the gentlelady from Florida asked for some information, and I would like to direct this to the Chairman. We are Judiciary, but I would like to inquire of HHS, because I think the bishop ar-

ticulated it excellently, of their plan of implementation where the religious entity will have no responsibility for paying for the insurance; that is, I would like to have that in writing, writing from HHS.

Mr. FRANKS. The Chair will take it under advisement.

Ms. JACKSON LEE. They will accept that, and then I would just ask one other question on the record. I would like to know whether or not the legal—I am trying to—Ms. Uddin's legal firm addresses any questions dealing with Seventh Day Sabbath and represents any clients dealing with—

Mr. FRANKS. The gentlelady can submit those questions in writing.¹

Mr. FRANKS. I would now recognize Mrs. Adams for 4 minutes.

Ms. ADAMS. Thank you, Mr. Chairman.

Bishop Lori, I was listening, and you said that during the discussions on the healthcare law, you were promised that, you know, the religious liberties were going to be kept intact. Then after the rule was released, again the promise. But then on February 10th, when the rule was finalized, it said the interim rule was finalized without change. Isn't that correct?

Bishop LORI. Yes. It says so four times.

Ms. ADAMS. Yes. So would that, then, lead you and the rest of the panel to be concerned about the proposed promises to address it at a later date and time?

Bishop LORI. Sure. What worries me, for example, would be a statement by Secretary Sebelius to the effect, for example, that religious insurers really do not shape their plans according to their religious convictions. Things like that sort of bode badly for what might be ahead. We don't know, though, for sure.

Ms. ADAMS. And I listened with great intent on the if you self-insure, but the insurance company has to pay for it. If you are self-insured, that would be you; would it not?

Bishop LORI. That is correct.

Ms. ADAMS. So if you are self-insured, and the insurance company has to pay for something that you believe goes against your tenets, would that violate your religious liberty?

Bishop LORI. It would. We have, of course, a third-party administrator, in our case Aetna, but it is the diocese that collects the funds, and it is the diocese that ultimately pays out the funds.

Ms. ADAMS. Well, as a woman I understand the difference between religious liberties and the ability to get contraceptives and the insurance for contraceptives, and I for one take offense when my government violates what I believe are my First Amendment rights.

So with that in mind, Ms. Uddin, you know that the government admits contraception services are widely available, and that the Federal Government already spends hundreds of millions of dollars each year funding free or nearly free family-planning services under its Title X program. So is this the case, then, of the government putting a grievous burden on religious entities in order to avoid placing a relatively minor burden on the individuals that they employ?

¹ The material referred to was not submitted.

Mrs. UDDIN. Absolutely. I mean, the burden here is not just substantial, it is quite severe. In many cases a lot of these organizations are going to have to pay literally hundreds of thousands of dollars in penalties for failure to comply with the mandate.

Ms. ADAMS. And, Ms. Monahan, I was amazed earlier, too, about the conversation, because you are here to testify on what actually is what I believe and I think you believe an assault on our religious freedoms and religious liberties, Amendment I. And do you believe that this proposed rule, finalized rule, with the possible promises, as we have heard—because it was promised during the debate, it was promised after the debate, it was promised after the rule was made public, but yet the rule has been finalized, and guess what? The promise hasn't come through, but don't worry, we are going to get to it after the election now. So do you believe that this rule does infringe on your religious liberty?

Ms. MONAHAN. Without a doubt. Yes. This rule infringes upon my religious liberty. I pay approximately close to \$1,000 annually into my insurance premium, and it would absolutely violate my religious liberties if that money went to pay for drugs that can have modes of action that can cause abortion, both pre- and post-implantation in the case of Ella.

Ms. ADAMS. Mr. Chairman, as a woman, I believe that this rule as proposed violates my religious liberty.

Mr. ISSA. I would ask unanimous consent the gentlelady have an additional minute.

Mr. FRANKS. Without objection.

Mr. ISSA. Would the gentlelady yield?

Ms. ADAMS. I will yield.

Mr. ISSA. Thank you.

I just have one closing quick question for our constitutional expert. You have been very generous with opinions, and I appreciate that. In the case of a long-forgotten bill, BCRA, the bipartisan campaign reform bill, there was an expedited capability to go to the Supreme Court, and essentially BCRA was stayed until that happened. There was no such expedited capability under ObamaCare.

If you were able to have this issue expedited to the Supreme Court in the same way as the bipartisan campaign finance reform was, and based on the current rule as it is, is there any doubt in your mind that it would be held unconstitutional and that this hearing would therefore not have been necessary?

Mrs. UDDIN. There is no doubt at all in my mind.

Mr. ISSA. So you would welcome a piece of legislation that would attempt to, in fact, make this issue ripe for the Supreme Court at the earliest possible date so that ultimately, even if we don't have individually the ability to change the law, but, rather, let the Court decide?

Mrs. UDDIN. I welcome anything that will get rid of the religious liberty problems inherent in this mandate.

Mr. ISSA. And, Bishop Lori, the same thing. You would welcome having the Court, based on its history, make the decision of what ultimately you may be forced to pay fines waiting for that decision?

Bishop LORI. I would.

Mr. ISSA. I thank the gentlelady, and I thank the Chairman.

Ms. JACKSON LEE. Mr. Chairman.

Mr. FRANKS. Does the gentleman—

Ms. JACKSON LEE. No, it is the deep voice over here.

Mr. ISSA. I would continue yielding to the gentlelady from Texas.

Mr. FRANKS. Without objection.

Ms. JACKSON LEE. I greatly appreciate it.

Very quickly, I disagree, Ms. Uddin, that they would be paying hundreds of thousands of dollars. What I wanted to explain on the record is that the implementation of the compromise really speaks to what Bishop Lori has asked for, and I believe that we should look to that implementation as a response to the firewall between church and state, which I believe is very important.

So I thank the gentleman for yielding. I don't think that was clarified. There is no one paying \$100,000 yet; the rule is not in place. No one is being obligated to pay that at this point in time. We are pursuing a rule that is not in place.

Mr. SENSENBRENNER. Will the gentlewoman yield, the gentlewoman from Florida yield?

Ms. ADAMS. I will, but just one quick question. If the insurance company has to pay, who pays into the insurance companies, Ms. Uddin?

Mrs. UDDIN. The employer in question.

Ms. ADAMS. But employees with their premiums and everything else. So somebody is paying for it, it is just not this unknown entity called "the insurance company," correct?

Mrs. UDDIN. Absolutely. But I think a more central point here is that we are just dealing right now with a promise, and it is not—it doesn't have any legal force. And as a law firm, the Becket Fund cannot really consider that in its arguments because—

Ms. JACKSON LEE. But you are suing for something that is not in place. You are suing nothing. It is not in place. It is not being implemented.

Mr. FRANKS. It is the gentlelady from Florida's time.

Mrs. UDDIN. We are suing the—it is just without—

Ms. JACKSON LEE. It doesn't exist.

Mr. SENSENBRENNER. Will the gentlewoman from Florida yield to me? You know, I am a bit confused. When the gentlewoman from Texas said that she was going to introduce the compromise that had been reached, I had a problem with that. Then the gentlewoman from Texas just a few minutes ago asked the Chair to take under consideration sending a letter to Secretary Sebelius asking for the text of the compromise. Now, either—

Ms. JACKSON LEE. If the gentleman would yield?

Mr. SENSENBRENNER. Either there—

Ms. JACKSON LEE. You incorrectly heard me.

Mr. SENSENBRENNER. That is hard to incorrectly hear you, ma'am.

Ms. JACKSON LEE. Yes, you did.

Mr. SENSENBRENNER. You know, there is a certain degree of inconsistency. The fact is that the compromise is under consideration. I imagine it will be under consideration until after the election, and then it will probably be litigated to an even greater extent than it is being litigated now.

You know, meantime Ms. Uddin's testimony very clearly stated in the written testimony how big fines these religious-based institu-

tions would be facing. And I think when we are talking about the legalities of this, we had better be darned sure that people are not fined for protecting their well-held religious beliefs, and I am afraid we might be getting down to that.

Mr. FRANKS. The gentleman's time has expired. All time has expired.

Ms. JACKSON LEE. Would the gentleman yield for an explanation?

Mr. FRANKS. All time has expired.

Mrs. UDDIN. If I can just clarify, I think the confusion that Congresswoman Jackson Lee has, and that is that the interim final rule that does not include a compromise is the final rule. I think that is the central issue of confusion here. And regardless of the compromise, even if it was implemented, it still does not satisfy all the constitutional issues here.

Ms. JACKSON LEE. Mr. Chairman, I would like unanimous consent to put a statement in the record. It is in writing.

Mr. FRANKS. Without objection.

Ms. JACKSON LEE. Which answers the gentlelady's issues. There is no injury. I don't know what the purpose of her lawsuit is, but I will put into the record an explanation of the existence of the rule as a safe harbor and that it will not be in place until August 2013. So I ask unanimous consent to put the statement in the record.²

Mr. FRANKS. Without objection.

Mr. SENSENBRENNER. And I would ask unanimous consent that Ms. Uddin, on behalf of the Becket Foundation, be able to put a comment in the record in rebuttal to Representative Jackson Lee's statement.

[See footnote 1.]

Mr. FRANKS. Without objection.

All right. I would like to thank our witnesses for their testimonies today. I would like to thank the Members for their participation. Without objection, all Members will have 5 legislative days to submit additional written materials and questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 7:15 p.m., the Committee was adjourned.]

²The statement referred to was not submitted.

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Post-Hearing Questions and Responses of Asma T. Uddin, Attorney,
The Becket Fund for Religious Liberty**

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April 5, 2012

Asama Uddin
The Becket Fund for Religious Liberty
3000 K Street NW, Suite 220
Washington, DC 20007

Dear Mrs. Uddin,

The Judiciary Committee held a hearing on "Executive Overreach: The HHS Mandate Versus Religious Liberty" on Tuesday, February 28, 2012. Thank you for your testimony.

Questions for the record have been submitted to the committee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Sarah Vance at Sarah.Vance@mail.house.gov by April 19, 2012. If you have any further questions or concerns, please contact Zach Somers, Counsel of the Constitution Subcommittee, at Zachary.Somers@mail.house.gov or (202) 225-2825.

Thank you again for your participation in the hearing.

Sincerely,



Lamar Smith
Chairman
Judiciary Committee

Question for the Record from Mr. Chabot

1. I would like to commend you and your organization for fighting to protect religious liberties. I also have great concerns about how this new mandate impedes upon religious freedoms in this country. This is why I introduced H.R. 3897, *the Religious Freedom Restoration Act of 2011*, to provide conscience protections for individuals and organizations. Today, I would like to address one of the most common arguments made by proponents of the mandate.

In your testimony, you stated that HRSA, a division of HHS, delegated the job of defining “contraceptive preventative services for women” to the Institute of Medicine “IOM.” The IOM then suggested a list of recommendations for “preventative services.” To your knowledge, when birth control pills were listed in the IOM’s recommendations, were they intended for any purpose other than contraception?

If in fact birth control pills are medically necessary to treat cysts, hormonal imbalances, or other diagnosable concerns, why weren’t these purposes distinguished from the contraceptive use? Couldn’t HHS have narrowly tailored their mandate by creating an exception for religious organizations when the purpose or use of the birth control is not for a diagnosable medical problem?

In your opinion, if HHS confined the mandate to medical uses outside of contraception, would this have resolved the conscience issues for your clients?

Questions for the Record from Mr. Nadler

1. If, as set out in the February 15, 2012 rule, additional rules are promulgated that allow religiously-affiliated employers to provide insurance coverage that does not include contraceptive services, what is the violation of a religiously-affiliated employer’s free exercise or conscience right? Please identify any statutes, constitutional provisions, or case law that supports your position.
2. Should any employer (whether for-profit and not-for-profit) who objects to insurance that covers contraception (an “objecting employer”) have the right to block an insurer from offering insurance that includes contraceptive services to employees of the objecting employer? Is the right to block an insurer from doing so limited to the insurer(s) with which the employer contracts or does it extend to all insurers? Please identify any statutes, constitutional provisions, or case law that supports your position.
3. Should an employer have the right to object to insurance coverage for health care services beyond contraception? If so, are there any limits to the scope of this right to object and (presuming there are any limits) what are they? Please identify any statutes, constitutional provisions, or case law that supports your position.
4. Does a woman whose faith supports the use of contraception have a claim (including under the First Amendment and the Religious Freedom Restoration Act) against the

government if the government goes as far as allowing an employer to block its insurer from contacting that employee directly and offering her insurance that covers contraceptive?

Please explain your reasoning and the statutes, constitutional provisions, or case law that you rely upon in reaching your conclusion.

Does your analysis change if this employer works for a for-profit employer? Please explain why or why not.

5. We have heard from a number of doctors and women about the need for contraceptive services for reasons other than preventing pregnancy. One doctor in Chicago, for example, has a patient who needs to use an intrauterine device (IUD) to reduce bleeding that is life-threatening. Her family cannot afford the \$1,000 outlay for this treatment.

Should her husband's employer – a religiously-affiliated hospital through whom they get insurance – be allowed to block its insurer from contacting them directly and offering them insurance that covers contraceptive services?

Is your answer any different if the employer is a for-profit employer?

6. The Supreme Court in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), struck down a Connecticut law that did not adequately take into account the rights of those not benefitting from the religious accommodation at issue. More recently, the Supreme Court stated in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005): "our decisions indicate that an accommodation must be measured so that it does not override other significant interests."

Do you agree that the executive branch needs to consider the interests of women who will not benefit from an accommodation that allows their employer to prevent coverage for contraceptives in deciding how to accommodate those who object to providing that coverage?

If not, please provide the case law that you rely upon in reaching this conclusion.

If you do agree that the government must consider the interests of women in developing a workable accommodation, please explain exactly how the federal government should accommodate the women who will not get insurance coverage because they work for an objecting religiously-affiliated employer?

7. During the hearing, you testified that cases brought in state courts challenging state contraceptive coverage laws differed from the Becket Fund's current legal challenges because, among other things, none of those cases involved a claim brought under the Religious Freedom Restoration Act (RFRA).

Through RFRA, Congress sought to restore the requirement (embodied in cases like *Sherbert v. Verner*, 374 U.S. 398 (1963)) that a law that imposes a substantial burden on religion be narrowly tailored to serve a compelling government interest, thus requiring courts to analyze such laws using what is commonly referred to as “strict scrutiny.”

The California Supreme Court, in *Catholic Charities v. Sacramento*, 85 P.3d 67, 91 (Cal. 2004), reviewed the challenge to its state’s contraceptive coverage requirement using “strict scrutiny” – thus applying exactly the same test that a court will now apply to the Becket Fund’s challenge under RFRA – and found that the state’s contraceptive coverage law, which does not exempt religiously-affiliated employers, is constitutional.

Is it your position that the analysis a court will undertake in considering the contraceptive coverage rule under RFRA differs from the “strict scrutiny” analysis undertaken by the California Supreme Court in upholding its law? If so, please explain exactly how the analysis will differ.

If not, and you believe instead that the same analysis will be used but a different conclusion reached, please explain exactly why the outcome will differ and identify any case law that you rely upon in reaching this conclusion.

8. The Administration has explained that it relied, in part, on the experience with contraceptive coverage in various states. Is it unreasonable for the Administration to have done so? If you do not believe that was reasonable, please explain why it wasn’t reasonable.

Given that the highest courts in New York and California upheld their laws, which do not exempt religiously-affiliated employers, was it unreasonable for the Administration to conclude that its rule is valid as a matter of law? If you do not believe that was a reasonable conclusion, please explain why it wasn’t reasonable and provide the case law upon which you rely to support your contrary conclusion.

9. In *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court ruled unanimously that the government need not exempt an Amish employer from the payment of Social Security taxes, notwithstanding the Court’s recognition that paying those taxes would offend his religious beliefs.

Do you believe that *Lee* was wrongly decided? If so, is it your position that the Constitution requires the government to exempt individuals from paying taxes if they object to programs on religious grounds? On any other grounds? What about complying with other laws – is the government obligated to exempt anyone who objects to complying on religious grounds? On any other grounds?

If *Lee* was correctly decided, why is the conclusion any different here (i.e., that there is no Free Exercise violation)? How is there a Free Exercise violation – with regard to the coverage of contraceptive services – if the government allows religiously-affiliated employers to provide coverage that excludes contraceptives and has that coverage provided directly to employees by insurers?

10. In *Lee*, the desired exemption did not have a direct effect on another person's interests. Here, however, an accommodation that prevents employees of religiously-affiliated employers from accessing insurance coverage that includes contraceptives directly impacts those employees. Does that not then require, as in *Thornton v. Caldor*, a balanced or measured accommodation that accounts for all of the interests involved? If your answer is no, please provide the case law that you rely upon in reaching your conclusion.



April 19, 2012

Chairman Lamar Smith (R-TX)
U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House office Building
Washington, D.C. 20515

Re: Response to Questions for the Record,
“Executive Overreach: The HHS Mandate vs. Religious Liberty”
Testimony by Asma Uddin, the Becket Fund for Religious Liberty
Given February 28, 2012

Dear Chairman Smith,

We are providing the following responses to the questions for the record requested of Asma Uddin based on her testimony before your Committee. Thank you for the opportunity to testify before your Committee and we look forward to working with the Committee again in the future.

(Regarding Questions from Rep. Chabot)

We are not in a position to provide information on the IOM's purposes or why HHS tailored the exemption as they did. Moreover, we are unable to take a position on the third question right now while litigation is pending that involves these issues.

(Regarding Questions from Rep. Nadler)

(Question #1) Our litigation is based on the current law. We are unable to provide a response for additional rules that may be promulgated in the future since the law as it stands is what currently infringes on the constitutional rights of our clients.

(Question #2) The current law mandating coverage applies to nearly all organizations and businesses with over 50 employees. For those who do not meet the narrow religious exemption, they have two options: violate their conscience and provide the offending services in their coverage, or opt out of providing insurance and pay a fine. There is currently no option to opt out of the contraceptive coverage for any employer.

(Question #3) We currently have four cases pending in courts throughout the U.S. Some of our clients have a conscientious objection to any and all contraception, others only to abortion-inducing drugs. In each case, the client believes these drugs and services kill human life, something that clearly violates their most deeply held religious beliefs.

Moreover, most of our claims are based on the First Amendment and RFRA, which prevent the government from imposing this kind of substantial burden on religious organizations like our clients, without satisfying the strict scrutiny test which the government has not done here. This was outlined in our written testimony. Our cases involve this mandate's provisions, and we have no comment currently on speculative questions about whether future cases should or may draw the line.

(Questions #4) See note on #2 above.

(Question #5) See note on #2 above.

(Question #6) Our current litigation involves the conscience rights of our clients, including women, and the interests they have in defending their conscientious objections to this mandate. The government has already admitted in numerous public statements that contraception is widely available, which undercuts any argument to the contrary that there is a problem with access to contraception generally. This mandate is about forcing religious organizations to pay for these drugs and services against their convictions which violates the constitution and federal law.

(Question #7) As to whether or not the same reasoning used in the California court's opinion could be applied in this case, there at least four differences between the two cases: (a) because the Religious Freedom Restoration Act does apply to the states, the CA case did not involve a RFRA claim (which our lawsuits do) and RFRA uses an entirely different standard than that found in *Employment Division v. Smith*; (b) there were some potential Free Exercise Clause arguments that were not raised in the CA case, so the CA court may not have had the best vetting of all the issues (e.g., counsel did not raise categorical and individualized exemptions arguments); (c) *Smith's* meaning has changed since the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (decided in January 2012); and (d) in CA, there are ways that religious groups can *de facto* opt out of the state mandate, so the burden on religious groups due to the federal mandate is greater than the burden involved with the state mandate because there is no similar opportunity to opt out under the federal mandate.

(Question #8) Please see note on #7 above.

(Question #9) See note on #3 above.

(Question #10) See note on #3 above.

Sincerely,



Tina Ramirez
Director of International and Government Relations
The Becket Fund for Religious Liberty

Material submitted by the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary



WASHINGTON OFFICE • 1730 RHODE ISLAND AVENUE, N.W. • WASHINGTON DC 20036
202-835-0414 • FAX: 202-835-0424

Rabbi Abba Cohen
Vice President for Federal Government Affairs
Washington Director and Counsel

February 28, 2012

The Honorable Lamar Smith, Chairman
House Judiciary Committee
Washington, D.C. 20515

Re: HHS Rule and Religious Liberty

Dear Mr. Chairman:

In preparation for today's hearing before the full House Judiciary Committee, I am pleased to share Agudath Israel of America's perspectives on HHS's recently-published Final Rule on contraception coverage and the impact that regulation will have on religious liberty concerns. Agudath Israel is a national Orthodox Jewish organization with a deep and abiding interest in the religion clauses of the First Amendment and has long been engaged in health care issues on the federal, state and local levels when these two issues intersect.

For that reason, when "health care reform" was first being discussed in 2009, we wrote to President Obama and to congressional leadership to encourage them to incorporate within the mix of considerations a perspective that "adds an important new dimension to the debate over health care policy, one that has largely been missing from the national debate to date: the impact any given policy proposal may have on the religious freedoms of patients and providers." Failure to do so at that time has now embroiled our fellow Americans in a national controversy -- leading to an array of political and theological recriminations.

Mr. Chairman, let me be clear: to our community, this is purely a matter of religious liberty. Indeed, there may be instances when contraception and abortion-inducing drugs are permitted -- indeed, even required -- under Jewish law and there is no larger interest or intention to remove them from store shelves or from insurance coverage. The bottom line for us is simply this: *Government has no authority to mandate that any religious group provide a service that forces them to violate their sincerely-held religious beliefs.* And whether the conflict between those beliefs and the mandate has been addressed or not, is a matter for the religious group to decide -- not the President, not Congress, and not for any other religious or secular group. To be sure, this decision is a theological determination that is proscribed by the First Amendment from government interference.

Chairman Lamar Smith
 February 28, 2012
 Page Two

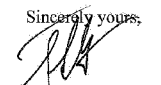
The President has indicated that he will make changes to the original interim rule, which curiously was made final "as is" shortly after his announcement. Many religious groups are understandably disturbed by this action. They also continue to point to problems with the scope, substance, legality and timetable of the planned revision. A number of these concerns -- which others have clearly outlined and will do so before the Committee -- are ones that we share and there is no need to highlight them here. But we exhort the parties involved that the First Freedom is not something on which we reach "compromise" or "accommodation," or over which we "negotiate" -- terms that the media have unfortunately attached to the President's action. Rather, when conflicts arise, our law most effectively provides for their resolution with broad, legislatively-based religious exemptions. "Finding the right regulatory language" can be tenuous and is not the right answer; religious liberty demands a higher level of respect and statutory protection.

As we had done in our 2009 correspondence, we wish to express a somewhat broader concern that is becoming more and more prevalent in the Orthodox Jewish community. Religious rights in the federal health care context have centered upon religious providers and, now, employers. It has also typically focused on abortion, sterilization and contraception. But what of the religious rights of *patients*? And what of *other* medical procedures that implicate religious values? These persons and issues are no less deserving of religious freedom and protection than others. A patient's *religious and moral beliefs* must figure in on the decision to provide medical coverage. Indeed, Agudath Israel has strongly and consistently advocated that this principle be included in any "Patient's Bill of Rights."

There have been an growing number of cases that Orthodox Jews -- and their families -- face apart from those implicated in HHS's provision on preventative care and contraception. For example, with the advances in medical science and technology, numerous "end of life" issues have come to the fore. Patient and families who adhere to Jewish law and values increasingly find themselves confronted with conflicting practices and procedures -- sometimes even pressure -- on the part of health care providers and insurers. The anguish these already-devastated families endure is enormous.

Freedom of religion is a value of the highest order. Its application to the health care context has enormous implications and presents formidable challenges. It must be dealt with in a comprehensive manner. No religious person, employer, insurer or organization should have to face the Hobson's Choice of either violating their convictions as they view them or face severe penalties. We urge Congress to act to strongly protect this fundamental liberty. Americans of faith -- and our entire nation -- deserve no less.

Sincerely yours,



Rabbi Abba Cohen

RAC/me

800 Eighth Street, N.W. Suite 318 • Washington, DC 2000 • Tel: 202.513.6484 • Fax: 202.289.8936

**UNION OF ORTHODOX JEWISH
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The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

National Headquarters:
Eleven Broadway
New York, NY 10004
www.ou.org/public_affairs



February 27, 2012

Hon. Lamar Smith, Chairman
Hon. John Conyers, Jr., Ranking Member
and Members of the Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Smith, Ranking Member Conyers and Members
of the Committee,

We hope this letter finds you well.

We write to you with regard to the debates and decisions of recent weeks over the issues of women's health care services and the liberty of religious institutions. We appreciate your Committee taking the time to examine and discuss these issues of paramount importance and substantive nuance in your deliberations and we write to you to provide our organization's views on these matters in, what we hope is, a constructive way.

As you know, on January 20, 2012, the Obama Administration announced a regulation with regard to the Affordable Care Act's requirement for employer-sponsored insurance programs to provide contraceptive, sterilization and other women's health services free of charge. In doing so, the Administration provided an exemption to an important category of religious institutions – those whose primary mission is to inculcate religious tenets and do not employ or serve people of other faiths.

However, the Orthodox Union, and many others across the American religious and political spectrum, protested this regulation. Our organization neither opposed nor supported the enactment of the Affordable Care Act. And, we did not object to this policy because of Orthodox Judaism's view toward contraception or other women's health services. Rather, we objected to the President's policy because of the underlying rationale that it is only the most insular religious institutions that are deserving of the fullest measure of religious liberty protection. This rationale is objectionable to us, and many others, because of our firm belief in the imperative for people – and institutions – of faith to engage with broader society and work for its betterment.

On February 10, 2012, President Obama announced a revision to this regulation. Under the revised approach, non-profit religious entities would also be exempt from funding or facilitating the provision of health care services they deem objectionable, but women employees of such entities would be able to receive such services via direct communication from the health insurance company which would also provide these services at no charge to the employee or employer.

It is the view of the Orthodox Union that the revised policy – while certainly a practical improvement over the January 20 regulation – still relies upon the objectionable distinction among religious institutions. Houses of Worship and similar entities remain fully exempt from involvement with this provision of the ACA, while the “religiously affiliated” entities are exempt from funding or facilitating their women employees receiving objectionable services, but the insurance carrier will provide the services to the employees.

We remain concerned about this distinction, relied upon by the Obama Administration. While on the level of practicality, the “core” and “affiliated” institutions function the same way (ie: no institution in either category must fund or facilitate services it objects to) the distinction between these two categories is in place. We fear that this distinction will – over time – erode fundamental religious liberties to an array of faith institutions on a diverse set of issues.

Therefore, the Union of Orthodox Jewish Congregations of America is prepared to support legislation that will provide a consistent and appropriate policy for *all* religious institutions with regard to the provision or sponsorship of health services the institution deems objectionable to its religious tenets.

While President Obama’s effort is commendable, we believe consistency in the application and enforcement of religious liberties is crucial. Moreover, First Amendment rights should not be subject to the whims of Executive Branch action.

We thank the Judiciary Committee for its attention to these crucial matters and look forward to working with you in the coming weeks and months in support of religious liberty – America’s “first freedom.”

Sincerely,

Yehuda Neuberger
Chairman, Public Policy

Nathan J. Diamant
Director, Public Policy

Here We Are

By Helen M. Alvare & Kim Daniels

February 21, 2012 2:00 P.M.

Like countless other women, we've been closely following the Obama administration's attempt to compel religious institutions to provide contraceptive coverage in violation of their beliefs. And like countless other women, over the past several days we've heard House Minority Leader Nancy Pelosi and others repeatedly ask those who oppose the contraceptive mandate, "Where are the women?"

Here we are.

We listened to prominent women purport to speak for us. We watched them duck the fundamental religious-liberty issues at stake. And we saw them assume that all women view cheaper contraceptives and abortion-causing drugs as unqualified goods.

In response, we circulated an [open letter](#) to a few dozen of our female friends in support of the competing voice offered by Catholic institutions on matters of sex, marriage, and family life. The letter spread, and in 72 hours we received some 750 signatures from a diverse group of women across the country, including women serving overseas. Signatures are still flooding in. Doctors, nurses, lawyers, teachers, mothers, business owners, community volunteers, scholars — women from all walks of life are proud to stand together with the Catholic Church and its invaluable witness.

Most of us are Catholic, but some are not. We are Democrats, Republicans, and independents. Many work or have worked for a Catholic institution. We are proud to have been associated not only with the work that Catholic institutions perform in the community — particularly for the most vulnerable — but also with the shared sense of purpose found among colleagues who chose their job because, in a religious institution, a job is also a vocation.

To a woman, we are deeply troubled by the mandate's violation of fundamental religious-liberty protections. Detailed analyses of the First Amendment and the Religious Freedom Restoration Act issues at stake here have already appeared in these pages. But we note that under RFRA, the government cannot substantially burden religious freedom unless the burden furthers a compelling government interest and is the "least restrictive" means of furthering that interest. Yet in the face of widespread opposition, the Obama administration was able to quickly revise the mandate to a version it (wrongly) considers "less restrictive" than its original proposal. That tells you all you need to know about how seriously the administration took its obligation to abide by RFRA in the first place.

Those who invoke "women's health" against those of us who disagree with forcing religious institutions or individuals to violate deeply held beliefs are more than a little mistaken — and more than a little dishonest. Even setting aside their simplistic equation of "costless" birth control with "equality" and "women's health," note that they have never responded to the large body of scholarly research indicating that many forms of contraception have serious side effects; or that some contraceptives destroy embryos; or that government contraceptive programs inevitably change the sex, dating, and marriage markets in ways that lead to more empty sex, more non-marital births, and more abortions. It is women who suffer disproportionately when these things happen.

No one speaks for all women on these issues. Those who purport to do so are simply attempting to deflect attention from the serious religious-liberty issues at stake. We are proud to stand with the Catholic Church and its rich, life-affirming teachings on sex, marriage, and family life. We call on President Obama, Health and Human Services Secretary Kathleen Sebelius, and our representatives in Congress to respect religious voices, to respect religious liberty, and to allow religious institutions and individuals to continue to provide witness to their faiths in all their fullness.

/4/12

Here We Are - National Review Online

--- *Helen M. Alvaré is an associate professor of law at George Mason University School of Law, the chair of the Witherspoon Task Force on Conscience Protection, and a consultant to the Pontifical Council for the Laity. Kim Daniels is former counsel to the Thomas More Law Center, where she focused on health-care rights of conscience. Visit womenspeakforthemselves.com to sign the letter yourself.*

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**OPEN LETTER TO PRESIDENT OBAMA, SECRETARY SEBELIUS
AND MEMBERS OF CONGRESS**

DON'T CLAIM TO SPEAK FOR ALL WOMEN

We are women who support the competing voice offered by Catholic institutions on matters of sex, marriage and family life. Most of us are Catholic, but some are not. We are Democrats, Republicans and Independents. Many, at some point in our careers, have worked for a Catholic institution. We are proud to have been part of the religious mission of that school, or hospital, or social service organization. We are proud to have been associated not only with the work Catholic institutions perform in the community – particularly for the most vulnerable -- but also with the shared sense of purpose found among colleagues who chose their job because, in a religious institution, a job is always also a vocation.

Those currently invoking “women’s health” in an attempt to shout down anyone who disagrees with forcing religious institutions or individuals to violate deeply held beliefs are more than a little mistaken, and more than a little dishonest. Even setting aside their simplistic equation of “costless” birth control with “equality,” note that they have never responded to the large body of scholarly research indicating that many forms of contraception have serious side effects, or that some forms act at some times to destroy embryos, or that government contraceptive programs inevitably change the sex, dating and marriage markets in ways that lead to more empty sex, more non-marital births and more abortions. It is women who suffer disproportionately when these things happen.

No one speaks for all women on these issues. Those who purport to do so are simply attempting to deflect attention from the serious religious liberty issues currently at stake. Each of us, Catholic or not, is proud to stand with the Catholic Church and its rich, life-affirming teachings on sex, marriage and family life. We call on President Obama and our Representatives in Congress to allow religious institutions and individuals to continue to witness to their faiths in all their fullness.

Helen M. Alvaré JD
Associate Professor of Law
George Mason University (VA)*

Kim Daniels JD
Former Counsel, Thomas More Law Center
(MD)

*(*Affiliations are listed for identification purposes only. They do not indicate institutional support.)*

Suzanne Abdalla MTS
Executive Director, ArborVitae Women's Center (MI)

Alecia Acquaviva
Coordinator for Marriage Preparation Program, Diocese of Charlotte (NC)

Jane Adolphe JD

Associate Professor of Law, Ave Maria School of Law (FL)

Maria Sophia Aguirre Ph.D.
Professor of Economics, The Catholic University of America (DC)

Erika J. Ahern MA
Writer, Editor (CT)

Jan Akers
Former Parish and Home Schooling Company Employee (VA)

Sr. Prudence Allen, RSM, PhD
Archbishop Charles J. Chaput Professor of Philosophy, St. John Vianney Theological
Seminary (CO)

Renee Allerheilgen
Catholic School Teacher (MN)

Liliana Alessandri MD (MD)

Sara Alvarez
Sr. Administrative Assistant (MD)

Katie Anderson
Financial Analyst (VA)

Lori A Anderson
Pianist (NC)

E. Joanne Angelo, M.D.
Assistant Clinical Professor of Psychiatry, Tufts University School of Medicine (MA)

Kathleen Asdorian JD (DC)

Ann W. Astell Ph.D.
Professor of Theology, University of Notre Dame (IN)

Reyes Aterido
World Bank (DC)

Erika Bachiochi, JD
Author and Legal Scholar
Editor, *Women, Sex & the Church: A Case for Catholic Teaching* (MA)

Maureen Bailey, JD (MD)

Diana L. Banister
Vice President & Partner, Shirley & Banister Public Affairs (VA)

Dori Belmonte
Administrator, Church of the Annunciation (DC)

Jennifer L Barbera
Department of Business & Economics, The Catholic University of America (DC)

Dr. Melanie Barrett, Ph.D., S.T.L.
Assistant Professor of Moral Theology, University of St. Mary of the Lake - Mundelein
Seminary (IL)

Michelle Barrette
Religious Education Teacher (MA)

Susan Baumert
Ph.D. candidate in the School of Theology and Religious Studies, Catholic University of
America (DC)

Elizabeth H. Bergin
Art Historian and Consultant, Former Employee of the Vatican Museums and Christie's
International Auction House (MD)

Thérèse Bempohl
Director, Office for Family Life, Catholic Diocese of Arlington (VA)

Rachel Berquist RN (CA)

Donna Bethell JD (PA)

Emily Bissonnette M.T.S.
Theology of the Body Education Coordinator (OH)

Barbara Onderchek Black MD (MD)

Eleanor Bobbitt
Financial Planner (FL)

Penelope Boldrick
Development Office, Stanford University (CA)

Beatriz Lopez Bonetti
Marketing Professional & adjunct faculty, Department of Business & Economics
The Catholic University of America (DC)

Mary Ellen Bork
Writer and Lecturer
Advisory Board, School of Philosophy, Catholic University (DC)

Carmen Boston
Assistant Director of Religious Education/ Assistant Coordinator of Ministry to the
Elderly, St. Elizabeth Church (MD)

Elena Bowman
Business Manager, Univ. of Notre Dame (IN)

Margaret Brecount
Former Catholic School Teacher (OH)

Elizabeth M. Briel
Managing Editor, *Logos: A Journal of Catholic Thought and Culture* (MN)

Gwen Brown, Ph.D.
Associate Professor Emerita of Communication, Radford University, Visiting Professor
of Communication, Rider University (NJ)

Therese D. Brown
Catholic High School Track Coach (PA)

Jennifer Bryson, Ph.D.
Director, Islam and Civil Society Project, The Witherspoon Institute (NJ)

Marilyn M. Buck
Doula Coordinator, Cheshire Medical Center (NH)

Jeanne G. Buckeye Ph.D.
Associate Professor, Ethics and Business Law, University of St. Thomas (MN)

Deborah Burdick
Researcher, Writer (FL)

Denise Burke JD (TX)

Mary Burkett
Parochial School Teacher (PA)

Anna Husted Burleigh
Writer (KY)

Marcella Burke
Law Student and Clerk (TX)

Jill Burket
Principal, St. Mark's Catholic High School (MO)

Kristin P. Burns, Ph.D.
Dean of the Graduate School, Christendom College (VA)

Sister Sara Butler, M.S.B.T.
Professor of Theology, University of St. Mary of the Lake (IL)

Cynthia Buttjer MTS
Masters Student, Philosophy, Holy Apostles College & Seminary (VA)

Crystie Byrde
Architect (MD)

Marjorie Murphy Campbell JD
Attorney at Law, Freelance Writer (CA)

Rachel Campos-Duffy
Author, blogger, television pundit (WI)

Elizabeth Gibbons Capdevielle
Assistant Teaching Professor, University of Notre Dame (IN)

Mary Devlin Capizzi JD (MD)

Joan Carey
Owner, Technical Documentations Corporation (WI)

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Retired City Government Employee (VA)

Michele Casey
Engineer (VA)

Jenny Casmus
Construction Manager

Cindy Cavnar
Publishing Acquisitions Editor (MI)

Triane Chang
Consultant (CA)

Julie Cipriano

President & Director, Aquinas Academic Center (VA)

Sharla Cloutier
Business Consultant (NY)

Jennifer Cole
Director of Admissions and Marketing, John Paul the Great High School (VA)

Kelly Cole
Graphic Designer/Client Services Manager (MI)

Anne Colevas
Construction and Property Manager (DC)

Teresa S. Collett JD
Professor of Law, University of St. Thomas School of Law (MN)

Ellen Condict, Ph.D.
College professor and Classical Academy Instructor (MI)

Elizabeth A. G. Connors, OTR/L
Occupational Therapist (CA)

Kimberly Cook
Director, Northwest Pregnancy Center (DC)

Holly Taylor Coolman Ph.D.
Assistant Professor of Theology, Providence College (RI)

Marilyn E. Coors, Ph.D.
Associate Professor of Bioethics, Center for Bioethics and Humanities, University of
Colorado Anschutz Medical Campus (CO)

Morgan Costigan
Mechanical Engineer

Lisa Coyne
Teacher, St. Edmund's Academy (PA)

Kristine Cranley, M.T.S.
Campus Minister (TX)

Sandra Lora Cremers, MD, FACS
Harvard Medical School (MA)

Susan Cummins

Adjunct Faculty, Sacred Heart Major Seminary (MI)

Eileen M. Cunis
Artist (NH)

Barbara Currano, MA, NCC
Licensed Clinical Professional Counselor (MD)

Lorna Cvetkovich MD, FACOG
Tepeyac Family Center (VA)

J. Michelle Datiles JD (DC)

Jessica A. Davidson, M.T.S
Chapter Coordinator, Couple to Couple League of Northern Virginia (VA)

Mary L Davenport, MD, FACOG
Fellow of the American College of Ob-Gyns

Laureen DeBenedetto
Liturgical Minister, Administrative Assistant (MA)

Cathy Deeds
Public Policy Consultant
Former U.S. Department of Health and Human Services Appointee (WI)

Jean De Groot Ph.D.
Associate Professor of Philosophy, The Catholic University of America (DC)

Lee Mirenda DelleMonache, M.S.
Strategic Planner, Neumann University (PA)

Ligia de Jesus JD
Law Professor, Ave Maria School of Law (FL)

Debra Ann DeMarco
Teacher, Parish Volunteer (NY)

Jeanette R. De Melo
Director of Communications, Archdiocese of Denver (CO)

Joan Desmond
Journalist (MD)

Pia de Solenni, SThD
Diotima Consulting, LLC (WA)

Margaret Devlin, RN (NY)

Catherine Dhooghe
High School Drama Teacher (TX)

Sandra E. Diaz
Community volunteer (NJ)

Elizabeth DiDomenico, MSN, CPNP
Pediatric Nurse Practitioner (NJ)

Dana L. Dillon Ph.D.
Assistant Professor of Theology, Providence College (RI)

Christine Odell DiNovo JD (NY)

Patricia Di Rito, MA, LAPC
Psychotherapist, Holy Family Counseling Center; Former Senior level Healthcare Executive

Regina Doman
Author & Editor, Owner, Chesterton Press

Wendy J. Dominguez
President & Co-Founder, Innovest Portfolio Solutions LLC (CO)

Patty Rice Doran
Assistant Professor of Special Education (MD)

Catherine Dowling MD
Hope Medical Clinic (MI)

Susan Doyle
Director of Religious Education, Blessed Sacrament Catholic Church (VA)

Jane A Driver, MD, MPH
Assistant Professor of Medicine, Harvard Medical School (MA)

Marguerite Duane MD, MHA, FAAFP
Medical Director, Spanish Catholic Center of Catholic Charities of DC,
Adjunct Associate Professor, Georgetown University (DC)

Marie D'Urso
Merchandising and Management (NJ)

Dawn Eden
Author (DC)

Katie Elrod
Montrose School (MA)

Elizabeth Enders RN
Labor and Delivery Nurse, Catholic Hospital (OH)

Mary Catherine Fairbairn
Certified Ecologist, Small Business Owner

Dr. Maria Fedoryk Ph.D.
Associate Professor Philosophy, Ave Maria University (FL)

Maureen Ferguson
Pre-Cana Educator (MD)

Jacquelyn Finn
Finn and Associates LLC (VA)

Mary Hallan FioRito, JD
Archdiocese of Chicago (IL)

Sister Jane Mary Firestone, R.S.M., M.D.
Vicar General of the Religious Sisters of Mercy of Alma
Chief of the Medical Staff of Sacred Heart Mercy Health Care Clinic

Simcha Fisher
Writer, Blogger (NH)

Mary T. Forr
High School Teacher, English and History, University of Notre Dame Alliance for
Catholic Education Service through Teaching Program (GA)
Angela Franks, Ph.D.
St. John's Seminary (MA)

Anna Franzonello JD (DC)

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Web Developer (TX)

Judy Gallagher, JD (DC)

Laura L. Garcia, PhD
Scholar in Residence, Department of Philosophy, Boston College (MA)

Maria L. Garcia
Realtor

Geri Garvey
Administrator, Irish Apostolate, USA (MD)

Anita M. Gaynor
Business Owne (PA)

Susan Gibbs
Owner, Gibbs Media Works, LLC (DC)

Sharon R. Gibbons
Bookkeeper, RCIA leader (IL)

Cynthia J. Gietman
Assistant Vice President of a Community Bank (WI)

Mary Catherine Gietman
Administrative Assistant, Fortune 500 Manufacturing Company (WI)

Cathleen Gillies
Institutional Bond Sales (CA)

Rossana Goni-Cuba
Editor Spanish Newspaper, Archdiocese of Denver (CO)

Katie Gorka
Executive Director of The Westminster Institute (VA)

Lorrie Gramer
President, National Association of Catholic Family Life Ministers,
Co-Director, Office of Family Life, Diocese of Rockford (IL)

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Former Elementary School Teacher (IN)

Amber Griggs
Photographer (NY)

Maren Grossman

M.A Philosophy, Catholic University of America (PA)

Ginger Gruters, MA, CAIA (American Citizen)
Educator (Seoul, South Korea)

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U.S. Military Officer (VA)

M. Katherine Hadley
Educator (VA)

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Partner, International Healthcare Solutions Group, LLC
Principal, Sovereign Global Solutions (VA)
Former Official, U.S. Dept. of Health and Human Services

Anna Halpine
CEO, FEMM Foundation (NY)

Gertrude Murphy Hanley, MD FACP.
Retired Pediatrician, Assistant Professor of Pediatrics (IL)

Ann Hartle Ph.D.
Professor of Philosophy, Emory University (GA)

Mary Rice Hasson, JD
Visiting Fellow, Ethics and Public Policy Center (DC)

Sharon Hefferan
Community Educator (IL)

Alice B. Heinzen
Natural Family Planning Coordinator, Diocese of La Crosse (WI)

Rosemary Henson
Interior Designer (PA)

Emily Hering
Legal Researcher (MN)

Liz Hildebrand
Former Lieutenant, U.S. Navy, and Parish Librarian (VA)

Helen Hull Hitchcock

President, Women for Faith & Family (MO)

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Executive Director, Pure Fashion Washington, D.C. (VA)

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Kathy Hofer
Catholic Schoolteacher (VA)

Catherine Horan
Campus Minister, Catholic Campus Ministry, George Mason University (VA)

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Director, Love and Fidelity Network (NJ)

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John Hartman and Associates, Fertility Care Center of Kissimmee (FL)

Katie Illingworth JD
General Counsel (OK)

Elise Italiano M.A.
Bioethics Teacher (DC)

Ms. April Jaure
Healthy Living Specialist/Natural Family Planning Coordinator
Elizabeth Ministry International (WI)

Paula M. Juelich, Ph.D.
Clinical Psychologist/Neuropsychologist, (MO)

Ever Johnson
Non-profit Executive Director (DC)

Dr. Sarah Lynn Jones, PhD

Katherine Jordan
Former Catholic Charities Caseworker,
Independent Sales Director (VA)

Lija Joseph MD
Lowell General Hospital, Adjunct at Boston University School of Medicine (MA)

Kristine Kalanges
Assistant Professor of Justice, Law and Society, American University (DC)

Elizabeth Kantor
Author and Editor, former Catholic School Teacher (VA)

Vanessa Garza Kelly
Former Director Anti-Trafficking in Persons Program
U.S. Dept. of Health and Human Services (VA)

Dr. Theresa Kenney
Associate Professor and Former Chair of the Dept. of English, University of Dallas (TX)

Mary M. Keys, Ph.D.
Associate Professor of Political Science, University of Notre Dame (IN)

Jennifer Kimball
Sine Calx Consulting (WA)

Elizabeth R. Kirk, J.D.
Visiting Scholar, University of Notre Dame Center for Ethics & Culture (IL)

Marylou Kirk
Former Catholic High School Employee (MD)

Anne Marie Klein
Ph.D. Literature Candidate, University of Dallas (TX)

Angela Knobel, Ph.D.
Associate Professor, Philosophy, Catholic University of America (DC)

Cecelia Klingele JD
Assistant Professor of Law (WI)

Claire Komives, Ph.D.
Associate Professor, Chemical & Materials Engineering (CA)

Irene M. Lagan
General Manager, Radio Station (MD)

Gerri Laird, Vice President
Cabrini Center for Catholic Health Care (VA)

Kathy Laird
Archdiocese of St Paul and Minneapolis (MN)

Sarah LaPierre
Program Director, Gabriel Project/Project Rachel (VA)

Dawn LaValle, Ph.D. candidate
Princeton University (NJ)

Lita Ledesma
Graphic Design Student, Corcoran College of Art + Design (DC)

Elizabeth A. Leone, J.D. (WI)

Mary Leisring
Director, Office of Black Catholic Ministry, Archdiocese of Denver (CO)

Carolyn R. Lemon
Vice President of Guadalupe Associates, Inc., and Production Editor at Ignatius Press
(CA)

Lisa Lickona
Speaker, Writer, Organic Farmer (NY)

Colette Lienhard
Director of the Catholic Education Center, LLC,
Author of the Revised Faith and Life series by Ignatius Press (VA)

Jennifer Lochner
Middle School Coordinator & Catechist
Youth for Life Coordinator, St. Peter Cathedral (MI)

Kathryn Jean Lopez
Editor-at-Large, National Review Online (NY)

Hallie Lord
Author/Editor of *Style, Sex, and Substance: 10 Catholic Women Consider the Things that Really Matter*, Business Owner

Gretchen Lorei
Exercise Physiologist and NFP Teacher (PA)

Janene Loughran, M.S.
President, St. Thomas Aquinas Homeschoolers, Rochester Area (NY)

Eileen Love M.T.S.
Teacher/Trainer, Endow (CO)

Marianne Luthin
Archdiocese of Boston (MA)

Robin Maas Ph.D.
Retired Professor and Academic Dean, The John Paul II Institute of Marriage and Family
Studies, Washington, DC; Director, The Women's Apostolate to Youth, The Diocese of
Arlington (VA)

Theresa Martin
Small business owner (MN)

Jennifer Matelis DDS
Dentist

Colbe Mazzarella JD (MA)

Therese McCann, M.A., L.P.
Licensed Psychologist

Christine Jurgens McCormick, Ph.D. (MA)

Joan McKamey
Managing Editor, Catholic Update (OH)

Margaret Harper McCarthy, Ph.D.
John Paul II Institute for Studies in Marriage and the Family (DC)

Monica McDaniel JD (NY)

Lori McGovern
Former Catholic Youth Minister/Campus Ministry Staff (MD)

Gigi V. McKinzie
Director, Sales Strategy Course Development (MO)

Monica Mehan
Project Manager, UCLA Health System (CA)

Silvia Marshall RN
Hospice Nurse (VA)

Mary Kay Minner
Volunteer Parish Secretary and Teacher, St Richard Parish (MO)

Susan Mire
Women's New Life Center (LA)

Rosalie Mirenda
President, Neumann University (PA)

Julie Miriovsky
Wedding Coordinator (MN)

Germana Mitchell
Community Volunteer (MD)

Lisa Mladinich
Author

Jennifer Roback Morse Ph.D.
Economist, Author and Professor (CA)

Marianne Evans Mount, Ph.D.
President, Catholic Distance University (VA)

Elise Mudd
Administrative Assistant (MD)

Maryrose Mudd
Accountant (MD)

Anne Marie Mullin
Vice President of Business Development & Marketing
Laboratory Alliance of Central New York, LLC (NY)

Tracy Murphy
Associate Director of Communications, Archdiocese of Denver (CO)

Anne Nash, Ph.D.
Book Editor, Translator (CA)

Mrs. Barbara Nield
Coordinator of Student Services, The Liturgical Institute, University of Saint Mary of the
Lake (IL)

Constance Nielsen, Ph.D. (WI)

Jeannemarie Nonnenmacher, R.N. (IL)

Yvonne Noggle
Executive Administrator (CO)

Sr. Marguerite O'Beirne, OSF
Vice President Mission and Ministry, Neumann University (PA)

Sheila O'Connor-Ambrose, Ph.D.
Author, Professor (NY)

Laura O'Neill, RN, BSN
School Nurse, Pope John Paul the Great Catholic High School (VA)

Mary T. Ortiz
Educator (DC)

Eve Osborne RN (OH)

Molly Oshatz, Ph.D.
Assistant Professor of History, San Francisco State University (CA)

Megan Paciaroni, Ph.D.
Assistant Professor, Department of Engineering Technology
Metropolitan State College of Denver (CO)

Catherine Pakaluk Ph.D.
Economics Professor, Ave Maria University (FL)

Joan Pascual
Administrative Assistant (NJ)

Lauren Patterson
Director of Religious Education, St. John Vianney Church (VT)

Sara Pecknold
Graduate Student and Teacher (VA)

Paula Pels JD (MD)

Sara Perla M.T.S.
Teacher, Theology, The Academy of the Holy Cross (MD)

Angela M. Pfister
Associate Director, Notre Dame Center for Ethics & Culture (IN)

Tara Seyfer Plymouth, BSN, RN, MTS

Terry Polakovic
Non-profit Corporation Director (CO)

Audrey Pollnow
Student, Princeton University; Campus Ministry Coordinator (NJ)

Charlotte M. Ponticelli
International Consultant and Adjunct Professor, Catholic University of America
Former Deputy Under Secretary for International Labor Affairs, US Department of Labor
Former Senior Coordinator for International Women's Issues, US Department of State
(DC)

Kerry Pound MD (MA)

Elaine Prescott-Austin RN IBCLC
Registered Nurse and Lactation Consultant (NH)

Christie Principe
Middle and Upper School Director (VA)

Katherine Quan
Graphic Designer, Small Business Owner (TX)

Alice Ramos, Ph.D.
Department of Philosophy, St. John's University (NY)

Joan S. Ratajczak, M.S.
Teacher, Catholic Montessori School (OH)

Octavia Ratiu
Medical Student
Assistant Director of Operations, The Witherspoon Institute (NJ)

Pearl Ramirez MD
Brown University School of Medicine (RI)

Mandy Reimer, M.D., MTS (AL)

Emily M. Reynolds
Acting Assistant Director, Wheatley Institution, Brigham Young University (UT)

Judith Gibbons Riordon JD (U.S. Citizen)
Attorney and educator (Misawa Air Base, Japan)
Ellen Romeiser JD

Rebecca Ryskind Teti
Columnist, Speaker (MD)

Ellen Rice
Documents Consultant (IN)

Lillie Romeiser
Youth Minister, Church of St. Mary (IL)

Mary Roque JD
Law Offices of Mary J. Roque (MA)

Grace Marie Rose
St. Pius X, Director of Youth Ministry (LA)

Julian C.S. Rose JD (NJ)

Lauren Roselli
Program Specialist, Dept. of Veterans Affairs (DC)

Brenda K. Royden
SpecTal/BAE Systems (VA)

Karen Ruberto
Chapter Coordinator, Legatus of St. Louis (MO)

Cathy Ruse JD (DC)

Shelly Saeman
Community Volunteer (CO)

Anne Marie St. Germain, CFCE
Certified FertilityCare Educator, Family Fertility Care Services (NH)

Zoe Saint Paul
Author, Life Coach (MD)

Alexandra Salazar
Catholic School Teacher (CO)

Sarah J. Santellano M.A., BSW
Inner City Catholic School Teacher (IN)

Cheryl Saggese
Parish Ministry Coordinator (NJ)

Deborah Savage Ph.D.
Professor of Philosophy and Pastoral Ministry, St. Paul Seminary School of Divinity (MN)

Daina Scheider
Sociologist, Potter (MD)

Jeanne Heffernan Schindler Ph.D.
Department of Humanities, Villanova University (PA)

Elizabeth M. Schlueter
Teacher (MI)

Sarah Dorff Schmid
Musician (OH)

Mary Schneider MSN, FNP-BC
Marquette University College of Nursing (WI)

Kathryn Schultz, RN, BSN, BS
St. Cloud Hospital (MN)

Karen Schultz
High School Science Teacher (VA)

Dr. Habil. Michele M. Schumacher
Département de théologie morale et d'éthique, Université de Fribourg (Switzerland)

Pam Schwartz
Former Public High School Teacher (VA)

Marie Seale, MPM
Office Director, Roman Catholic Diocese of Austin (TX)

Sarah Sehorn
Teacher (IN)

Renee Sewall
Senior Consultant, Analytics Division, Booz Allen Hamilton

Lisa Sharp M.A. Theology

Dr. Karen Shields
National Program Director, *Centesimus Annus Pro Pontifice*, and Chiropractic Physician,
Principal - Greenwich Chiropractic Office (CT)

Annette Short
Former school district employee; group leader at St. Joseph Catholic Parish (CA)

Lucia Silecchia JD
Professor of Law, Catholic University of America (DC)

Kara Slaughter JD
Government Relations Director, Nonprofit Policy Advocate (WI)

Paula Smaldone
Executive Assistant, Mount St. Mary's Seminary (MD)

Janet Smith Ph.D.
Professor of Ethics, Sacred Heart Minor Seminary (MI)

Laura Smith
Planning Commissioner (MI)

Marie Smith
Executive Director, Non-Profit (DC)

Leigh Fitzpatrick Snead M.A.
Formerly of the Notre Dame Center for Ethics and Culture (IN)

Kayla Snider
Office of Communications, Archdiocese of Denver (CO)

Christin Sommers
Chemistry Teacher, Christian Brothers Academy

Amy Speetjens JD
Ministry and Social Justice Volunteer (VA)

Daria Spezzano, Ph.D.
Post-doctoral Teaching Scholar, University of Notre Dame (IN)

Christina M. Strafaci, MA, PhD, MTS
Adjunct Faculty, Kino Institute, Adjunct Instructor, University of the Incarnate Word
(AZ)

Martha Staley
Dietitian (MO)

Anne Strahota
Former Vice President, Trade Association (MD)

Hilary Strahota
Communications Professional (MD)

Jane Steele
Government Contractor (VA)

Donna Steichen
Author (CA)

Mary Beth Style, M.S.W.
Gabriel Project (VA)

Laura M. Sullivan JD (MD)

Gretchen Sunko
Corporate Product Manager (IL)

Katherine Super
Executive Director, Yuma Study Center (AZ)

Lisa Toscani
Owner, Toscani Designs (PA)

Maureen E. Trabold,
Registered Pharmacist (PA)

Lisa D. Tuggle
President, Chattanooga Deanery Council of Catholic Women (TN)

Susanne Tyrrell
Teacher (NJ)

Dianne Vadney
Fertility Care Practitioner (WI)

Leticia Velasquez
Co-founder of Keep Infants with Down Syndrome; Author of *"A Special Mother is Born"*
(CT)

Eva Marie Wash
Teacher (NJ and Portugal)

Moirá M. Walsh, Ph.D.
Murray Hill Place, Inc. (NY)

Nina Walters RN, BSN (NY)

Jennifer Ward
Artist (OH)

Susan E. Wills, JD, LLM (MD)

Jaymie Stuart Wolfe
Newspaper Author and Columnist; Editor at Pauline Books & Media (MA)

Sarah Wolohan Watson
Small Business Owner/Home Stylist/Stager (MI)

Margaret Datiles Watts JD (MD)

Elizabeth Wisenberg (U.S. Citizen)
Dancer, Stuttgart Ballet

Joanne Welsh
School Communications Director, The George Washington University (DC)

Brooke Wenzel
Legal Research Associate (MD)

Margaret M. Whitehead
Retired Religious Educator
Current Member of the Board of Educational Guidance Institute (VA)

Meredith A. Wholley JD (NY)

Lynette Wilhelm
Association of Clinical Research Professionals (VA)

Leslie Wolfgang JD (CT)

Celia I. Wolff
Doctoral Candidate in Theology, Duke Divinity School (NC)

Wendy Wright,
Interim Executive Director, Catholic Family and Human Rights Institute (NY)

Lisa Wrona
Registered Dietitian (CO)

Cassie Yacovazzi, University of Missouri, History Dept.
Doctoral Candidate (MO)

Noreen Zaino MA Theology (CT)

Jessica Zittlow
Communications Strategist, Minnesota Catholic Conference (MN)

End of Alphabetical Order, beginning of chronological listing

Barbara Kalinowski
Attorney and President of Barbara A. Kalinowski, PLLC
Adjunct Professor at Thomas M. Cooley Law School (MI)

Tonia Hap Murphy
Associate Teaching Professor, University of Notre Dame (IN)

Lynn M. Hubert, Ed.D.
University of Notre Dame (IN)

Mary O'Callaghan, Ph.D.

Amy T. McInerney, J.D. (VA)

Mary K. Daly
Program Coordinator, University Life Initiatives, Institute for Church Life, University of
Notre Dame (IN)

Erika Tuttle, JD

Connie Marshner,
President, Connie Marshner & Associates (DC)

Cindy M. Northon, JD

Mia Reini
Compliance Director, Georgia Institute of Technology (GA)

Theresa Thomas
Author

Kelly C. Escorpizo, J.D.

Theresa Arico
Senior, University of Notre Dame (IN)

Kathryn Duda
Ph.D. Candidate, University of Chicago (IL)

Brigid C. Hansen, MSA

Barbara Nicolosi Harrington
Executive Director, The Galileo Forum and Studio, Azusa Pacific University (CA)

Jennifer Schmidt, M.A.

Licensed Clinical Professional Counselor, Counseling Center Assistant Director
Benedictine College (KS)

Beth Bubik
University of Notre Dame, Life Initiatives, Alumni Association (IL)

Kimberly C. Shankman
Dean of the College, Benedictine College (KS)

Nellie Edwards
Artist, Graphic Designer, and Small-Business Owner

Ruth Mercado
Biotech Marketing Director (CA)

Ellen Reilander, J.D. (VA)

Patricia R. Bart, Ph.D.
Assistant Professor of English Literature (MI)
Jocelin Sisto, MA, MMS, PA-C
Adventist Health Partners

Joanne Sirtoli, RN, BSN

Bridget L. Fay JD
Lawyer and Political Activist

Cecilia Aranda Frantz Ph.D.
Retired Psychologist (VA)

Doris Cerna
Teacher (CA)

Monica Herber, RN
Young Adult Minister, Frassati Fellowship (NY)

Jennifer Heil
Director of Provider Relations, St Helena Napa Valley Hospital. (CA)

Katrina Ten Eyck
Ph.D. Candidate, John Paul II Institute (DC)

Mary Dugan
Retired Montgomery County School Teacher (MD)

Monica Kolf
Teacher (VA)

Emily Stimpson
Author and Contributing Editor (OH)

Melissa Sloan
Catholic Elementary School Teacher (MD)

Johanne S. Dunn, M.D
Family Physician (FL)

Judy Hutchinson
Assistant Director, Office of International Studies (IN)

Lorraine Fusaro
The Sister Marie de Mandat-Grancey Foundation (NY)

Maria Santo
National Park Service Manager.

Carol Hess CPA
Former CFO of Atlantic Lift Truck, Inc. (VA)

Laura Burke Ph.D.
Former Associate Professor Industrial and Manufacturing Systems Engineering, Lehigh University

Julia Grella O'Connell, D.M.A. (NY)

Laura Hale MD

Denise Seeger
Educator (IN)

Kelli J. Drury R.Ph.

Lynn Mary Wilson, M.S. Ed. (NY)

Holly Farnham RN (MA)

Cassandra D'Urso
Certified Social Worker (NJ)

Susan E. Hanssen Ph.D.
Associate Professor of History, University of Dallas (TX)

Joan Renee Cloutier

Doctoral Student, Syracuse University (NY)

Nora C, Germain
K-12 Guidance Counselor (NY)

Dr. Melinda Nielsen, Ph.D.
Green Scholars Initiative Post-Doctoral Fellow
Institute for the Study of Religion, Baylor University (TX)

Kristen Weidner
Graphic Designer (DC)

Madeleine Laird RN (VA)

Tatiana Lozano
Director, Loudoun Vigil for Life (VA)

Melissa Moschella
Doctoral Candidate, Princeton University (NJ)

Marcelle Devine
Controller (NY)

Valerie E Plaus, M.S., ABD
Future Assistant Professor, St. Gregory's University (OK)

Kristi Kloenne
Teacher Assistant, St Vincent de Paul School ()

Christine Potocki
Human Resources Business Partner for Major Global Financial Institution (NY)

Maria Schultz, MTS
Chief Marketing Officer, Providence Resources, LLC (NY)

Kathryn Weber
Certified Teacher, grades K-8

Julie Maimone
Teacher, Religion and Latin (VA)

Maria del Carmen Diez Peña
Catechist, Christ The Good Shepherd ()

Lydia LoCoco

Director, The Nazareth Project for Marriage and Family Formation, Archdiocese of Milwaukee (WI)

Anna F. Haine,
Choir Director-St. Mary's Church (IL)

Denise Mackura JD (OH)

Bernadette Moughamer
Retired Human Resources Director and Office Manager

Barbara L. Meier, BSN, RN, FCP
Operating Room Nurse, Family Practice and Fertility Care Professional (MA)

Mrs. Melissa Manaker
Middle School Teacher, St. Rita School (VA)

Dr. Caitlin McLaughlin-Raiger DDS
Dentist (FL)

Kathleen McGarry
President, Murray Hill Institute (TX)

Lisa Kelly RN

Janet Deken
Vice President, Office Manager (MO)

Jean Golden-Tevald, DO, CFCMC, FCP
Family Physician, Past President of the American Academy of Fertility Care Professionals (NJ)

Ramona Carter
Small Business Owner, Birdhouse Studio LLC (VA)
Debra Esolen
Special Lecturer, School of Continuing Education, Providence College (RI)

Joanne C. Craig, M.A.
Former Intelligence Analyst
Catholic High School Teacher (MI)

Mary Lynne Duncan
Occupational Therapist

Kim Viti Fiorentino JD (MD)

Ludmila Kovar
High School French Teacher (VA)

Maria Blazeovich
Coordinator of Saint Louis' Catechesis of the Good Shepherd Montessori Atrium

Kathy Schickel
Director of Operations, Our Daily Bread (OH)

Jessie Stephenson RN (FL)

Aleksandra Doran JD

Karen Murphy PT (MA)

Heather L. Mehigan JD (MD)

Anne Sayre
Certified Credit Counselor (PA)

Christina Hanson Maier
College Lecturer (MI)

Maria Cecilia Marquez
Educator

Marijean Srubar
Catholic School Teacher (TX)

Mara Gilbert
Registered Nurse (MD)

Leslie Smyth
Retired Health Care Administration (CA)

Christina Hanson Maier
College Lecturer (MI)

Laura T. Rahe JD (MI)

Anne Valenza RN FCP
Nurse and Creighton Fertility Care Practitioner (MO)

Therese Rodriguez, RN
Fertility Care Practitioner (MD)

Risa Stalboerger, M.T.S.
Small Business Owner

Mary Lynn Linzmeyer, MS
Director, Birthright of Loudoun County (VA)

Amanda N. Perales MA
BEI Basic Interpreter (TX)

Dr. Francine Orr
Optometrist (VA)

Melanie Baker
Administrative Assistant, Catholic Retreat Center (MD)

Carolyn Flaherty RN, BSN

Elizabeth Fisher)
Teacher (MD)

Maureen Walther (Researcher)

Suzette Norris
Independent Business Owner (NY)

Kristina A. Clark
Former Employee, Catholic Law School

Christine West
Artist (TX)

Irma T. Guerra. M.Ed.
Teacher (TX)

Darya Villhauer
Catholic School Teacher (VA)

Elizabeth Whitmore
Project Manager (IN)

Sister Mara Lester, R.S.M.
Fourth Year Medical Student, The George Washington University (DC)
Linda Wieland
Registered Dietitian, Registered Nurse

Regina M Hoffman

Teacher

Mary Rose Somarriba
Chief Operating Officer, Catholic Information Center (DC)

Theresa Talavera
Former Catholic School Teacher (VA)

Mary Vigil
Nurse, Public Health Professional (DC)

Marie Valeski
Volunteer Chairwoman (VA)

Emily Porres MCP

Elena Porres: Cosmetologist
Former Counselor at a Catholic Mental Health Clinic
Former Employee of a Catholic hospital, a Catholic university, and other Catholic organizations

Kathryn H Schmid
Retired Schoolteacher and Part-time Librarian, Our Lady of the Holy Spirit Center (OH)

Melissa Gordon Steenson
Former Associate Editor, CUA Magazine, The Catholic University of America (DC)

Kathleen Musslewhite, J.D.

Ester Ramirez-Cepeda, M.D.,FAAP
Pediatrician (CT)

Sister Mary Patrice Ahearn, R.S.M., M.S., Psy.D.
Candidate, Institute for the Psychological Sciences (VA)

Patricia Murphy, PhD
Assistant Professor of Moral Theology, St. Augustine's Seminary in Toronto

Eden Casteel
Adjunct Voice Faculty, Salve Regina University (RI)

Carol Parowski, Retired Pastoral Counselor, Co-director Haven Ministry to the Ministers (PA)

Laura Klucik Straub, BA, MA
Administrator, College Instructor (VA)

Karleen B. Goerke
Vice President of Nursing (CO)

Kathleen Murphy
Teacher, Community Volunteer

Courtney Poulsen
Teacher (TX)

Lucy E. Moye, Ph.D.
Associate Professor of History (MI)

Kate Gallagher
Executive Lobbying Assistant

Anne Clarke
Realtor (NJ)

Sister Marie-Therese Swiezynski, FSGM
Music Teacher, St. Mary's School (IL)

Marika Donders
Campus Minister, Newman Center for Keene State College (NH)

Rachel Ronnow
Teacher (VA)

Rebecca Neeson
Former Employee, St. Elizabeth Ann Seton Catholic School in Houston, (TX)

Elizabeth Robinson RN
Artist, Registered Nurse (OH)

Mary Radford
Operations Manager, American Philanthropic (PA)

Carly O'Connor
Graduate Student, Theology (IN)

Elaine Kady, MTS
Teacher, small business owner (PA)

Marie Tocci
Assistant Teacher at a Christian Day Care

Sister Teresa Mary Kozlovski, R.S.M.
Pre-med Student at Michigan State University (MI)

Christine M. Zainer, MD
Assistant Professor of Anesthesiology, Medical College of Wisconsin (Ret. Dis.) (WI)

Linda McManus RN (MA)

Margaret Jorgensen Turano, MS, CBC, ABM, IBCLC
Board Certified Lactation Consultant, Pregnancy and Child Birth Educator,
Family Planning Consultant (CA)

Alicia Joy M. Parowski
Infant Educator; Previously Employee of Catholic Schools, Diocese and Parish (VA)

Maureen Teller
Former Catholic school teacher (OH)

Elizabeth C Gilges (NY)

Susan J. Gay JD (MA)

Madeline Gillen
Student, University of Notre Dame (IN)

Katie Hibey
Graphic Designer

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*EWTN v. Sebelius**Belmont Abbey College v. Sebelius**Colorado Christian University v. Sebelius*

FAQs: Becket Fund's Lawsuits Against HHS

(1) How did the government mandate arise?

As part of universal health insurance reform passed in 2010, all group health plans must now provide—at no cost to the recipient—certain “preventive services.” In September 2010, the government announced a general list of “preventive services,” but asked the Institute of Medicine (IOM) to recommend a list of “preventive services for women.” Religious groups urged the IOM to not include sterilization and contraceptive services in the mandate. Undeterred, the IOM made recommendations that included the two services, and the government adopted them in the summer of 2011.

(2) What does the government mandate require?

The government mandate requires group health plans to pay for several preventive services for women: annual well-woman visits; *screening* for gestational diabetes, HPV, HIV, and domestic violence; and *counseling* for sexually transmitted infections, HIV and domestic violence, as well as breastfeeding support and supplies. None of these nine services are morally troublesome for our clients—Belmont Abbey College, Colorado Christian University, or EWTN.

It is the tenth government-mandated service that puts them in a moral bind. It requires: “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”

(3) What's so troubling about FDA-approved contraceptives?

Most serious is the fact that at least one of the approved contraceptives can cause an abortion. Abortions are a serious violation of Belmont Abbey's, CCU's, and EWTN's faiths. Although the government has publicly stated that the mandate does

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“not include abortifacient drugs,” the text of the regulation itself contains no such guarantee. The “FDA-approved contraceptives” covered by the mandate include “emergency contraception” drugs. One of them is “*ella*” (ulipristal)—which is a close analogue to the abortion drug RU-486 (mifepristone)—and can cause an abortion when taken to avoid pregnancy. Thus, Belmont Abbey, CCU, and EWTN believe that providing coverage for *ella* would be a serious violation of their faiths. The government should not trample on sincere religious convictions, even if—especially if—they are unpopular.

(4) How is the Becket Fund fighting this mandate?

The Becket Fund for Religious Liberty has brought three legal challenges to this mandate. The Becket Fund currently represents Belmont Abbey College, a small Catholic liberal arts college located in Belmont, North Carolina; Colorado Christian University, an interdenominational Christian liberal arts university located near Denver, Colorado; and EWTN, a global Catholic media network headquartered in Irondale, Alabama. The Becket Fund is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious faiths. What is at issue in these cases is the protection of the right of conscience.

(5) What is the right of conscience?

James Madison famously said that conscience is “the most sacred of all property.” Conscience—particularly in the religious sense—is the right all of us have not to be forced by the government to violate our religion. It is a right that we have always recognized in this country—from religious exemptions for Quakers who could not fight in the military, to religious exemptions for those who could not work on certain days of the week, to religious exemptions for those who could not pledge allegiance to the flag, to religious exemptions for corrections workers who could not be involved in capital punishment, to religious exemptions for health-care personnel who could not be involved in abortions. It is a bedrock principle of our Constitution, our history, and our basic liberty.

(6) Isn’t this just a Catholic issue?

No. Many religious organizations are opposed to the government-mandated drugs, devices, and procedures aimed at forcing them to provide sterilization,

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contraception, abortion and related education and counseling to their employees and/or students. Although Belmont Abbey and EWTN are Catholic institutions, Colorado Christian is an evangelical university, which shows that this is not just a Catholic issue. And the mandate has been sharply criticized from across the political spectrum, and from religious leaders of a variety of faiths.

(7) Is there precedent for the government requiring a broad mandate for contraception and sterilization?

No. The government mandate is unprecedented in federal law, and broader than any state contraception mandate to date. Never has federal law required private health plans to cover sterilization or contraception. And as compared to State mandates, the government mandate is the most expansive ever enacted. At least 22 States have no contraception mandate at all. Of the 28 States that have some mandate, none require contraception coverage in self-insured and ERISA plans, only two States include contraception in plans that have no prescription drug coverage, and only one State specifies sterilization.

(8) Is there a religious exemption from the mandate, and who qualifies under the exemption?

There is a “religious employer” exemption from the mandate, but it is extremely narrow and will, in practice, cover very few religious employers. The exemption may cover certain churches and religious orders (that are tax-exempt and not required to file a tax return under certain IRS provisions) that inculcate religious values “as [their] purpose” and which *primarily employ and serve* those who share their faith. Many religious organizations—including hospitals, charitable service organizations, and schools—cannot meet this definition. They would be forced to choose between covering drugs and services contrary to their religious beliefs or cease to offer health plans to their employees and incur substantial fines.

(9) What are the penalties if religious employers don’t fall within the exemption and don’t comply with the mandate?

If Belmont Abbey, CCU, and EWTN do not violate their consciences and refuse to furnish sterilization, contraception, abortion drugs, and related education and counseling against their teachings, they will be forced to stop providing health

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insurance altogether and will be issued a penalty. Without a change in the rules, Belmont Abbey could be forced to pay more than \$300,000; CCU more than \$500,000; and EWTN more than \$600,000 (with penalties increasing in future years) for the “privilege” of not underwriting services they believe are immoral.

And the burden does not end there. Without employer health plans, many religious institutions would find themselves at a serious competitive disadvantage vis-à-vis other employers. Some religious institutions could find that without a group health plan, they could not attract sufficient staff and would be forced to close their operations altogether.

(10) Is there precedent for such a narrow exemption?

Again, the answer is no. Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health care sector. For example, for 25 years, Congress has protected religious institutions from discrimination (based on their adherence to natural family planning) in foreign aid grant applications. For 12 years, Congress has both exempted religious health plans from the contraception mandate in the Federal Employees’ Health Benefit Program and protected individuals covered under other health plans from discrimination based on their refusal to dispense contraception due to religious belief.

On the State level, the federal mandate is unquestionably broader in scope and narrower in its exemption than *all* of the 28 State’s comparable laws. Almost half the States do not have a state contraception mandate at all, so there is no need for an exemption. Of the States that have some sort of state contraception mandate (all less sweeping than the federal one here), 19 provide an exemption. Of those 19 States with an exemption, only three (California, New York, and Oregon) define the exemption nearly as narrowly as the federal one, although the federal exemption is still worse because of the regulation’s discretionary language that the government “may” grant an exemption. Moreover, religious organizations in States with a mandate—even those where there is no express exemption—may opt out by simply self-insuring, dropping prescription drug coverage, or offering ERISA plans. The federal mandate permits none of these alternatives, and therefore is less protective of religious liberty than any of the States’ policies.

FREQUENTLY ASKED QUESTIONS

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*EWTN v. Sebelius**Belmont Abbey College v. Sebelius**Colorado Christian University v. Sebelius***(11) Why is this particular exemption so troubling?**

Not even Jesus' ministry would qualify for this exemption, because He fed, healed, served, and taught non-Christians. The government should not punish religious organizations today that likewise serve the general public. Churches and other religious organizations have a long history of feeding the hungry, educating children, and providing much-needed social services to those who need them most. Under the government's mandate, religious organizations can follow their beliefs as long as they only serve their own members. But when they start to do the good work of serving the community, the government can restrict them. This is extremely troubling, for without these religious organizations, many of the poor and needy would go without services altogether.

(12) Why won't any exemption from the mandate harm women and women's health?

Including a robust exemption protecting the deeply held religious beliefs of Belmont Abbey, CCU, EWTN and others like them would not harm women or women's health. The evidence is clear. Nine out of ten employer-based insurance plans in the United States already cover contraception. The government admits these services are widely available in "community health centers, public clinics, and hospitals with income-based support." In fact, the federal government already spends hundreds of millions of dollars a year funding free or nearly free family planning services under its Title X program.

Therefore, the issue is not really about access to contraception but rather about who pays for it. The government's answer is to force religious organizations to pay for services against their deeply held religious beliefs. Of course, if the government really believed free provision of these drugs and services were crucially important for women's health, there are many other alternatives it could pursue to accomplish that goal. Instead, it is trying to force a small group of religious objectors into submission with huge fines and penalties to make them pay for these drugs and services.

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(13) If the exemption covers only religious employers, then are religious colleges and universities required to provide free contraception to their students?

Yes. Student health plans are indeed included within the government mandate (with some narrow exceptions that don't apply to Belmont Abbey or CCU). And there is no exemption from the mandate for religious colleges and universities that offer health care plans to their students. Even if Belmont Abbey and CCU were to qualify for the "religious employer" exemption, they would still be required by law to pay for sterilization, contraception, and abortion drugs for students through their student health care plans.

There is something quite unsettling about the government mandating that—while a university pastor may preach to his student congregants on Sunday that pre-marital sexual intercourse, contraception, and abortion are all immoral—on Monday, the university has to pay for those students to be educated, counseled, and provided with drugs, devices and procedures in direct violation of those teachings.

(14) Are the legal claims different between the three parties?

The three lawsuits challenge the government mandate as a violation of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedures Act (APA).

Under the First Amendment, we argue that the mandate (1) is neither neutral nor generally applicable and imposes a substantial burden in violation of the Free Exercise Clause, (2) intentionally discriminates against religious beliefs in violation of the Free Exercise Clause, (3) imposes its requirements on some religions but not on others in violation of the Free Exercise Clause, (4) prefers some denominations over others and places a selective burden on our clients in violation of the Establishment Clause, (5) compels our clients to provide counseling and education on subjects that violate their religious beliefs in violation of the Free Speech Clause, (6) unconstitutionally forces our clients to associate with actions and beliefs that are against their religious convictions, and (7) gives a government agency the "unbridled discretion" to decide which organizations can be exempted from the mandate and thus have their First Amendment rights accommodated.

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We also argue that the mandate violates RFRA—a federal civil rights statute sponsored by Ted Kennedy and signed into law by President Clinton—because the mandate places a substantial burden on our clients' religious exercise without a compelling government interest that is narrowly tailored to meet that interest.

The lawsuits seek declaratory judgments which are statements from the court that the mandate and the enforcement of it against our clients violate the First Amendment, RFRA, or the APA, and an order prohibiting the government from enforcing the mandate against our clients and any other religious group that cannot pay for these drugs and services because of their religious convictions.

(15) What happened on January 20, 2012?

The Obama Administration announced in a statement on January 20, 2012, that they were taking religious principles very seriously—by giving religious institutions an extra year to get over them. The Administration announced that it would not expand the exemption from its abortion-drug mandate to include religious schools, colleges, hospitals, and charitable service organizations. Instead, the Administration merely extended the deadline for religious groups who do not already fall within the existing narrow exemption so that they will have one more year to comply or drop health care insurance coverage for their employees altogether and incur a hefty fine.

(16) What was the so-called “compromise” announced by the President on February 10, 2012?

After a firestorm of opposition from across the political and religious spectrum arose following the Administration's January announcement, the President held a press conference on February 10, 2012, to announce his so-called “compromise.” In fact, all the Administration did was finalize the August 2011 mandate—leaving intact all of its provisions and making no changes to the exemption, the narrowest protection for conscience known in federal or state law.

For non-exempt religious organizations, the president made two promises. First, enforcement of the mandate would be delayed by a year so that they could get their houses in order to comply with the mandate. And second, the president promised that in a rule yet to be developed, insurance companies—not the religious

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employers themselves—would be forced to pay for the abortion-inducing drugs, sterilization, and contraception.

The problems with this so-called “compromise” are many. First, anyone who understands economics knows that insurance companies will not offer these services for free. Religious employers would still ultimately be paying for these services against their conscience, with the costs spread through higher insurance premiums for their employees. Some argue that insurance companies would cover these services for free because it helps their bottom line, but if that were the case, why haven’t insurance companies already done it?

Second, hundreds if not thousands of religious organizations have self-insured plans, where the religious organization is the “insurance company.” The new “compromise” offers them nothing. Ironically, many religious organizations chose self-insurance to avoid state contraception mandates.

Third, it’s still unclear whether, even under the new proposal, non-exempt religious organizations (for-profit organizations, individuals, or non-denominational organizations) will have their religious liberty protected at all. The president’s plan only reinforces how the government’s policy intends to treat different religious groups and individuals differently which is unconstitutional.

(17) Does the President’s announcement change your lawsuits?

No. We are full steam ahead.

(18) Don’t religious employers have to comply with this mandate if they receive federal funds?

Proponents of the mandate argue that religious groups must provide these services—whatever their religious convictions—because they receive federal funding. Not so. It would be one thing if the mandate required religious organizations to choose between their convictions and federal funding. But this mandate is much worse: It applies with full force to every religious school, hospital, and soup kitchen, even if every single dollar of funding comes from private donations. It is simply a red herring to say that the mandate is somehow tied to the receipt of federal funding.

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(19) Doesn't the Equal Employment Opportunity Commission's opinion in 2000—stating that denying women contraception is illegal—govern this issue?

No. The only federal court of appeals to rule on the issue has held that the 2000 EEOC opinion was unpersuasive and lacked the force of law. The U.S. Court of Appeals for the Eighth Circuit held that Title VII, as amended by the Pregnancy Discrimination Act (PDA), did *not* require employers to provide contraception to female employees. It rejected the reasoning of the 2000 EEOC opinion that interpreted the PDA as requiring employers to cover prescription contraception for women if they cover other prescription drugs and devices.

Indeed, if the federal government thought that the EEOC opinion already required employers to provide contraception, why would it have pushed the mandate through as part of the universal health reform law? The fact of the matter is that the EEOC opinion requires nothing.

(20) What is the relationship between these lawsuits challenging the contraception mandate and the Supreme Court case involving the individual healthcare mandate?

The Supreme Court agreed to review a challenge to the individual mandate, a separate provision of the universal health insurance reform law that requires individuals to obtain healthcare by 2014. The Becket Fund lawsuits involve another mandate under that law that requires all group health plans to provide contraception, sterilization, abortion-inducing drugs.

Even though these lawsuits involve two different mandates, they stem from a similar problem with the healthcare reform law—Congress over-reaching to impose a conformist one-size-fits-all solution to a perceived societal problem. It should come as no surprise that when Congress imposes mandates like these, it threatens individual liberty, generally, and religious liberty, specifically. The Founders knew this and structured our nation's government such that Congress would have limited powers for this reason, so that Congress could not restrict liberty in these ways.

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(21) What happens to the rest of the healthcare law (including the contraception mandate) if the Supreme Court strikes down the individual mandate as unconstitutional?

It depends. If the Supreme Court strikes down the individual mandate as unconstitutional, the Court would still need to decide a second question: whether the rest of the healthcare reform law is sufficiently separate from the individual mandate that it can remain good law. The Court could decide that the rest of the healthcare reform law can remain in effect because it can function without the individual mandate. Or the Court could decide that the rest of the law must also be struck down because it is so closely tied to the individual mandate that the rest of the law cannot work absent the unconstitutional individual mandate.



UNACCEPTABLE

FEBRUARY 15, 2012

The Obama administration has offered what it has styled as an “accommodation” for religious institutions in the dispute over the HHS mandate for coverage (without cost sharing) of abortion-inducing drugs, sterilization, and contraception. The administration will now require that all insurance plans cover (“cost free”) these same products and services. Once a religiously-affiliated (or believing individual) employer purchases insurance (as it must, by law), the insurance company will then contact the insured employees to advise them that the terms of the policy include coverage for these objectionable things.

This so-called “accommodation” changes nothing of moral substance and fails to remove the assault on religious liberty and the rights of conscience which gave rise to the controversy. It is certainly no compromise. The reason for the original bipartisan uproar was the administration’s insistence that religious employers, be they institutions or individuals, provide insurance that covered services they regard as gravely immoral and unjust. Under the new rule, the government still coerces religious institutions and individuals to purchase insurance policies that include the very same services.

It is no answer to respond that the religious employers are not “paying” for this aspect of the insurance coverage. For one thing, it is unrealistic to suggest that insurance companies will not pass the costs of these additional services on to the purchasers. More importantly, abortion-drugs, sterilizations, and contraceptives are a necessary feature of the policy purchased by the religious institution or believing individual. They will only be made available to those who are insured under such policy, *by virtue of the terms of the policy*.

It is morally obtuse for the administration to suggest (as it does) that this is a meaningful accommodation of religious liberty because the insurance company will be the one to inform the employee that she is entitled to the embryo-destroying “five day after pill” pursuant to the insurance contract purchased by the religious employer. It does not matter *who* explains the terms of the policy purchased by the religiously affiliated or observant employer. What matters is what services the policy covers.

The simple fact is that the Obama administration is compelling religious people and institutions who are employers to purchase a health insurance contract that provides abortion-inducing drugs, contraception, and sterilization. This is a grave violation of religious freedom and cannot stand. It is an insult to the intelligence of Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, and other people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick.

Finally, it bears noting that by sustaining the original narrow exemptions for churches, auxiliaries, and religious orders, the administration has effectively admitted that the new policy

(like the old one) amounts to a grave infringement on religious liberty. The administration still fails to understand that institutions that employ and serve others of different or no faith are still engaged in a religious mission and, as such, enjoy the protections of the First Amendment.

Signed:

John Garvey
President, The Catholic University of America

Mary Ann Glendon
Learned Hand Professor of Law, Harvard University

Robert P. George
McCormick Professor of Jurisprudence, Princeton University

O. Carter Snead
Professor of Law, University of Notre Dame

Yuval Levin
Hertog Fellow, Ethics and Public Policy Center

Religious Leaders

Archbishop Joseph E. Kurtz, D.D.
Archbishop of Louisville

Archbishop Charles J. Chaput, OFM
Archbishop of Philadelphia

Chuck Colson
Founder, Prison Fellowship Ministries

Dr. Paige Patterson
Former President, Southern Baptist Convention
President, Southwestern Baptist Theological Seminary

Reverend Frederick R. Parke
Pastor, Assumption Catholic Church

Mother Agnes Mary Donovan, SV
Superior General, Sisters of Life

[Note: Affiliations provided for identification purposes only]

University and College Professors

Jean Bethke Elshtain

Laura Spelman Rockefeller Professor of Social and Political Ethics in the Divinity School,
Department of Political Science and the Committee on International Relations,
The University of Chicago

Michael W. McConnell
Richard and Frances Mallory Professor of Law & Director, Stanford Constitutional Law Center,
Stanford University

Rabbi David Novak
J. Richard and Dorothy Shiff Chair in Jewish Studies Professor of Religion and Philosophy
University of Toronto
President, Union for Traditional Judaism

Thomas L. Pangle
Joe R. Long Endowed Chair in Democratic Studies
Department of Government
University of Texas at Austin

Lorraine Pangle
Professor of Government
Co-Director, Thomas Jefferson Center for the Study of Core Texts and Ideas
University of Texas at Austin

Donald Landry, Samuel Bard Professor of Medicine & Chair, Department of Medicine &
Physician-in-Chief, Columbia University

Thomas F. Farr
Director of the Religious Freedom Project, Georgetown University

Margaret F. Brinig
Fritz Duda Family Chair in Law
Notre Dame Law School

Daniel Costello
Bettex Chair Professor Emeritus
College of Engineering, University of Notre Dame

Ann W. Astell
Professor of Theology, University of Notre Dame

Robert M. Gimello
Research Professor of Theology and of East Asian Languages and Cultures
University of Notre Dame

Tom Pratt
Dept of EE, College of Engineering
University of Notre Dame

David W. Fagerberg
Associate Professor

Department of Theology
University of Notre Dame

Peter M. Kogge
Ted McCourtney Prof. of Computer Science & Engineering Concurrent Professor of Electrical
Engineering, Univ. of Notre Dame

Michael J. Crowe
Cavanaugh Professor Emeritus
Program of Liberal Studies
University of Notre Dame

Msgr Michael Heintz, PhD
Director, Master of Divinity Program
Department of Theology
University of Notre Dame

John Uhran
Emeritus Professor, Computer Science and Engineering
University of Notre Dame

Thomas A. Gresik
Department of Economics
University of Notre Dame

W. David Solomon
Associate Professor of Philosophy
University of Notre Dame

Dr. Kirk Doran
Assistant Professor of Economics
University of Notre Dame

Tonia Hap Murphy
Mendoza Pre-Law Advisor
Associate Teaching Professor
University of Notre Dame

Jim A Seida
Viola D. Hank Associate Professor of Accountancy
Mendoza College of Business
University of Notre Dame

Jeffrey J. Burks
Assistant Professor of Accountancy
University of Notre Dame

Adrian J. Reimers
Adjunct Assistant Professor
University of Notre Dame

Patrick Griffin
Department Chair and Madden-Hennebry Professor of History, University of Notre Dame

Richard W. Garnett
Associate Dean and Professor of Law, University of Notre Dame

John Cavadini
Director, Institute for Church Life and Associate Professor of Theology,
University of Notre Dame

Christian Smith
William R. Kenan Professor of Sociology & Director, Center for the Study of Religion and
Society, University of Notre Dame

Gary Anderson
Hesburgh Professor of Theology, University of Notre Dame

Harindra Joseph F. Fernando
Wayne and Diana Murdy Endowed Professor of Engineering and Geosciences,
University of Notre Dame

William N. Evans
Keough-Hesburgh Professor of Economics, University of Notre Dame

Alfred J. Freddoso
John and Jean Oesterle Professor of Thomistic Studies
Concurrent Professor of Law
Philosophy Department, University of Notre Dame

M. Katherine Tillman
Professor Emerita, Program of Liberal Studies, University of Notre Dame

Walter Nicgorski
Professor, Program of Liberal Studies, University of Notre Dame

Philip Bess
Director of Graduate Studies and Professor of Architecture, University of Notre Dame

Paolo Carozza
Professor of Law and Director, Center for Civil and Human Rights, University of Notre Dame

John F. Gaski
Associate Professor of Marketing, University of Notre Dame

Duncan G. Stroik
Associate Professor of Architecture, University of Notre Dame

Rev. Wilson D. Miscamble, C.S.C.
Professor of History, University of Notre Dame

Kenneth Garcia, Ph.D.
Associate Director, Institute for Scholarship in the Liberal Arts, University of Notre Dame

Gerard V. Bradley
Professor of Law, University of Notre Dame

Amy Barrett
Professor of Law, University of Notre Dame

Sean Kelsey
Director of Graduate Studies and Associate Professor of Philosophy, University of Notre Dame

Gabriel Said Reynolds
Tisch Family Associate Professor of Islamic Studies and Theology
University of Notre Dame

William K. Kelley
Associate Professor of Law, University of Notre Dame

David O'Connor
Associate Professor of Philosophy and Concurrent Associate Professor of Classics,
University of Notre Dame

Joseph Kaboski
David F. and Erin M. Seng Associate Professor of Economics, University of Notre Dame

Vincent Phillip Muñoz
Tocqueville Associate Professor of Political Science
Concurrent Associate Professor of Law
Department of Political Science, University of Notre Dame

John O'Callaghan
Director, Jacques Maritain Center & Associate Professor of Philosophy,
University of Notre Dame

Daniel Philpott
Associate Professor of Political Science, University of Notre Dame

Mary M. Keys
Associate Professor of Political Science, University of Notre Dame

Eric Sims
Assistant Professor of Economics, University of Notre Dame

Mike Pries
Associate Professor of Economics, University of Notre Dame

Edward Maginn
Professor of Chemical and Biomolecular Engineering

Associate Dean for Academic Programs, The Graduate School
University of Notre Dame

Angela M. Pfister, J.D.
Associate Director, Notre Dame Center for Ethics and Culture
Concurrent Instructor, Mendoza College of Business
University of Notre Dame

Stephen F. Smith
Professor of Law
University of Notre Dame

Phillip R. Sloan
Professor Emeritus, Program of Liberal Studies and Graduate Program in History and
Philosophy of Science, University of Notre Dame

Richard A. Lamanna
Emeritus Professor of Sociology
University of Notre Dame

Fr. Ronald M. Vierling
Rector, Morrissey Manor
University of Notre Dame

Rev. William R. Dailey, CSC
Visiting Associate Professor
Notre Dame Law School

Thomas A. Stapleford
Associate Professor, Program of Liberal Studies
University of Notre Dame

Thomas P. Flint
Professor of Philosophy
University of Notre Dame

Daniel J. Costello, Jr.
Bettex Prof. of Elec. Engr., Emeritus
University of Notre Dame

Nicole Stelle Garnett
Professor of Law
University of Notre Dame

James O'Brien
Associate Teaching Professor
University of Notre Dame

Matthew J. Barrett
Professor of Law

Notre Dame Law School

John B. Londregan
Professor of Politics and Public Affairs, Princeton University

Patrick McKinley Brennan
John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University

Mark C. Murphy
McDevitt Professor of Religious Philosophy, Georgetown University

Steven Smith
Class of 1975 Endowed Professor of Law, University of San Diego

Larry Alexander
Warren Distinguished Professor of Law, University of San Diego

David A. Skeel
S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania

W. Cole Durham, Jr.
Susa Young Gates University Professor of Law and
Director, International Center for Law and Religion Studies
J. Reuben Clark Law School, Brigham Young University

Lynn D. Wardle
Bruce C. Hafen Professor of Law, Brigham Young University Law School

Randy Beck
Justice Thomas O. Marshall Chair of Constitutional Law, University of Georgia School of Law

Prof. Alan Mittleman
Professor of Modern Jewish Thought
The Jewish Theological Seminary

Rabbi Meir Y. Soloveichik
Director, Straus Center for Torah and Western Thought, Yeshiva University

Gilbert Meilaender
Duesenberg Professor in Christian Ethics, Valparaiso University

Russell D. Moore, Ph.D.
Dean and Professor of Christian Theology and Ethics,
The Southern Baptist Theological Seminary

J. Budziszewski
Professor of Government and Philosophy, University of Texas at Austin

Peter A. Lawler
Dana Professor of Government, Berry College

Thomas Kelly
Associate Professor of Philosophy, Princeton University

Michael Stokes Paulsen
Distinguished University Chair & Professor of Law, The University of St. Thomas

David Lyle Jeffrey
Distinguished Professor of Literature and the Humanities, Baylor University

Hadley P. Arkes
Edward N. Ney Professor of Jurisprudence and American Institutions, Amherst College

Salvatore Torquato
Professor of Chemistry, Princeton University

Edward R. Dougherty
Robert M. Kennedy '26 Chair
Director, Genomic Signal Processing Laboratory
Department of Electrical and Computer Engineering, Texas A&M University

Ann Hartle
Professor of Philosophy, Emory University

Fr Joseph Koterski SJ
President, Fellowship of Catholic Scholars & Dept of Philosophy, Fordham University

Timothy S. Fuerst
Professor of Economics, Bowling Green State University

Patrick Deneen
Tsakopoulos-Kounalakis Associate Professor
Director, The Tocqueville Forum on the Roots of American Democracy
Department of Government, Georgetown University

Thomas A. Smith
Professor of Law, University of San Diego

Michael A. Scaperlanda
Edwards Family Chair in Law, University of Oklahoma College of Law

Maria E. Garlock
Associate Professor of Civil and Environmental Engineering & Director, Program in
Architecture and Engineering, Princeton University

Mark Regnerus
Associate Professor of Sociology, University of Texas at Austin

Bryan T. McGraw
Assistant Professor of Politics and International Relations, Wheaton College

Timothy Samuel Shah
Associate Director & Scholar in Residence, Religious Freedom Project,
Berkley Center for Religion, Peace & World Affairs, and
Visiting Assistant Professor, Department of Government, Georgetown University

Jacqueline M. Nolan-Haley
Professor of Law and Director, ADR & Conflict Resolution Program, Fordham University

David K. DeWolf
Professor of Law, Gonzaga University

David B. Kopel
Research Director, Independence Institute Adjunct Professor of Advanced Constitutional Law,
Denver University, Sturm College of Law

Rev. Thomas V. Berg
Professor of Moral Theology, St. Joseph's Seminary-Dunwoodie

William S. Brewbaker III
Associate Dean and William Alfred Rose Professor of Law, University of Alabama

John W. Carlson, Ph.D.
Professor of Philosophy, Creighton University

Rev. Robert John Araujo, S.J.
John Courtney Murray, SJ University Professor of Law, Loyola University of Chicago

John Breen
Professor of Law, Loyola University Chicago

Robert Miller
Professor of Law, Villanova University

William B. Hurlbut, M.D.
Consulting Professor, Dept of Neurobiology, Stanford University Medical Center

Elizabeth Komives
Dept of Chemistry and Biochemistry, UC San Diego

John Finley, PhD
Tutor, Thomas Aquinas College

Micah J. Watson
Director, Center for Politics and Religion and Assistant Professor of Political Science,
Union University

John Potts
Professor Emeritus of Law, Valparaiso University

Dr. Sean Collins
Thomas Aquinas College

Michael M. Uhlmann
Professor of Politics and Policy, Claremont Graduate University

Helen Alvaré
Associate Professor of Law, George Mason University

Michael Moreland,
Associate Professor of Law, Villanova University

V. Bradley Lewis
Associate Professor of Philosophy, The Catholic University of America

Maria Sophia Aguirre
Professor of Economics, The Catholic University of America

Jody Vaccaro Lewis,
Assistant Professor of Sacred Scripture
Pontifical Faculty of the Immaculate Conception at the Dominican House of Studies

Mark Rienzi
Senior Counsel, the Becket Fund for Religious Liberty
Assistant Professor of Law, the Catholic University of America

Patrick Lee
Professor of Philosophy, Franciscan University of Steubenville

Francis J. Beckwith
Professor of Philosophy and Church-State Studies, Baylor University

William Imboden
Assistant Professor, Lyndon B. Johnson School of Public Affairs, University of Texas

Christopher Tollefsen
Professor of Philosophy, University of South Carolina

Thomas A. Cavanaugh
Professor of Philosophy, University of San Francisco

James F. Hitchcock,
Professor of History, St. Louis University

C. Ben Mitchell, PhD
Graves Professor of Moral Philosophy, Union University

Christopher Wolfe
Co-Director, Thomas International Center & Emeritus Professor, Marquette University

Christopher J. Eberle,
Associate Professor of Philosophy, United States Naval Academy

Gerald R. McDermott
Jordan-Trexler Professor of Religion, Roanoke College

Robert D. Benne
Director of the Center for Religion and Society, Roanoke College

Douglas Henry
Associate Professor of Philosophy, Baylor University

Scott H. Moore
Associate Professor of Philosophy and Great Texts, Baylor University

Kevin E. Miller, PhD
Assistant Professor of Theology, Franciscan University of Steubenville

Gregory Schaller
Asst. Professor of Politics, Colorado Christian University

Richard Stith
Professor of Law, Valparaiso University

Thomas S. Kidd
Associate Professor of History and Senior Fellow, Institute of Religion, Baylor University

Joseph Knippenberg
Professor of Politics, Oglethorpe University

Gary D. Glenn
Distinguished Teaching Professor Emeritus
Northern Illinois University

Prof Janet E. Smith
Father Michael J. McGivney Chair of Life Ethics
Sacred Heart Major Seminary

Carson Holloway
Associate Professor of Political Science, University of Nebraska at Omaha

John D. Woodbridge
Research Professor of Church History and Christian Thought,
Trinity Evangelical Divinity School

Rev Prof D. A. Carson
Research Professor of New Testament, Trinity Evangelical Divinity School
President, The Gospel Coalition

Kevin Roberts
President & Headmaster, John Paul the Great Academy
President, John Paul II Institute for the New Evangelization

Gareth N. Genner
President, Holy Spirit College & Preparatory School

Christopher Wolfe
Co-Director, Thomas International Center, and Emeritus Professor
Marquette University

Daniel Bonevac
Professor of Philosophy
University of Texas at Austin

Richard R. Jesse, Ph.D.
Associate Professor Emeritus of Business Administration, The University of Vermont

Leroy Huizenga
Director of the Christian Leadership Center and Assistant Professor of Theology
University of Mary—North Dakota

Jonathan J. Sanford, Ph.D.
Professor and Chair
Philosophy Department
Franciscan University of Steubenville

Msgr. Robert Sokolowski
Elizabeth Breckenridge Caldwell Professor of Philosophy
The Catholic University of America

Gerald H. Maring
Professor Emeritus
Washington State University—Pullman

Will Morrissey
Hillsdale College

Dr. Chris Decaen
Thomas Aquinas College (CA)

Dr. Mickey Craig
William & Berniece Grewcock Professor of Politics
Hillsdale College

John Schwenkler
Dept. of Philosophy, Mount St. Mary's University (MD)

Ronald J. Pestritto
Graduate Dean and Associate Professor of Politics, Hillsdale College

George H. Guthrie, Ph.D.
Benjamin W. Perry Professor of Bible
Union University

John Gueguen
Politics and Government, Emeritus
Illinois State University

Professor John J. Kircher
Marquette University Law School

Dr. R. Glen Coughlin
Thomas Aquinas College (CA)

Grant S. Nelson
William H. Rehnquist Professor of Law
Pepperdine University

Bradley C. S. Watson
Philip M. McKenna Chair in American and Western Political Thought Co-Director
Center for Political and Economic Thought
Saint Vincent College

Wilfred M. McClay,
SunTrust Chair of Excellence in Humanities
University of Tennessee at Chattanooga

Gerard Wegemer
Professor of Literature
Director, Center for Thomas More Studies
University of Dallas

Michael Augros, Ph. D.
Thomas Aquinas College (CA)

John Grant, Ph.D.
Assistant Professor of Politics
Hillsdale College

Robert Eden
Professor of Politics
Hillsdale College

Robert J. Phillips
Associate Professor of Political Science
Wheeling Jesuit University

Martijn Cremers
Associate Professor of Finance

Yale School of Management

Scott Fitzgibbon
Boston College Law School

Marc DiGirolami
St. John's University School of Law

Philip D. Mitchell
Professor of Social Sciences, Colorado Christian University

Paul Cuff
Assistant Professor, Department of Electrical Engineering, Princeton University

Peter L. DeLuca
Vice President for Finance and Administration
Tutor, Thomas Aquinas College

Anthony P. Andres
Tutor, Thomas Aquinas College

Christopher Oleson, Ph.D.
Tutor, Thomas Aquinas College

Jared P. Kuebler
Tutor, Thomas Aquinas College

Gregory Froelich
Tutor, Thomas Aquinas College

Don J. Briel
Koch Chair in Catholic Studies
Director, Center for Catholic Studies
University of Saint Thomas

Jeffrey Dirk Wilson, Ph.D.
Clinical Assistant Professor
The School of Philosophy
The Catholic University of America

Michael Rota
Assistant Professor of Philosophy
University of St. Thomas

Fr. Michael Keating
University of St. Thomas
Department of Catholic Studies

Thomas R. Rourke
Professor of Political Science

Clarion University of Pennsylvania

Father Paul A. Burke
Chair of the Faculty of Theology
Holy Spirit College—Atlanta

David Hurtt
Associate Professor, Accounting and Business Law
Baylor University

John S. Grabowski, Ph.D.
Associate Professor of Moral Theology
Ethics School of Theology and Religious Studies
The Catholic University of America

Lorraine Gin
Assistant Professor of Legal Writing & Legal Writing Administrator
James E. Rogers College of Law, The University of Arizona

James V. Schall, S. J.
Professor, Department of Government
Georgetown University

Clifford Orwin
Professor of Political Science, Classics, and Jewish Studies
Fellow of St. Michael's College and Senior Fellow of Massey College
Distinguished Visiting Fellow and Member of the Boyd C. and Jill Smith Task Force on the
Virtues of a Free Society, Hoover Institution of Stanford University
Department of Political Science, University of Toronto

Molly Brigid Flynn
Assistant Professor of Philosophy
Assumption College

Edward T. Egan, J.D.
Director, Pre-Law Program
Mount St. Mary's University

Robert W. Shaffern
Professor of Medieval History
University of Scranton

Louise Carroll Keeley, Ph.D.
Professor of Philosophy
Associate Provost
Assumption College

Notre Dame University

David S. Younger
 Assistant Director
 Italian, Classics, German, and Russian Programs
 Office of International Studies
 University of Notre Dame

Kelley M. Shrock
 Operations Specialist
 University of Notre Dame Investment Office

Bartley Burk
 Social Sciences/Hispanic Cataloger
 Hesburgh Libraries, University of Notre Dame

Judy Hutchinson
 Assistant Director
 Office of International Studies
 University of Notre Dame

Craig Tiller, RA, LEED®AP
 Senior Director, Project Management
 Facilities Design and Operations
 University of Notre Dame

Joseph A. Reimers
 Technology Support Assistant III
 University of Notre Dame Kresge Law Library

Michael A. Zenk
 Director, Post Award Financial Management
 Office of Research
 University of Notre Dame

Mary K. Daly
 Program Coordinator, University Life Initiatives
 Institute for Church Life, University of Notre Dame

Mr. David Anthony Cavalieri, M.S.M.A.E., P.E.
 Research Specialist
 Aerospace and Mechanical Engineering
 Center for Flow Physics and Control (FlowPAC)

Michael A. Mogavero Ph.D
 Director of Undergraduate Studies
 The University of Notre Dame

Mary K. Daly
 University Life Initiatives

University of Notre Dame

Greer Hannan
Program Coordinator
Notre Dame Center for Ethics and Culture

William G. Schmitt
Communications/Media Specialist
Institute for Educational Initiatives (IEI)
Alliance for Catholic Education (ACE)
University of Notre Dame

Joseph S. O'Hannigan
Senior Associate Director of Executive Programs
Mendoza College of Business
University of Notre Dame

Diane C. Freeby, SMC '88
Editor/PrayND, Notre Dame Alumni Association
University of Notre Dame

Al Bucci
Director of Regional Development
University of Notre Dame

Judy Madden, M.A.
University of Notre Dame

Richard F. Klee Jr. CPA
University Tax Director
University of Notre Dame

University/College/Seminary Presidents, Deans, and Board Members

Stephen D. Minnis
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What could happen to the stock market if Republicans take back the White House?

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CRINION | Updated February 15, 2012, 6:35 a.m. ET

Birth-Control Mandate: Unconstitutional and Illegal*It violates the First Amendment and the 1993 Religious Freedom Restoration Act.*

By DAVID B. RIVKIN JR.
AND EDWARD WHELAN

Last Friday, the White House announced that it would revise the controversial ObamaCare birth-control mandate to address religious-liberty concerns. Its proposed modifications are a farce.

The Department of Health and Human Services would still require employers with religious objections to select an insurance company to provide contraceptives and drugs that induce abortions to its employees. The employers would pay for the drugs through higher premiums. For those employers that self-insure, like the Archdiocese of Washington, the farce is even more blatant.

The birth-control coverage mandate violates the First Amendment's bar against the "free exercise" of religion. But it also violates the Religious Freedom Restoration Act. That statute, passed unanimously by the House of Representatives and by a 97-3 vote in the Senate, was signed into law by President Bill Clinton in 1993. It was enacted in response to a 1990 Supreme Court opinion, *Employment Division v. Smith*.

That case limited the protections available under the First Amendment's guarantee of free exercise of religion to those government actions that explicitly targeted religious practices, by subjecting them to difficult-to-satisfy strict judicial scrutiny. Other governmental actions, even if burdening religious activities, were held subject to a more deferential test.

The 1993 law restored the same protections of religious freedom that had been understood to exist pre-*Smith*. The Religious Freedom Restoration Act states that the federal government may "substantially burden" a person's "exercise of religion" only if it demonstrates that application of the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest.

The law also provides that any later statutory override of its protections must be explicit. But there is nothing in the ObamaCare legislation that explicitly or even implicitly overrides the Religious Freedom Restoration Act. The birth-control mandate proposed by Health and Human Services is thus illegal.



The refusal, for religious reasons, to provide birth-control coverage is clearly an exercise of religious freedom under the Constitution. The "exercise of religion" extends to performing, or refusing to perform, actions on religious grounds—and it is definitely not confined to religious institutions or acts of worship. Leading Supreme Court cases in this area, for example, involve a worker who refused to work on the Sabbath (*Sherbert v. Verner*, 1963) and parents who refused to send their teenage children to a public high

Getty Images

HHS Secretary Kathleen Sebelius and President Obama in a press conference on the contraception mandate on Friday.

school (*Wisconsin v. Yoder*, 1972).

In the high-school case, the Supreme Court found that even a \$5 fine on the parents substantially burdened the free exercise of their religion. Under the Patient Protection and Affordable Care Act, employers who fail to comply with the birth-control mandate will incur an annual penalty of roughly \$2,000 per employee. So it is clearly a substantial burden.

Objecting employers could, of course, avoid the fine by choosing to go out of business. But as the Supreme Court noted in *Sherbert v. Verner*, "governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against" noncompliant parties.

The birth-control mandate also fails the Religious Freedom Restoration Act's "compelling governmental interest" and "least restrictive means" tests.

Does the mandate further the governmental interest in increasing cost-free access to contraceptives by means that are least restrictive of the employer's religious freedom? Plainly, the answer is no. There are plenty of other ways to increase access to contraceptives that intrude far less on the free exercise of religion.

Health and Human Services itself touts community health centers, public clinics and hospitals as some of the available alternatives; doctors and pharmacies are others. Many of the entities, with Planned Parenthood being the most prominent, already furnish free contraceptives. The government could have the rest of these providers make contraceptive services available free and then compensate them directly. A mandate on employers who object for religious reasons is among the most restrictive means the government could have chosen to increase access.

The mandate also fails the "compelling government interest" test. Given the widespread availability of contraceptive services, and the far less restrictive other ways to increase their availability, the government can hardly claim it has a "compelling" interest in marginally increasing access to birth control by requiring objecting employers to join in this effort.

The "compelling interest" claim is further undercut by the mandate's exclusion, for purely secular reasons, of employers who offer "grandfathered" plans. These are employer-provided plans that existed at the time ObamaCare was enacted and can continue to operate so long as they do not make major changes. They cover tens of millions of enrollees, according to a recent estimate by Health and Human Services.

In an effort to rally its base in the upcoming November election, the Obama administration seems more interested in punishing religiously based opposition to contraception and abortion than in marginally increasing access to contraception services. It is the combination of the political motive, together with the exclusion of so many employers from the mandate, that has profound constitutional implications. It transforms the mandate into a non-neutral and not generally applicable law that violates the First Amendment's Free Exercise Clause.

In short, the birth-control mandate violates both statutory law and the Constitution. The fact that the administration promulgated it so flipantly, without seriously engaging on these issues, underscores how little it cares about either.

Mr. Rivkin, who served in the Justice Department under Presidents Reagan and George H.W. Bush, represented the 26 states in their challenge to ObamaCare before the trial and appellate courts. Mr. Whelan served in the Justice Department under President George W. Bush and is president of the Ethics and Public Policy Center.

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WALL STREET JOURNAL OP ED ON RELIGIOUS FREEDOM

By Timothy M. Dolan

Religious freedom is the lifeblood of the American people, the cornerstone of American government. When the Founding Fathers determined that the innate rights of man and women should be enshrined in our Constitution, they so esteemed religious liberty that they made it the first freedom in the Bill of Rights.

In particular, the Founding Fathers fiercely defended the right of conscience. George Washington himself declared: "The conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be extensively accommodated to them." James Madison, a key defender of religious freedom and author of the First Amendment, said: "Conscience is the most sacred of all property."

Scarcely two weeks ago, in its *Hosanna-Tabor* decision upholding the right of churches to make ministerial hiring decisions, the Supreme Court unanimously and enthusiastically reaffirmed these longstanding and foundational principles of religious freedom. The court made clear that they include the right of religious institutions to control their internal affairs.

Yet the Obama administration has veered in the opposite direction. It has refused to exempt religious institutions that serve the common good—including Catholic schools, charities and hospitals—from its sweeping new health-care mandate that requires employers to purchase contraception, including abortion-producing drugs, and sterilization coverage for their employees.

Last August, when the administration first proposed this nationwide mandate for contraception and sterilization coverage, it also proposed a "religious employer" exemption. But this was so narrow that it would apply only to religious organizations engaged primarily in serving people of the same religion. As Catholic Charities USA's president, the Rev. Larry Snyder, notes, even Jesus and His disciples would not qualify for the exemption in that case, because they were committed to serve those of other faiths.

Since then, hundreds of religious institutions, and hundreds of thousands of individual citizens, have raised their voices in principled opposition to this requirement that religious institutions and individuals violate their own basic moral teaching in their health plans. Certainly many of these good people and groups were Catholic, but many were Americans of other faiths, or no faith at all, who recognize that their beliefs could be next on the block. They also recognize that the cleverest way for the government to erode the broader principle of religious freedom is to target unpopular beliefs first.

Now we have learned that those loud and strong appeals were ignored. On Friday, the administration reaffirmed the mandate, and offered only a one-year delay in enforcement in some cases—as if we might suddenly be more willing to violate our consciences 12 months from now. As a result, all but a few employers will be forced to purchase coverage for contraception, abortion drugs and sterilization services even when they seriously object to them. All who share the cost of health plans that include such services will be forced to pay for them as well. Surely it violates freedom of religion to force religious ministries and citizens to buy health coverage to which they object as a matter of conscience and religious principle.

The rule forces insurance companies to provide these services without a co-pay, suggesting they are "free"—but it is naïve to believe that. There is no free lunch, and you can be sure there's no free abortion, sterilization or contraception. There will be a source of funding: you.

Coercing religious ministries and citizens to pay directly for actions that violate their teaching is an

unprecedented incursion into freedom of conscience. Organizations fear that this unjust rule will force them to take one horn or the other of an unacceptable dilemma: Stop serving people of all faiths in their ministries—so that they will fall under the narrow exemption—or stop providing health-care coverage to their own employees.

The Catholic Church defends religious liberty, including freedom of conscience, for everyone. The Amish do not carry health insurance. The government respects their principles. Christian Scientists want to heal by prayer alone, and the new health-care reform law respects that. Quakers and others object to killing even in wartime, and the government respects that principle for conscientious objectors. By its decision, the Obama administration has failed to show the same respect for the consciences of Catholics and others who object to treating pregnancy as a disease.

This latest erosion of our first freedom should make all Americans pause. When the government tampers with a freedom so fundamental to the life of our nation, one shudders to think what lies ahead.

Cardinal-designate Timothy M. Dolan is the archbishop of New York and president of the U.S. Conference of Catholic Bishops. This article originally appeared in the Wall Street Journal on January 25, 2012, and is reprinted with permission of the author.

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REVIEW & OUTLOOK | February 11, 2012

Immaculate Contraception

An 'accommodation' that makes the birth-control mandate worse.

Here's a conundrum: The White House wants to impose its birth-control ideology on all Americans, including those for whom sponsoring or subsidizing such services violates their moral conscience. The White House also wants to avoid a political backlash from this blow to religious freedom. These goals are irreconcilable.

So you almost have to admire the absurdity of the new plan President Obama floated yesterday: The government will now write a rule that says the best things in life are "free," including contraception. Thus a political mandate will be compounded by an uneconomic one—in other words, behold the soul of ObamaCare.



AFP/Getty Images

President Obama with HHS Secretary Kathleen Sebelius announce an adjustment to the health care bill on Friday.

Under the original Health and Human Services regulation, all religious institutions except for houses of worship would be required to cover birth control, including hospitals, schools and charities. Under the new rule, which the White House stresses is "an accommodation" and not a compromise, nonprofit religious organizations won't have to directly cover birth control and can opt out. But the insurers they hire to cover their employees can't opt out. If that sounds like a distinction without a difference, odds are you're a rational person.

Say Notre Dame decides that its health plan won't cover birth control on moral grounds. A faculty member wants such coverage, so Notre Dame's insurer will then be required to offer the benefit as an add-

on rider anyway, at no out-of-pocket cost to her, or to any other worker or in higher premiums for the larger group.

But wait. Supposedly the original rule was necessary to ensure "access" to contraceptives, which can cost up to \$600 a year as Democratic Senators Jeanne Shaheen, Barbara Boxer and Patty Murray wrote in these pages this week. The true number is far less, but where does that \$600 or whatever come from, if not from Notre Dame and not the professor?

Insurance companies won't be making donations. Drug makers will still charge for the pill. Doctors will still bill for reproductive treatment. The reality, as with all mandated benefits, is that these costs will be borne eventually via higher premiums. The balloon may be squeezed differently over time, and insurers may amortize the cost differently over time, but eventually prices will find an equilibrium. Notre Dame will still pay for birth control, even if it is nominally carried by a third-party corporation.

This cut-out may appease a few of the Administration's critics, especially on the Catholic left—but only if they want to be deceived again, having lobbied for the Affordable Care Act that created the problem in the first place. The faithful for whom birth control is a matter of religious conviction haven't been accommodated at all. They'll merely

have to keep two sets of accounting books.

The real audience for this non-compromise are the many voters shaken that the White House would so willfully erode the American traditions of religious liberty and pluralism, most of whom don't adhere to anti-contraceptive teachings. On a conference call with reporters yesterday, a senior Administration official not known for his policy chops claimed that the new plan was "our intention all along" and that the furor is nothing more than partisan opportunism. Hmmm.

We couldn't recall any spirit of conciliation when the birth-control mandate was finalized in January, so we went back and checked the transcript of that call with senior Administration officials. Sure enough, back then they said that the rule "reflects careful consideration of the rights of religious organizations" and that a one-year grace period "really just gives those organizations some additional time to sort out how they will be adjusting their plans."

A journalist asked, "Just to be clear, so it's giving them a year to comply rather than giving them a year to in any way change how they feel or the Administration to change how it feels." Another senior official: "That is correct. It gives them a year to comply."

Yesterday's new adventure in damage control and bureaucratic improvisation makes the compliance problem much worse. There is simply no precedent for the government ordering private companies to offer a product for free, even if they recoup the costs indirectly. Why not do that with all health benefits and "bend the cost curve" to zero? The shape of the final rule when the details land in the Federal Register is anyone's guess, including the HHS gnomes who are throwing it together on the fly to meet a political deadline.

One major problem will be how the rule applies to large organizations that self-insure. Arrangements in which an employer pays for care directly and uses insurers to manage benefits and process claims (not to take on insurance risk) account for the majority of the private market. In these cases there isn't even a free lunch to pretend exists.

As reporting by Bloomberg and ABC this week has made clear, the contraception mandate was fiercely opposed within the Administration, including by Vice President Joe Biden. The larger tragedy is that none of them objected to government health care, which will always take choices away from individuals and arrogate them to an infallible higher power in Washington. Who was it again who claimed that if you like your health plan, you can keep your health plan?

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Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Testimony of

Rev. Barry W. Lynn

**Executive Director of
Americans United For Separation of Church and
State**

Submitted to

**U.S. House of Representatives Committee on
Oversight and Government Reform**

***Written Testimony* for the Hearing Record on**

**“Executive Overreach: The HHS Mandate Versus
Religious Liberty”**

February 28, 2012

I am submitting testimony on behalf of Americans United for Separation of Church and State (Americans United) for the hearing on “Executive Overreach: The HHS Mandate Versus Religious Liberty.” It is my belief that the HHS mandate does not threaten religious liberty. To the contrary, religious liberty would be threatened if Congress were to further broaden the religious exemption.

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

The focus of this hearing is the regulatory provisions governing the “Affordable Care Act” that will require employers to provide insurance coverage for contraceptives, without a co-pay or deductible. The rule issued recently by the Department of Health and Human Services (HHS) provides a sufficient exemption for churches, other houses of worship, and similar organizations that object, on religious grounds, to providing coverage for contraceptives.¹

Then, on February 10, the Obama Administration announced it will issue an additional rule that will expand the religious exemption even further. It will require insurance companies—not religious organizations—to provide coverage for contraception if the religious organization objects to such coverage. The religious organization will not have to pay for the coverage or refer employees to organizations that provide coverage. And, women will still be provided coverage for contraceptives with no charge. Groups ranging from Planned Parenthood to the Catholic Health Association welcomed the compromise.

Unfortunately, the compromise has not quelled the rhetoric from the far right or efforts to further erode women’s access to birth control—some are actually even trying to expand the religious exemption to individual business owners, making the coverage mandate meaningless.

Contrary to the sentiments expressed by the title of the hearing, *expansion* of the exemption—not keeping the exemption as-is—is what risks violating religious liberty. The separation of church and state means that the government will not force one religious view or doctrine upon the people. Expansion of the Obama compromise, however, would allow one particular religious doctrine to govern our public health policies at the expense of the health, safety, and religious conscience rights of the women they employ

¹ United States. Dept. of Health and Human Services. Final Rules, “Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act.” 77 CFR 8725. Feb. 15, 2012. Print.

If the expansion for contraceptives is further expanded, it will not be long before people in other faiths demand the “right” to refuse coverage of other procedures, prescriptions, or medical specialties they find inconsistent with their theological tenets. This would be not only a nightmare as a practical matter. It would turn the right of “conscience” into a sword to be used to fight off any and all regulation that a business owner chose not to implement. This turns genuine conscience claims on their heads in pursuit of an incredibly broad and utterly unconstitutional false declaration of a right surely not contemplated by the Framers of the Constitution itself.

Religious Liberty Requires Protecting the Employee’s Right of Conscience

I testify in opposition to an expansion of the religious exemption as a member of the clergy committed to religious freedom. I was ordained in the ministry of the United Church of Christ in 1973. My faith has been a stalwart guide for my life. It has also guided my reflection on how public policies have an impact on Americans of faith and those who reject religious traditions. And, it has led me to be a strong advocate for the preservation of the right of “conscience.” Indeed, my commitment to religious freedom and the right of conscience was recently acknowledged both by the Franklin and Eleanor Roosevelt Institute in Hyde Park, which honored me with the distinguished Medal of Freedom for my work to preserve the “freedom to worship,” and the Boston University School of Theology, which granted me a “distinguished alumnus” award.

The Constitution clearly protects the rights of conscience. One early draft of what became the First Amendment actually stated: “Congress shall not make any law infringing the right of conscience or establishing any religious sect or society”. Ultimately, that language was changed, but it would be a misnomer to believe that claims of conscience were not envisioned as a protected by the final language of the Constitution.

In the continuing battle over the HHS regulations regarding insurance program coverage of contraception, there are actually two claims of “conscience.” One, asserted by the Conference of Catholic Bishops and some Protestant evangelical groups, would establish a right of religious institutions to exercise a “corporate conscience” and implement only those federal policies they deem consistent with their theological understanding. The second is a “conscience” claim by individual employees who seek the right to make moral judgments about contraceptive use upon consultation with both medical and spiritual advisors of their choosing.

In my view, it is the individual who has the stronger claim. Women—not their employers—should be allowed to make decisions about their healthcare and their religious beliefs. A woman may not share the religious beliefs of their employer or practice religion in exactly the same way her employer does. It is the woman’s right to exercise her religion freely and make her own decisions about reproductive health, even if she is employed by an organization that holds a different position on

these matters. But, for many women, the right to purchase birth control is often meaningless without the insurance coverage to do so. If the government allowed religious interests to overcome a woman's health interest, church-state separation would be threatened.

The original HHS regulation protected the individual woman's conscience right by requiring large entities like religiously-affiliated hospitals and universities to provide contraceptive coverage, but exempted churches, seminaries, and similar institutions. To me, that arrangement was the correct balance of equities. Unlike churches, these larger religious organizations act like large corporations: (1) they employ many persons who do not share the religious affiliation of the parent group; (2) they receive large amounts of financial support from taxpayers of all religious and philosophical viewpoints; and (3) they hold themselves out as providing a public function. In addition, the actual impact the insurance mandate would have on the "corporate conscience" of these institutions would be minimal: It is the individual employee—not the religious institution—who will make the independent private choice whether to avail herself of prescription contraception as one of the many services under the group insurance plan. And, under the regulation, an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the employees themselves.

The religious convictions of the individual employee should certainly supersede the "corporate conscience" of these quasi-public institutions.

Under the new regulations issued on Friday, the corporate "conscience" is even more tenuously implicated: coverage becomes an issue largely between an employee and a private insurance company with no connection to any religious institution. Religious organizations will not have to cover or refer women to providers of contraceptives. Religious organization will have no connection whatsoever to a woman's use of contraceptive coverage. It is difficult to understand how allowing a woman—without financial support, approval, or assistance from her employer—to access coverage on her own would violate the conscience of her religious employer.

No one would argue that a religious employer could legally object to an employee using money from her paycheck to pay for contraceptives. Why then should the religious employer have the right to object to a woman obtaining contraceptives from an insurance company when the employer has no connection to that coverage?

The Obama Compromise Protects Women's Health and Reproductive Autonomy.

Access to birth control is not just a matter of respecting a woman's right of religious conscience. First, the use of birth control is necessary for women implementing fundamental childbearing decisions. At the core of every woman's right to privacy is whether and when to become a parent.

In addition, birth control affects the health of women and their children. Access to birth control leads to fewer unintended pregnancies and improves a woman's ability to space pregnancies. Because "unintended pregnancies are by definition unplanned, . . . women may be entering pregnancy with behavioral risks, genetic risks, and unmanaged chronic conditions that affect their health and the health of their babies."² And, according to the U.S. Agency for International Development (USAID), "short birth-to-pregnancy intervals are associated with significant increased risk of neonatal, infant, child and under-5 mortality; low birthweight and preterm births; infant/child malnutrition in some populations; and stillbirths, miscarriages, and maternal morbidity."³ Women also use birth control pills for reasons other than birth control. For example, women who suffer from endometriosis often use the pill for relief.

Further Expansion of the Religious Exemption Should Be Rejected Because it is the True Threat to Religious Freedom.

The religious exemption the witnesses on the panel seek to impose is incredibly expansive: they want to exempt *any* individual employer—even individual business owners and for-profit corporations—with an objection to providing coverage of contraceptives from the mandate. Indeed, they all expressed support for H.R. 1197, which would implement such an exemption.

In addition, last week, according to *USA Today*, Anthony Picarello, general counsel for the U.S. Conference of Catholic Bishops, argued against the compromise, saying his goal is to get the contraceptive mandate removed from the healthcare law altogether.⁴ He explained that no mandate should apply to "good Catholic business people who can't in good conscience cooperate with this."⁵ And he complained that "If I quit this job and opened a Taco Bell, I'd be covered by the mandate,"⁶ Indeed, the Catholic Bishops are arguing that even owners of a Taco Bell should be able to act upon a "corporate conscience" and deny women coverage of birth control based on a religious objection.

Similarly, in a Congressional hearing in November, witnesses from the Christian Medical Association and the Alliance for Catholic Health Care also argued that the religious exemption should include individual employers.⁷

² North Carolina Department of Health and Human Services, "Unintended Pregnancies: 2004-2006 N.C. Pregnancy Risk Assessment Monitoring System," *North Carolina Prams Fact Sheet*, March 2009. Retrieved Feb. 15, 2012, from <<http://www.schs.state.nc.us/SCHS/pdf/UnintendedPregnancies.pdf>>.

³ U.S. Agency for International Development, "Birth Spacing," *USAID Website*, 2009. Retrieved Feb. 15, 2012, from <http://www.usaid.gov/our_work/global_health/pop/techareas/birthspacing/index.html>.

⁴ Richard Wolf and Cathy Lynn Grossman, "Obama mandate on birth control coverage stirs controversy," *USA Today*, Feb. 9, 2012. Retrieved Feb. 14, 2012, from <<http://www.usatoday.com/news/washington/story/2012-02-08/catholics-contraceptive-mandate/53014864/1>>.

⁵ *Id.*

⁶ *Id.*

⁷ David Stevens, CEO of the Christian Medical Association, argued against the proposed regulation on the grounds that it "provides no protection to conscientiously objecting individuals," and William J. Cox, President

If Congress were to expand the exemption to individuals, the exemption could easily end up swallowing the rule. Employees would have no real protections, as anyone could simply refuse to provide insurance coverage for contraceptives. Employees would not necessarily even know before they accept a job whether or not they would be granted coverage for preventative care services offered to other Americans.

In fact, the logical conclusion of those urging a more expansive exemption is that *any* employer—whether an individual or corporation—could refuse to cover *any* procedure to which they objected on religious grounds.⁸ Such an astonishing broad and far sweeping exemption would endanger patient health and threaten to overturn the important medical decisions of employees. Its reach would extend beyond reproductive healthcare, such as sterilization and abortion, to areas such as coverage of end-of-life directives, services for patients with HIV, and patients in need of psychiatric medicines and services. Allowing employers a blanket exemption from providing insurance coverage for *any* service or item—with no consideration of the effect such exemption would have on the patients—creates a serious threat to public health.

For example, an employer who works for an individual who believes the Bible proscribes blood transfusions could be denied coverage for that life saving procedure or services related to the procedure. An employee who, in this tough job market, takes a job with an individual who opposes traditional medicine for religious reasons could be denied insurance that covers any service or item beyond prayer therapy. And, an employee who works for an adherent of Scientology could be denied most psychiatric services.

Furthermore, expanding the exemption risks violating the Establishment Clause. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,⁹ its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”¹⁰ For example, in *Texas Monthly, Inc. v. Bullock*,¹¹ the Supreme Court explained that legislative exemptions for religious organizations that exceed Free Exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.”

and CEO of the Alliance of Catholic Health Care, stated, “HHS should also amend the rule to ensure that individuals... are similarly protected.” U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Health. *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?*. 112th Cong, 1st sess. 2011.

⁸ Indeed, H.R. 1197 would impose this very exemption into the “Affordable Care Act.”

⁹ Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

¹⁰ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

¹¹ 480 U.S. 1, 18 n. 8 (1989).

In *Cutter v. Wilkinson*,¹² the Supreme Court held that, to meet the confines of the Establishment Clause, “an accommodation must be measured so that it does not override other significant interests.” The Court upheld the law in that case because the government could deny the exemption if “religious accommodations become excessive” or would “impose unjustified burdens on other[s].”¹³ Indeed, in *Estate of Thornton v. Caldor, Inc.*,¹⁴ the Supreme Court struck down a blanket exemption for Sabbatarians because it “unyielding[ly] weight[ed]” the religious interest “over all other interests,” including the interests of co-workers.

It is clear that the more expansive the exemption and the greater the burden it places on others, the more likely the exemption will violate the Establishment Clause. Here, critics want to expand the exemption, burdening more women by denying them insurance coverage. This risks becoming an “excessive” accommodation that imposes an “unjustified burden” on women seeking contraceptives.

Conclusion

Religious freedom means that the government will not force one religious view or doctrine upon the people. The religious exemption compromise attempts to strike a balance and not promote the private interests of one religion over the conscience of employees. This rule allows women—not their employers—to make decisions about their healthcare and their religious beliefs. Women may not share the religious beliefs of their employer or practice religion in the exact way their employer does. It is the woman’s right to exercise her religion freely and make her own decisions about reproductive health, even if she is employed by an organization that holds a different position on these matters. But, for many women, the right to purchase birth control is often meaningless without the insurance coverage to do so. If the government, however, allowed the “corporate conscience” or a religious institution to override the conscience and health interests of its employees, church-state separation would be compromised.

¹² 544 U.S. 709 (2005).

¹³ *Id.* at 726.

¹⁴ 472 U.S. 703, 704f (1985).



Written Statement of the American Civil Liberties Union

Laura W. Murphy
Director, Washington Legislative Office

Sarah Lipton-Lubet
Policy Counsel

Dena S. Sher
Legislative Counsel

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Committee on the Judiciary

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"Executive Overreach: The HHS Mandate Versus Religious Liberty"

The American Civil Liberties Union (“ACLU”) thanks the Committee on the Judiciary for the opportunity to submit this statement for today’s hearing addressing the Department of Health and Human Services (“HHS”) requirement that new health insurance plans include coverage for contraception. The hearing is titled: “Executive Overreach: The HHS Mandate Versus Religious Liberty.” The HHS rule advances women’s health while doing no harm to religious freedom. This hearing, therefore, poses a false conflict.

The ACLU is a nonpartisan public interest organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation’s civil rights laws. The ACLU has a long history of defending both religious liberty and reproductive freedom. The ACLU vigorously defends the constitutional right of all Americans to exercise and express religious beliefs and individual conscience and advocates for policies that heighten protections for religious exercise. At the same time, we have participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care. Because of our profound respect for both religious liberty and for reproductive rights, the ACLU is particularly well-positioned to comment on the issues before this Committee.

All calls to rescind the HHS requirement that new health plans include contraceptive coverage without extra out of pocket costs, or to pass radical bills like H.R. 1179, the Respect for Rights of Conscience Act of 2011, must be rejected. When employers are allowed to deny women contraceptive coverage, they are granted a license to discriminate: the religious beliefs of some are imposed on the lives of others and gender equality is undermined.

Sexually active individuals should have affordable access to the full range of contraceptive options. Women need access to contraception to prevent unintended pregnancies, plan the size of their families, plan their lives, and protect their health. Meaningful access to contraception is integral to a world in which people are free to express their sexuality, to form intimate relationships, to lead healthy sexual lives, to flourish, and to decide when and whether to have children.

Although some have expressed concern about the impact on institutions that oppose the use of birth control, religious liberty is not infringed by requiring insurance plans to cover contraception. The religious beliefs of those who employ and serve diverse populations no more justify denying employees contraceptive coverage than they did denying African-Americans service at restaurants owned by those whose religious beliefs opposed integration.

Religious liberty does not come with the right to impose one's faith on others. Indeed, the contraceptive coverage provision serves the nation's interest in gender equality, reproductive autonomy, and religious freedom by making contraception accessible and affordable, and therefore allowing women – using their own consciences – to choose for themselves whether, when, and how to use birth control.

I. Background

The Patient Protection and Affordable Care Act (“ACA”) provides that certain preventive services must be provided in health insurance plans without cost-sharing.¹ The preventive services provision is designed to ensure that health insurance provides real access to vital health care. Because existing preventive care guidelines otherwise incorporated into the ACA have significant gaps when it comes to women's health, Congress included the Women's Health Amendment (“WHA”), which requires health insurance plans to cover additional preventive services for women,² as described in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).³

To implement the WHA, the Institute of Medicine (“IOM”) “review[ed] what preventive services are necessary for women's health and well-being”⁴ and developed recommendations for comprehensive guidelines. After an extensive science-based process, the IOM published *Clinical Preventive Services for Women: Closing the Gaps*, a report of its analysis and recommendations, on July 19, 2011. Among other things, the report recommended that the HRSA guidelines include “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁵ On August 1, 2011, HRSA adopted the IOM's recommendations, including the recommendation on contraceptive services.⁶

Also on August 1, HHS promulgated amendments to the interim final regulation implementing the preventive services provision, creating an exception to the HRSA Guidelines'

¹ Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 131 (2010).

² See, e.g., 155 CONG. REC. S12019, 12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) (“The underlying bill introduced by Senator Reid already requires that preventive services recommended by the U.S. Preventive Services Task Force be covered at little to no cost. . . . But [those recommendations] do not include certain recommendations that many women's health advocates and medical professionals believe are critically important”); see also 155 CONG. REC. S12261, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) (“The current bill relies solely on the U.S. Preventive Services Task Force to determine which services will be covered at no cost. The problem is, several crucial women's health services are omitted. [The Women's Health] amendment closes the gap.”).

³ ACA, Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 131.

⁴ INSTITUTE OF MEDICINE (“IOM”), CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (prepublication ed.) (2011) [hereinafter CLOSING THE GAPS].

⁵ *Id.* at 94.

⁶ Health Resources and Services Administration, U.S. Dep't of Health & Human Services, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, <http://www.hrsa.gov/womensguidelines/>.

contraceptive coverage requirement for religious employers such as houses of worship. The definition of religious employer in the rule tracks the definition of the exempted entities in contraceptive equity laws in California and New York, each of which has been upheld against challenges arguing for expansion.⁷ On February 10, 2012, HHS released a final rule affirming this definition. On the same day, President Obama announced a forthcoming modification to the rule that will allow certain non-exempted employers with religious objections to offer plans without contraception, while simultaneously guaranteeing that contraceptive coverage is provided to employees directly by the insurance company.⁸

II. Contraceptive Coverage is Essential for Women's Health and Equality

Access to safe and effective contraception is a critical component of basic health care for women. Virtually all sexually active women use contraception over the course of their lives.⁹ Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception,¹⁰ maternal and infant mortality rates have declined.¹¹ Without contraception, women have more unplanned pregnancies and are less likely to obtain adequate prenatal care in a timely manner.¹² Controlling pregnancy spacing affects birth outcomes such as low birth-weight and premature birth. Pregnancy planning can also help women control a number of conditions that negatively impact their health, such as gestational diabetes and high blood pressure.¹³

Access to contraception gives women control of their fertility, enabling them to decide whether and when to become a parent. Contraception not only furthers the health of women and their children but equality as well, allowing women to make educational and employment choices that benefit themselves and their families. It is imperative that the benefits of access to birth control reach all women.

⁷ See *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (NY 2006).

⁸ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

⁹ Guttmacher Institute, Testimony before the Committee on Preventive Services for Women, Institute of Medicine 7 (Jan. 12, 2011) [hereinafter Guttmacher Institute Testimony].

¹⁰ *Griswold v. Conn.*, 381 U.S. 479 (1965).

¹¹ See Centers for Disease Control and Prevention ("CDC"), *Ten Greatest Public Health Achievements—United States, 1990-1999, Family Planning*, MORBIDITY AND MORTALITY WEEKLY REPORT 242 (April 2, 1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf> (access to family planning has led to "fewer infant, child, and maternal deaths"); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, at 222 (2006); U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS: TRENDS IN INFANT MORTALITY BY CAUSE OF DEATH AND OTHER CHARACTERISTICS, 1960-88, at 3 (1993).

¹² Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7-8 (Winter 2011), available at <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf>.

¹³ See, e.g., March of Dimes, *Pregnancy After 35* (May 2009), http://www.marchofdimes.com/trying_after35.html.

Contraception has an important role in women's preventive care beyond preventing unintended pregnancies. As the IOM noted in its report, "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases."¹⁴ Contraception can also decrease the risk of ovarian cancer and eliminate menopause symptoms.¹⁵

The HRSA Guidelines' contraceptive coverage requirement is based on decades of experience with the benefits of family planning, recognized by the Centers for Disease Control and Prevention as one of the ten most significant public health achievements of the 20th century.¹⁶ In addition to the IOM, "[n]umerous health care professional associations and other organizations recommend the use of family planning services as part of preventive care for women."¹⁷ Multiple federal programs promote contraception access.¹⁸

The Women's Health Amendment, through the HRSA Guidelines, also builds on a network of state contraceptive coverage laws. Twenty-eight states require health plans that include prescription drug coverage to cover contraception. These laws were passed in response to decades of gender discrimination in the provision of health insurance; without contraceptive coverage mandates, women routinely pay more than men for their health care. Similarly, the Equal Employment Opportunity Commission issued an opinion a decade ago making clear that Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, requires employers to provide contraceptive coverage when they offer coverage for comparable drugs and devices.¹⁹

The IOM found, however, that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health

¹⁴ CLOSING THE GAPS, *supra* note 4, at 92.

¹⁵ Guttmacher Institute Testimony, *supra* note 9, at 6; Dep't of Health & Human Servs., *Menopause Symptom Relief and Treatments*, Sept. 29, 2010, <http://www.womenshealth.gov/menopause/symptom-relief-treatment/>.

¹⁶ CDC, *supra* note 11, at 241.

¹⁷ CLOSING THE GAPS, *supra* note 4, at 93 (including "the American College of Obstetricians and Gynecologists, the American Academy of Family Physicians, the American Academy of Pediatrics, the Society of Adolescent Medicine, the American Medical Association, the American Public Health Association, the Association of Women's Health, Obstetric and Neonatal Nurses, and the March of Dimes").

¹⁸ See, e.g., Susan A. Cohen, *The Numbers Tell the Story: The Reach and Impact of Title X*, 14 GUTTMACHER POL'Y REV. 1 (2011), available at <http://www.guttmacher.org/pubs/gpr/14/2/gpr140220.pdf>; Rachel Benson Gold & Adam Sonfield, *Block Grants Are Key Sources of Support for Family Planning*, 2 GUTTMACHER REPORT ON PUB. POL'Y (1999), available at <http://www.guttmacher.org/pubs/gr/02/4/gr020406.pdf>.

¹⁹ Equal Employment Opportunity Commission, *Decision of Coverage of Contraception* (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html> ("Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices."); see also *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). But see *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

plans in which copayments for visits and for prescriptions have increased in recent years.”²⁰ Contraceptive copays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all.²¹ These high costs have posed a substantial barrier to access and effective use. The cost of contraceptive methods can cause women to have gaps in their use of birth control, or to employ less effective methods with lower upfront costs like condoms, as opposed to long-acting reversible methods like the IUD. Eliminating cost-sharing increases use of these more effective methods.²²

The WHA, and the HRSA Guidelines developed pursuant to it, close the gap, facilitating affordable coverage for this essential health care service.²³

III. Requiring Insurance Coverage of Contraception Does Not Infringe on Religious Liberty

Opponents of family planning are urging both HHS and Congress to eliminate contraceptive services from the HRSA Guidelines altogether, in furtherance of their agenda to prevent all women from having this benefit.²⁴ Indeed, the U.S. Conference of Catholic Bishops (“USCCB”) has gone as far as to say that contraception “is not properly seen as basic health care,” and that the only solution is to “rescind the mandate of these objectionable services” altogether.²⁵ Their continued opposition, despite the administration’s February modification, reveals what this fight has been about all along: rolling back access to birth control for as many women as possible.

Family planning opponents seek a regime under which insurers and secular employers like Taco Bell (as suggested recently by the USCCB’s general counsel),²⁶ would be able to deny

²⁰ CLOSING THE GAPS, *supra* note 4, at 94.

²¹ See Guttmacher Institute Testimony, *supra* note 9, at 7-8; Su-Ying Liang et al., *Women’s Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 CONTRACEPTION 491, 531 (June 2010).

²² Sonfield, *The Case for Insurance Coverage of Contraceptive Services*, *supra* note 12.

²³ See, e.g., 155 CONG. REC. at S12026-7 (daily ed. Dec 1, 2009) (statement of Sen. Mikulski) (“We want to either eliminate or shrink those deductibles and eliminate that high barrier, that overwhelming hurdle that prevents women from having access to” preventive care.).

²⁴ See, e.g., Press Release, U.S. Conference of Catholic Bishops, Bishops Renew Call for Legislative Action on Religious Liberty (Feb. 10 2012), <http://www.usccb.org/news/2012/12-026.cfm>; Christian Medical Association, Comments on Interim Final Rule on Preventive Services (Sept. 29, 2011).

²⁵ See United States Conference of Catholic Bishops (USCCB), Comments on Interim Final Rules on Preventive Services, 3 (Aug. 31, 2011); Press Release, U.S. Conference of Catholic Bishops, Bishops Renew Call for Legislative Action on Religious Liberty (Feb. 10, 2012), <http://usccb.org/news/2012/12-026.cfm>. Contraception is preventive care. See CLOSING THE GAPS, *supra* note 4, at 91. Despite baseless claims to the contrary, the HRSA Guidelines, which require coverage of all FDA-approved contraceptives, do not require coverage of medical abortion. Any arguments, therefore, that by including all FDA-approved contraceptives the HRSA Guidelines violate restrictions on abortion in the ACA or other federal laws is pure misdirection.

²⁶ Richard Wolf and Cynthia Lynn Grossman, *Obama Mandate on Birth Control Coverage Stirs Controversy*, USA TODAY, Feb. 8, 2012.

others contraceptive coverage, despite the IOM's conclusion that contraception is indicated preventive care for *all* women, without regard to whom they happen to work for, be insured by, or share enrollment in a health plan with. Indeed, some are pushing for an exception that would give *any* employer or insurer a veto over the coverage for *any* health service available in *any* health plan.²⁷

Requiring coverage of contraception in insurance plans does not infringe on religious liberty. The HRSA Guidelines – like the contraceptive coverage laws that have come before them²⁸ and a host of generally applicable anti-discrimination and labor laws across the country – are constitutionally unremarkable. Similarly, opposition to neutral laws from religious organizations is not unique to contraception. For example, individuals and institutions have claimed religious objections to desegregation and to equal pay laws:

In 1964, three African-American residents of South Carolina brought a suit against Piggie Park restaurants, and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964's public accommodations provision violated his religious freedom "since his religious beliefs compel[ed] him to oppose any integration of the races whatever."²⁹

In 1976, Roanoke Valley Christian Schools added a "head of household" supplement to their teachers' salaries – but only to heads of household as determined by scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, "[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family."³⁰ When sued under the Equal Pay Act, Roanoke Valley claimed a right to an exemption from equal pay laws because its "head-of-household practice was based on a sincerely-held belief derived from the Bible."³¹

²⁷ See USCCB, *supra* note 25, at 18-19; see also The Respect for Rights of Conscience Act, H.R. 1179/S. 1467, 112th Cong. (2011). The USCCB endorsed this legislation as their response to the HRSA Guidelines. Letter from Cardinal Daniel N. DiNardo, Chairman, Committee on Pro-Life Activities, U.S. Conference of Catholic Bishops, to Members of Congress (Sept. 7, 2011) (writing in support of H.R. 1179/S. 1467). See also Press Release, U.S. Conference of Catholic Bishops, Bishops Renew Call for Legislative Action on Religious Liberty (Feb. 10, 2012), <http://usccb.org/news/2012/12-026.cfm>.

²⁸ First Amendment claims brought against the California and New York contraceptive equity laws were rejected by the high court of each state. See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 74; *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 461. Those courts did not address the Religious Freedom Restoration Act ("RFRA") because it is inapplicable to state laws.

²⁹ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

³⁰ *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

³¹ *Id.* at 1397.

But just as it was not a violation of religious freedom to require segregated restaurants to integrate,³² or schools to pay their teachers equally,³³ in the face of longstanding and sincerely held religious objections, it is not a violation of religious freedom to require that women have access to contraceptive coverage.

A. The First Amendment

The United States Supreme Court has rejected the notion that the Free Exercise Clause of the First Amendment requires exemptions from generally applicable and neutral laws like the Women's Health Amendment.³⁴ As the Court noted in *Employment Division v. Smith*, to do otherwise would be to create a system "in which each conscience is a law unto itself."³⁵ The WHA requires all new insurance plans to include coverage of the preventive services listed in the HRSA Guidelines. It applies to plans held by secular and religiously affiliated employers alike. Such a neutral law does not violate the First Amendment, despite the existence of theological doctrines opposing contraception.

In their advocacy on this issue, the U.S. Conference of Catholic Bishops and others have attempted to skirt the *Smith* standard in two ways. First, they argued that the contraceptive coverage requirement was somehow targeted at the Catholic Church. Although contraception and support for contraceptive coverage are overwhelmingly popular, objection to it is in no way limited to Catholic institutions.³⁶ Regardless, the HRSA Guidelines are not aimed at any religious objector. Rather, the Guidelines "target" *all* insurance plans toward the goal of bettering women's health and well-being by requiring coverage of preventive services at no cost-sharing.

Second, the USCCB invokes the "hybrid rights" exception to *Smith*, claiming that the contraceptive coverage requirement violates freedom of speech and association. In *Smith*, the Supreme Court explained its prior precedents, which did require exemptions from neutral laws, as implicating both religious liberty and a separate constitutional right. The lower federal courts have disagreed about whether the Court created a new "hybrid rights" exception to the *Smith*

³² *Piggie Park Enters., Inc.*, 256 F. Supp. at 945.

³³ *Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be "heads of households" could be held liable under equal pay laws); see also *E.F.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of households" violated Title VII).

³⁴ See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

³⁵ *Id.* at 890.

³⁶ See, e.g., Christian Medical Association, *supra* note 24; Press Release, Family Research Council, FRC Opposes HHS Mandated Coverage of Abortifacients Under Obamacare (Aug. 1, 2011); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 463 (plaintiffs challenging New York's contraceptive equity law included several Baptist groups).

doctrine, and if so, what showing it demands of a religious adherent.³⁷ But even the most expansive view of the hybrid rights exception could not call into question the WHA. It is well established that one does not make out a hybrid rights claim “merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right.”³⁸ The WHA implicates neither speech nor association.

Like other contraceptive coverage laws, the WHA does not “compel [anyone] to associate, or prohibit [anyone] from associating, with anyone.”³⁹ Compliance with a health insurance law does not implicate expressive association. Similarly, compliance with the WHA is not an endorsement of birth control; adherence to a law does not violate the speech rights of someone who disagrees with it. As the California Supreme Court held in this context, “for purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.”⁴⁰ Employers and insurance issuers remain free to oppose birth control, to attempt to persuade others not to use contraception, and to convey their moral messages. What they may not do is impose their religious beliefs on third parties by choosing which essential health services third parties are able to access.

B. Religious Freedom Restoration Act

Congress enacted the Religious Freedom Restoration Act (“RFRA”) to restore the strict scrutiny standard that protected religious exercise from substantial burdens imposed by neutral laws prior to *Smith*. The ACLU advocated for its passage. Despite claims to the contrary, RFRA is not implicated here for the simple reason that the contraceptive coverage requirement does not impose a substantial burden on religion. And even if the statute did impose such a burden, it furthers a compelling state interest in promoting gender equality, reproductive autonomy, and religious liberty.

³⁷ See *McTernan v. City of York*, 564 F.3d 636, 647 n.5 (3d Cir. 2009) (listing the circuits that have rejected the notion of a special hybrid rights rule); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir. 2008) (declining to adopt doctrine after noting widespread scholarly criticism); *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (describing hybrid rights theory as non-binding dicta); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (describing doctrine as “completely illogical”).

³⁸ *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999).

³⁹ *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465.

⁴⁰ *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 89; see also *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 20-21 (D.C. 1987) (holding that provision of benefits to a student group would amount to neither “an abstract expression of the University’s moral philosophy” nor an expression of support for the group or its views).

1. Substantial Burden

Under RFRA, a “substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]’”⁴¹ But the fact that government action “is offensive to [an individual’s] religious sensibilities” does not render the action a substantial burden.⁴² The link between the contraceptive coverage requirement and the religiously prohibited behavior is too attenuated to amount to a substantial burden.

The contraceptive coverage requirement simply requires employers to pay money, which purchases insurance, which covers a range of health care, which an employee may ultimately use to access birth control in her private life. The same, or greater, attenuation applies to insurers and individual purchasers. The long journey between a devout person’s paying money, and *someone else’s* use of that money to engage in behavior that the devout person considers sinful does not compel the government to excuse a religious adherent from a general law.⁴³

Courts have routinely rejected claims for exemption from paying taxes or providing benefits which conflict with its religious doctrine. In *United States v. Lee*, an Amish taxpayer objected to participating in the Social Security system on religious grounds. The Supreme Court unanimously rejected that free exercise claim, explaining:

[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.⁴⁴

Moreover, under the February 10 modification, institutions like hospitals, social service agencies, and universities that have religious belief-based objections to birth control will not even have to pay any money toward contraceptive coverage for their employees. Instead,

⁴¹ *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); accord *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (explaining that since RFRA does not create a new test to determine what constitutes a “substantial burden,” courts look to pre-*Smith* free exercise cases for that analysis).

⁴² *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

⁴³ See, e.g., *Tarsney v. O’Keefe*, 225 F.3d 929 (8th Cir. 2000) (paying taxes that subsidize Medicaid abortion coverage cannot even support standing to assert a free exercise claim because the injury it inflicts on a taxpayer religiously opposed to abortion is too attenuated).

⁴⁴ *United States v. Lee*, 455 U.S. 252, 259-60 (1982) (citations omitted); see also *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000); *Adams v. Comm’r*, 170 F.3d 173 (3d Cir. 1999).

coverage will be provided to enrollees directly by the insurer.⁴⁵ Any argument that could have been made under the original formulation of the rule (which we maintain was always lawful) should clearly now be put to rest. Indeed, the Catholic Health Association, the umbrella organization for Catholic hospitals, has come out in strong support of the modification, explaining that the needs of Catholic hospitals, in their view, have now been addressed.⁴⁶ Catholic Charities and the Association of Jesuit Colleges and Universities, among others, have also voiced support for the modified rule.⁴⁷

Importantly, nothing in the HRSA Guidelines requires any person to *use* contraception. The requirement is merely that contraceptive services be covered in insurance plans at no cost-sharing, such that individuals may choose whether or not to access those services. Senator Barbara Mikulski, the author of the Women's Health Amendment, put it well when explaining the purpose of the provision on the Senate floor: "[W]e do not mandate that you have the service; we mandate that you have *access* to the service. The decision as to whether you should get it will be a private one, unique to you."⁴⁸

Any entity covered by this provision remains free to relate its teachings about contraception to its adherents, its employees, and the general public, and attempt to persuade them not to use birth control. Indeed, when Wisconsin enacted a contraceptive equity provision with no religious refusal, a spokesman for the Diocese of Madison explained "Our employees know what church teaching is. And we trust them to use their conscience and do the right thing."⁴⁹

Insurance typically provides a broad range of benefits, some of which individual insureds will never use. Because Jehovah's Witnesses believe that accepting blood transfusions is a sin, devout Jehovah's Witnesses presumably do not use transfusion coverage. But this is a long way from asserting that a Jehovah's Witness employer should be entitled to purchase customized health plans that exclude coverage for blood transfusions for all its employees. As New York's

⁴⁵ The Obama administration has stated that a similar modification will be made for self-insured plans. See Paige Cunningham, *Self-insuring faith groups exempt from contraceptive order*, WASHINGTON TIMES, Feb. 15, 2010, available at <http://www.washingtontimes.com/news/2012/feb/15/self-insuring-faith-groups-exempt-from-contraceptive/>. See also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

⁴⁶ Press Release, Catholic Health Association of the United States, Catholic Health Association is Very Pleased with Today's White House Resolution that Protects Religious Liberty and Conscience Rights, http://www.chausa.org/Pages/Newsroom/Releases/2012/Catholic_Health_Association_is_Very_Pleased_with_Today's_White_House_Resolution_that_Protects_Religious_Liberty_and_Conscience_Rights/.

⁴⁷ Laurie Goodstein, *Obama Shift on Providing Contraception Splits Critics*, N. Y. TIMES, Feb. 14, 2012, available at <http://www.nytimes.com/2012/02/14/us/obama-shift-on-contraception-splits-catholics.html>.

⁴⁸ 155 CONG. REC. at S12277 (daily ed. Dec 3, 2009) (statement of Sen. Mikulski) (emphasis added).

⁴⁹ Annysa Johnson, *Catholic Church, Contraception Coverage Collide*, MILWAUKEE JOURNAL-SENTINEL, Aug. 12, 2010, available at <http://www.jsonline.com/features/religion/100504294.html>.

highest court explained in a similar context, there is no “absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings.”⁵⁰

Offering or contributing to insurance coverage that provides numerous health services, including one to which you object, simply is not a substantial burden cognizable under RFRA.⁵¹ Any claim to the contrary would turn RFRA into a blanket religious exemption that would threaten numerous health, welfare, and civil rights protections. Thus, any RFRA claim fails at the threshold. Even if it did not, the contraceptive coverage requirement survives RFRA review intact.

2. *Compelling Interest*

Allowing organizations to ignore the contraceptive coverage requirement would directly harm their employees’ rights. The Supreme Court has recognized that granting an exemption to a religious employer “operates to impose the employer’s religious faith on the employees.”⁵² Exempting employers from the contraceptive coverage requirement injures three fundamental rights of the women affected: gender equality, reproductive autonomy, and religious liberty. Those interests should not be sacrificed here.

a. Gender Equality

Omitting contraceptive coverage from a comprehensive benefit package is gender discrimination.⁵³ Prescription contraceptives are, for the most part, a form of health care available *only* to women. The consequences of the failure to be able to access and use contraception fall primarily on women. Denying contraceptive coverage undermines women’s control over childbearing, which directly affects women’s ability to participate equally in society. The Supreme Court has recognized as much: “The ability of women to participate

⁵⁰ *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465 (rejecting a challenge to New York’s contraceptive equity law). See also *U.S. Dep’t. of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff’d sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

⁵¹ See *Goehring v. Brophy*, 94 F.3d 1294, 1297, 1300 (9th Cir. 1996), *overruled on other grounds by City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997) (rejecting students’ objections to a university registration fee that was used to subsidize the schools’ health program which covered abortion care, reasoning that the payments did not impose a substantial burden on the plaintiffs’ religious exercise because “the plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services.”).

⁵² *Lee*, 455 U.S. at 261. This is all the more true for an insurer that would impose its beliefs on the employees of a range of different organizations.

⁵³ See Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html> (“Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.”); *Erickson v. Bartell Drug Company*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”⁵⁴

Equality is unquestionably a compelling government interest.⁵⁵ Ending sex discrimination in employment benefits is “equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.”⁵⁶ Ensuring equal benefits to men and women promotes “interests of the highest order.”⁵⁷

The WHA was designed to improve women’s health and redress sex discrimination in health benefits. “[T]his legislation . . . offers free preventive services to millions of women who are being discriminated against . . .”⁵⁸ As Senator Mikulski noted: “Often those things *unique to women* have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . .”⁵⁹ In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stems from reproductive health care:

Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.⁶⁰

Creating gaping holes in the contraceptive coverage requirement would perpetuate the fundamental inequity that the WHA was designed to erase.

⁵⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

⁵⁵ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

⁵⁶ *Fremont Christian Sch.*, 781 F.2d at 1369 (quoting *E.E.O.C. v. Pac. Press Publ’g Assoc.*, 676 F.2d 1272, 1280 (9th Cir. 1982)).

⁵⁷ *Shenandoah Baptist Church*, 899 F.2d at 1398 (quoting *Wisconsin v. Foder*, 406 U.S. 205, 215 (1972)). The high courts of California and New York each reached this conclusion when considering their respective contraceptive coverage laws. See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92 (“The [contraceptive requirement] serves the compelling state interest of eliminating gender discrimination.”); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 (describing the “State’s substantial interest in fostering equality between the sexes, and in providing women with better health care”).

⁵⁸ 155 CONG. REC. at S12020 (daily ed. Dec. 1, 2009) (statement of Sen. Reid); see also 155 CONG. REC. S11979, S11987 (daily ed. Nov. 30, 2009) (Statement of Sen. Mikulski).

⁵⁹ 155 CONG. REC. at S11988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (emphasis added).

⁶⁰ See 155 CONG. REC. at S 12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); see also 155 CONG. REC. at S12272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) (“Women of childbearing age pay on average 68 percent more for their health care than men do.”).

b. Reproductive Autonomy

At the core of the right to privacy is every person's right to make the profound, life-altering decision of whether to become a parent. The "realm of personal liberty" includes a woman's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁶¹ Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.⁶² Protecting access to reproductive health services is a compelling public interest.⁶³

Virtually all women of reproductive age have used birth control at some point.⁶⁴ Denial of contraceptive coverage causes some women to forgo birth control or use less expensive and less effective methods, resulting in unintended pregnancies.⁶⁵ Further, cost-sharing requirements pose substantial barriers to accessing this preventive care.⁶⁶ The contraceptive coverage requirement promotes women's interest in planning their families.⁶⁷

c. Religious Liberty

Just as those religious tenets opposing the use of contraception are entitled to respect, so too are contrary religious traditions, which hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. In our constitutional system, the government is supposed to be a neutral actor, allowing individuals to follow their own religious or moral consciences. Requiring contraceptive coverage in health plans does just that – it allows every woman to decide for *herself* what is right for her and her family.⁶⁸ That is not an employer's decision to make.

⁶¹ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁶² *Griswold*, 381 U.S. 479.

⁶³ *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (4th Cir. 1995); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994).

⁶⁴ CLOSING THE GAPS, *supra* note 4, at 92.

⁶⁵ Guttmacher Institute Testimony, *supra* note 9, at 8.

⁶⁶ CLOSING THE GAPS, *supra* note 4, at 94.

⁶⁷ See, e.g., 155 CONG. REC. at S12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("These health care services include . . . family planning services."); *id.* at S12027 (statement of Sen. Gillibrand) ("With [the WHA], even more preventive screening will be covered, including . . . family planning."); 155 CONG. REC. at S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("Under [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as . . . family planning"); *id.* at 12274 (statement of Sen. Murray) ("We have to make sure we cover preventive services, and [the WHA] takes into account the unique needs of women. . . . Women will have improved access to . . . family planning services.");

⁶⁸ As the California Supreme Court has recognized, "[o]nly those who join a church impliedly consent to its religious governance on matters of faith and discipline." *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 77.

IV. The Calls for Exceptions to Insurance Coverage Requirements are Limitless

The argument that the Affordable Care Act cannot require contraception coverage because some oppose birth control on religious or moral grounds knows no limit. In a “cosmopolitan nation made up of people of almost every conceivable religious preference,”⁶⁹ innumerable medical procedures will be disfavored by adherents of one religion or another. Indeed, the legislative “fix” some have proposed goes far beyond creating loopholes to the contraceptive coverage requirement. H.R. 1179, the Respect for Rights of Conscience Act of 2011, not only would roll back access to birth control, but also could eliminate insurance coverage for countless other critical health care services. This bill would allow *any* insurer or employer to refuse coverage of *any* health service otherwise required under the Affordable Care Act. Prenatal care, testing for HIV, mental health services, screening for cervical cancer, screening for Type II diabetes, vaccinations—coverage for any or all of these services and countless others could be denied to any person under this radically broad bill. This bill could jeopardize vital and necessary health care services for an untold number of Americans.

The bill would create gaping exceptions that would swallow the rule governing the preventive services and essential health benefits that must be provided in insurance plans under the Affordable Care Act. Under the bill, any entity could refuse coverage for any service that is contrary to that business’s “religious beliefs or moral convictions.” The consequences know no limit. For example, a restaurant owner could deny its employees coverage for screenings for infections that cause cervical cancer out of religious opposition to premarital sex. An insurance company could refuse to provide coverage for HIV testing, or preventive health care related to obesity out of a moral objection. In the name of religion or “morality,” any person, any employer, or any insurer could refuse to cover numerous other procedures or prescriptions, leading to discrimination and undermining health care. This isn’t religious liberty; this is a license to discriminate. And it’s the direct extension of the logic behind calls to rescind the contraception coverage rule.

The distorted view of religious liberty, which would grant virtually boundless rights to use religion to discriminate or ignore important health and safety protections, has no basis in law or the Constitution. The right to exercise one’s religion is not without bounds under existing law, and it should not be.⁷⁰ “To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”⁷¹ It has long been understood that religious exercise should not interfere with others’ rights, safety, and an ordered society.⁷² When entities seek special dispensation from laws that protect civil

⁶⁹ *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

⁷⁰ See, e.g., *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

⁷¹ *Lee*, 455 U.S. at 259.

⁷² See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Watson v. Jones*, 80 U.S. 679, 728 (1872); see also Thomas Jefferson, Query XVII in *Notes on the State of Virginia*, 159 (William Peden ed. 1955 Chapel Hill:

rights, health, and safety, the Constitution requires that courts examine the burdens such an exception would impose on others.⁷³ Any exception “must be measured so that it does not override other significant interests.”⁷⁴ It would be difficult to argue that allowing any person, employer, or insurer to refuse to provide coverage for vital health care services is “measured.” Thus, legislation like H.R. 1179, in addition to being wrong as a policy matter, also raises constitutional concerns.

* * *

Meaningful access to effective contraception is essential for women. The contraceptive coverage requirement is a huge step forward for women’s health and equality. And it clearly does not harm religious liberty. Any new exception to the contraceptive coverage requirement “increases the number of women affected by discrimination in the provision of health care benefits.”⁷⁵ The HHS Guidelines should be celebrated, not dismantled.

University of North Carolina Press) (“But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”).

⁷³ E.g., *Estate of Thornton*, 472 U.S. at 708-10.

⁷⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

⁷⁵ *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 94 (concluding that California’s contraceptive coverage law was narrowly tailored).

**Statement from Thirty-One Leaders of Religious and Faith-Based Organizations
Supporting Contraceptive Coverage**

**Written Testimony Prepared for Hearing Titled,
“Executive Overreach: The HHS Mandate Versus Religious Liberty”**

**US House of Representatives
Committee on the Judiciary
February 28, 2012**

Leaders of major mainstream religious and faith-based organizations released a statement in February 2012 supporting the January 20, 2012 announcement by the Department of Health and Human Services that contraceptive services must be covered by most insurance policies without deductibles or co-pays, and that only purely sectarian organizations are exempt from this requirement.

This statement supports our collective belief that the Obama Administration’s policy around healthcare coverage of contraception respects a critical principle of religious freedom: that every woman must be able to exercise her own moral agency. In particular, every woman has the right to make her own decisions about health care, including reproductive health care, guided by her own conscience, faith tradition, or religious or moral views. We thank the committee for considering our views.

Catholics for Choice; the Central Conference of American Rabbis; Concerned Clergy for Choice; Disciples for Choice; Disciples Justice Action Network; Episcopal Divinity School; Episcopal Women’s Caucus; Hadassah; the Jewish Reconstructionist Federation; Jewish Women International; Methodist Federation for Social Action; More Light Presbyterians; Muslims for Progressive Values; the National Council of Jewish Women; Planned Parenthood Clergy Advisory Board; Presbyterians Voices for Justice; Presbyterians Affirming Reproductive Options; the Rabbinical Assembly; the Religious Coalition for Reproductive Choice; the Religious Institute; Shalom Center; Society for Humanistic Judaism; The United Synagogue of Conservative Judaism; Union Theological Seminary; Unitarian Universalist Association; United Church of Christ; Women’s Alliance for Theology, Ethics, and Ritual; Women’s League for Conservative Judaism; and Women of Reform Judaism represent millions of religious leaders and people of faith across the country.

Together, the leaders of these Christian, Jewish and Muslim national organizations affirmed:

“We stand with President Obama and Secretary Sebelius in their decision to reaffirm the importance of contraceptive services as essential preventive care for women under the Patient Protection and Affordable Care Act, and to assure access under the law to American women, regardless of religious affiliation. We respect individuals’ moral agency to make decisions about their sexuality and reproductive health without governmental interference or legal restrictions. We do not believe that specific religious doctrine belongs in health care reform – as we value our nation’s commitment to church-state separation. We believe that women and men have the right to decide whether or not to apply the principles of their faith to family planning decisions, and to do so they must have access to services. The Administration was correct in requiring institutions that do not have purely sectarian goals to offer comprehensive preventive health care. Our leaders have the responsibility to safeguard individual religious liberty and to help improve the health of women, their children, and families. Hospitals and universities across the religious spectrum have an obligation to assure that individuals’ conscience and decisions are respected and that their students and employees have access to this basic health care service. We invite other religious leaders to speak out with us for universal coverage of contraception.”

Signed,

1. **Catholics for Choice**, Jon O'Brien, President
2. **Central Conference of American Rabbis**, Rabbi Jonathan Stein, President
3. **Concerned Clergy for Choice**, Rabbi Dennis Ross, Director
4. **Disciples for Choice**, Nancy Hunt Wirth, Representative
5. **Disciples Justice Action Network**, Rev. Dr. Ken Brooker Langston, Director
6. **Episcopal Divinity School**, The Very Reverend Dr. Katherine Hancock Ragsdale, President
7. **Episcopal Women's Caucus**, Rev. Dr. Elizabeth Kaeton, Convener
8. **Hadassah, The Women's Zionist Organization of America**, Marcie Natan, National President
9. **Jewish Reconstructionist Federation**, Robert Barkin, Interim Executive Vice President
10. **Jewish Women International**, Lori Weinstein, Executive Director
11. **Methodist Federation for Social Action**, Jill Warren, Executive Director
12. **More Light Presbyterians**, Rev. Dr. Michael Adey, Executive Director
13. **Muslims for Progressive Values**, Ani Zonneveld, President
14. **National Council of Jewish Women**, Nancy Kaufman, CEO
15. **Planned Parenthood Clergy Advisory Board**, Rev. Jane Emma Newall, Chair
16. **Presbyterians Affirming Reproductive Options**, Rev. Amanda Riley; Elder Brian S. Symonds, Co-Moderators
17. **Presbyterian Voices for Justice**, Rev. H. William Dummer, Moderator
18. **Rabbinical Assembly**, Rabbi Julie Schonfeld, Executive Vice President
19. **Religious Coalition for Reproductive Choice**, Rev. Steve Clapp, Chair
20. **Religious Institute**, Rev. Dr. Debra W. Haffner, Executive Director
21. **Shalom Center**, Rabbi Arthur Waskow, President
22. **Society for Humanistic Judaism**, M. Bonnie Cousens, Executive Director
23. **The United Synagogue of Conservative Judaism**, Rabbi Steven Wernick, CEO
24. **Union Theological Seminary**, Rev. Dr. Serene Jones, President
25. **Unitarian Universalist Association**, Rev. Peter Morales, President
26. **United Church of Christ**, Rev. Geoffrey Black, General Minister and President
27. **Women's Alliance for Theology, Ethics, and Ritual (WATER)**, Dr. Mary Hunt, Executive Director
28. **Women's League for Conservative Judaism**, Rita L. Wertlieb, President; Sarrae G. Crane, Executive Director
29. **Women of Reform Judaism**, Rabbi Maria J. Feldman, Executive Director

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**Materials Submitted on behalf of Jim Winkler, General Secretary
United Methodist Church, General Board of Church and Society**

**Written Testimony Prepared for Hearing Titled,
“Executive Overreach: The HHS Mandate Versus Religious Liberty”**

**US House of Representatives
Committee on the Judiciary
February 28, 2012**

Members of the Committee:

The enclosed materials express the support of the United Methodist Church General Board of Church and Society for the new contraceptive coverage policy under the Affordable Care Act.

They include two pieces for the hearing record:

1. *Insurance Coverage of Birth Control: It's Not About Religious Freedom*, an article published February 24, 2012
2. An organizational press release, *United Methodist social justice agency applauds HHS ruling expanding contraceptive coverage*, published January 23, 2012

I thank the committee for considering this perspective.

Jim Winkler
General Secretary
United Methodist Church General Board of Church and Society

Insurance Coverage of Birth Control: It's Not About Religious Freedom
Published February 24, 2012 at RH Reality Check

I've always appreciated that The United Methodist Church has never claimed to be a victim of religious persecution. Even though we imposed our religious views on others when we pushed through an amendment to the U.S. Constitution prohibiting sale and manufacture of alcohol nearly 100 years ago, we did not insist our religious liberty was infringed when Prohibition was repealed.

We strongly oppose gambling and find war incompatible with Christian teaching. We don't suggest, however, that the spread of gambling and the constant warfare around the world represent persecution of Methodism.

Why is it that the liberty of those who are denied basic health-care services is not at issue?

Yet, when the General Board of Church & Society agreed that religiously affiliated employers have an obligation to provide contraceptive services through the health insurance plans they offer to their employees, we have been accused of thwarting the religious liberty of various groups such as evangelical Christians and the Roman Catholic Church.

Why is it that the liberty of those who are denied basic health-care services is not at issue? Contraception benefits society. It reduces the spread of sexually transmitted diseases, reduces the need for abortions, and assists families to plan the number and spacing of their children.

Doesn't make it so

Just because someone says their religious liberty is being infringed upon does not make it so. Just because the Catholic hierarchy says that birth control is a sin against God does not make it so.

This is one area where The United Methodist Church is in clear disagreement with the Roman Catholic Church: "People have the duty to consider the impact on the total world community of their decisions regarding childbearing and should have access to information and appropriate means to limit their fertility" (United Methodist Social Principles, 162K, 2008 Discipline). "We affirm the right of men and women to have access to comprehensive reproductive health/family planning information and services that will serve as a means to prevent unplanned pregnancies, reduce abortions, and prevent the spread of HIV/AIDS" (Social Principles, 162V, 2008 Discipline).

A compromise has been offered that enables religiously affiliated institutions to refuse basic contraception coverage to their employees by mandating that insurance companies offer these services to women who opt for them. Catholic leadership has rejected the compromise.

Why? Because they don't want women to have the liberty to choose to use birth control. They want to deny that freedom to women.

Wrong then and now

There were those who argued that racial segregation was biblically mandated, that keeping women out of church leadership was sanctioned by God, and that destruction of the environment is approved by God. All of these notions were and are wrong. Religious freedom is not violated by denying religiously affiliated hospitals, universities and other institutions the right to discriminate on the basis of race or gender.

Now, Sen. Roy Blunt of Missouri proposes that *any* employer — religious or anti-religious, for that matter — should have the “right” to refuse coverage to its employees of any services, treatments or medications it disagrees with.

Perhaps an employer may hold the wild idea that use of pain medication or anesthesia indicates some sort of moral weakness. Therefore, the employer excludes that from the health-insurance plan offered to employees. Or, maybe an employer thinks that people contract diabetes due to poor dietary and exercise decisions they’ve made. Therefore, the employer doesn’t want to offer treatment for the disease.

Notice, if you will, that in this debate it is the religious freedom of institutions and corporations that is being addressed, not that of employees. In a world where corporations are declared to be people —where corporations even claim religious freedom — is it possible that real human beings, employees, no longer will have the rights of human beings or the freedom to practice behavior they consider ethical?

We hold as a denomination the belief that health care is a basic right and part of that includes ensuring access for women to contraception. This is about the common good.

FOR IMMEDIATE RELEASE (Jan. 23, 2012)

From Wayne Rhodes, Director of Communications General Board of Church & Society 100 Maryland Ave., N.E. Washington, D.C. 20002 (202) 488-5630 / wrhodes@umc-gbcs.org

United Methodist social justice agency applauds HHS ruling expanding contraceptive coverage

Ensures new insurance plans under Affordable Care Act include contraceptive coverage without patient cost-sharing

WASHINGTON, D.C. — The General Board of Church & Society (GBCS) of The United Methodist Church applauds the ruling by the U.S. Dept. of Health & Human Services (HHS) to ensure that all new insurance plans under the Affordable Care Act include contraceptive coverage without patient cost-sharing, except in very narrow circumstances.

"This is a great day for women in the United States," said Jim Winkler, GBGS chief executive. "This ruling ensures the availability of contraception for all women. It will result in millions having the services to be able to plan their families and prevent unplanned pregnancies regardless of the woman's economic security."

The HHS ruling means that hospitals, universities and other institutions affiliated with a particular faith group will not be allowed to deny their employees access to this critical preventive care. The United Methodist Church believes health care is a right for all persons. Historically, the denomination has taken a firm position in support of contraception and family planning. The denomination's Social Principles say: "We affirm the right of men and women to have access to comprehensive reproductive health/family planning information and services that will serve as a means to prevent unplanned pregnancies, reduce abortions and prevent the spread of HIV/AIDS." Furthermore, all United Methodist congregations are called to support programs that provide information about how to access to family planning and contraception resources.

"It's important for women to make their own personal decisions about birth control rather than living by the dictates of their employers," Winkler emphasized. "This act goes a long way in increasing the overall maternal health in the United States."

Winkler pointed out that the United States ranks the lowest of any developed nation in terms of maternal mortality. "We can and must do better!" he declared.

The General Board of Church & Society is one of four international general program boards of The United Methodist Church. The board's primary areas of ministry are Advocacy, Education & Leadership Formation, United Nations & International Affairs, and resourcing these areas for the denomination. It has offices on Capitol Hill in Washington, D.C., and at the Church Center for the United Nations in New York City.

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Material submitted by and Prepared Statement of the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary

Thank you, Mr. Chairman.

The title of this hearing suggests that we need only consider the religious liberty of those who object to coverage for contraception. It does not even hint at the significant interests of the government or of the millions of women and families who seek access to safe and affordable contraceptive services.

Neither Congress nor the Executive Branch is free to ignore these interests, and—far from waging a war on the Constitution or on religion—President Obama and his Administration have sought a sensible balance that ensures that all women have access to free contraceptive services and honors the religious beliefs of those who object to providing or paying for these services.

A “sensible balance” is exactly what is required by our laws and Constitution. As one of the architects of the Religious Freedom Restoration Act of 1993—or RFRA—I worked hard to overturn the Supreme Court’s decision in *Employment Division v. Smith*. As we explained in our findings to RFRA, the core principle we codified by restoring the “compelling interest” test for laws that substantially burden religion was the need for “sensible balances between religious liberty and competing prior governmental interests.” RFRA was supported by a broad coalition ranging from the ACLU to the National Association of Evangelicals, and both Chambers of Congress passed it with overwhelming bipartisan majorities.

The Constitution also demands a sensible balance. Where—as is the case here—the government chooses to accommodate religious beliefs, even if doing so is not constitutionally required, the government must also take into account the interests of those who do not benefit from the accommodation.

In striking down Connecticut’s law allowing Sabbath observers to take their Sabbath day off work in *Estate of Thornton v. Caldor*, for example, the Supreme Court found that, because “the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath,” it constituted an “unyielding weighting” in favor of religion that violates the First Amendment. In the 2005 case of *Cutter v. Wilkinson*, the Court made clear that “an accommodation [for religion] must be measured so that it does not override other significant interests.”

In addressing the exact question at issue here, the California Supreme Court upheld application of a contraceptive coverage requirement, finding that exempting religiously-affiliated charities would “increas[e] the number of women affected by discrimination in the provision of health care benefits,” whose interests could not be overlooked. As the California Supreme Court explained:

“Strongly enhancing the state’s interest is the circumstance that any exemption from the [state contraceptive coverage requirement] sacrifices the affected women’s interest in receiving equitable treatment with regard to health benefits.”

The Administration’s policy is an attempt to balance competing rights and, in seeking a sensible balance at the federal level, the Administration understandably looked to California’s experience and modeled its initial August 2011 exemption for “religious employers” on laws like California’s and New York’s, both of which have been upheld as constitutional by their State’s highest courts.

This original exemption for “religious employers” was criticized as too narrow because it would not include religiously-affiliated hospitals, universities, and charities that serve and employ persons from a variety of faiths, many of whom may not share their religious beliefs. Responding to these concerns, President Obama and Secretary of HHS Kathleen Sebelius crafted an additional accommodation that establishes a safe harbor for a year (until August 1, 2013). During this time, a final rule will be promulgated that still ensures that all women have access to contraceptive services. But objecting religious organizations will not have to provide or pay for these benefits. Instead, insurance companies will contact employees and offer these benefits to them directly and free of charge. The Administration has said that this is workable because covering contraception saves money, and that insurance companies will not be permitted to increase premiums of objecting employers to cover the cost of contraceptive services.

Many who objected to the original rule as too narrow support this approach. For example, the Catholic Health Association said it was “very pleased with the White House announcement” and it “looked forward to reviewing the specifics.” The Association of Jesuit Colleges & Universities “commended the Obama administration for its willingness to work with us on moving toward a solution” and “looked forward to working out the details of these new regulations with the White House.”

Others are not satisfied. The United States Conference of Catholic Bishops, for example, initially called the plan a “step in the right direction” but later condemned it, taking the position that “the only complete solution to this religious liberty problem is for HHS to rescind the mandate of these objectionable services.” Some Members of Congress have also called for rescission of the requirement or, in the alternative, for legislation that would exempt any employer or insurer from providing any services to which they object on religious or moral grounds. These proposals—like H.R. 1179, the “Respect for the Rights of Conscience Act of 2011,” cause grave constitutional concerns by granting an unyielding weight to the interests of religious objectors at the expense of all others.

Where, in these demands for complete removal of or exemption from the requirement for preventive contraceptive services, is there any acknowledgment or protection of the religious, health, and economic rights of women or the significant public health interest that the government shares in improving the well-being and health of women and their families?

99% of all women who are sexually active in their lifetimes use contraceptives and nearly 38.5 million women are currently using some method of contraception. The interests of these women and their families cannot be ignored and should not be cast aside.

We are likely to hear that requiring access to cost-free contraceptive services—and making those services part of routine, preventive care—is not necessary. Women can easily get contraception at a local clinic or over the internet, this care is inexpensive, and removing the requirement of coverage will not really harm women or their families.

Most of the people making these claims are not public health experts. They are not doctors. They are not Sandra Fluke’s friend at Georgetown Law, who could not afford the out-of-pocket costs required to continue prescription birth control that stopped cysts from growing on her ovaries. Without this medication, a tennis-ball size cyst grew and required a trip to the emergency room and complete removal of an ovary. Ms. Fluke’s testimony, provided at a hearing held last week by Minority Leader Nancy Pelosi, provides several compelling examples of the cost barriers to obtaining contraceptive services and the real harm caused by inadequate access to that care. I ask that her testimony be included in the record for this hearing as well.

Today, we have a doctor and public health expert with us. Dr. Linda Rosentock is the Dean of the School of Public Health at UCLA. She also chaired the Committee on Preventive Services for Women, convened at HHS’ request by the Institute of Medicine—a nonpartisan organization responsible for advising the federal government on issues of medical care, research and education—to study and make recommendations regarding the preventive services that should be provided to women at no cost, as was required of HHS by Congress in the Affordable Care Act.

HHS accepted all of the IOM’s eight recommendations, one of which was to include FDA-approved contraceptive services as part of routine, preventive care for women because of the tremendous benefits that family planning provides for women and their families. I look forward to hearing from Dr. Rosentock about this decision.

I also urge all of my colleagues to set partisan politics aside for a moment and consider carefully the accommodations that the Administration has proposed.

I believe that the President and Secretary Sebelius can and will achieve a workable balance. They already have gone beyond what I believe is required as a purely legal matter to accommodate religious belief, though I support their laudable work to ensure that any burden on religion will be minimal, which the proposed rule ensures by removing objecting employers from the equation.

I fear that those who continue to object—and do so despite the fact that their right to decline to participate in the provision of preventive contraceptive services has been respected—truly seek to block women’s access to contraceptive services altogether. But the Constitution does not grant them that right and, in fact, guards against that risk. As Judge Learned Hand once explained, the First Amendment “gives no one the right to insist that in pursuit of their own interests other must conform their conduct to his own religious necessities.” Sacrificing the rights and needs of women, and of the public health, by removing the requirement for these critical services or broadly exempting anyone who might object, is neither wise nor is it constitutional.

With that, I yield back the balance of my time.



**LAW STUDENTS
FOR
REPRODUCTIVE
J U S T I C E
CHAPTER**

Leader Pelosi, Members of Congress, good morning, and thank you for calling this hearing on women's health and allowing me to testify on behalf of the women who will benefit from the Affordable Care Act contraceptive coverage regulation. My name is Sandra Fluke, and I'm a third year student at Georgetown Law, a Jesuit school. I'm also a past president of Georgetown Law Students for Reproductive Justice or LSRJ. I'd like to acknowledge my fellow LSRJ members and allies and all of the student activists with us and thank them for being here today.

Georgetown LSRJ is here today because we're so grateful that this regulation implements the nonpartisan, medical advice of the Institute of Medicine. I attend a Jesuit law school that does not provide contraception coverage in its student health plan. Just as we students have faced financial, emotional, and medical burdens as a result, employees at religiously affiliated hospitals and universities across the country have suffered similar burdens. We are all grateful for the new regulation that will meet the critical health care needs of so many women. Simultaneously, the recently announced adjustment addresses any potential conflict with the religious identity of Catholic and Jesuit institutions.

When I look around my campus, I see the faces of the women affected, and I have heard more and more of their stories. . On a daily basis, I hear from yet another woman from Georgetown or other schools or who works for a religiously affiliated employer who has suffered financial, emotional, and medical burdens because of this lack of contraceptive coverage. And so, I am here to share their voices and I thank you for allowing them to be heard.

Without insurance coverage, contraception can cost a woman over \$3,000 during law school. For a lot of students who, like me, are on public interest scholarships, that's practically an entire summer's salary. Forty percent of female students at Georgetown Law report struggling financially as a result of this policy. One told us of how embarrassed and powerless she felt when she was standing at the pharmacy counter, learning for the first time that contraception wasn't covered, and had to walk away because she couldn't afford it. Women like her have no choice but to go without contraception. Just last week, a married female student told me she had to stop using contraception because she couldn't afford it any

longer. Women employed in low wage jobs without contraceptive coverage face the same choice.

You might respond that contraception is accessible in lots of other ways. Unfortunately, that's not true. Women's health clinics provide vital medical services, but as the Guttmacher Institute has documented, clinics are unable to meet the crushing demand for these services. Clinics are closing and women are being forced to go without. How can Congress consider the Fortenberry, Rubio, and Blunt legislation that would allow even more employers and institutions to refuse contraceptive coverage and then respond that the non-profit clinics should step up to take care of the resulting medical crisis, particularly when so many legislators are attempting to defund those very same clinics?

These denials of contraceptive coverage impact real people. In the worst cases, women who need this medication for other medical reasons suffer dire consequences. A friend of mine, for example, has polycystic ovarian syndrome and has to take prescription birth control to stop cysts from growing on her ovaries. Her prescription is technically covered by Georgetown insurance because it's not intended to prevent pregnancy. Under many religious institutions' insurance plans, it wouldn't be, and under Senator Blunt's amendment, Senator Rubio's bill, or Representative Fortenberry's bill, there's no requirement that an exception be made for such medical needs. When they do exist, these exceptions don't accomplish their well-intended goals because when you let university administrators or other employers, rather than women and their doctors, dictate whose medical needs are legitimate and whose aren't, a woman's health takes a back seat to a bureaucracy focused on policing her body.

In sixty-five percent of cases, our female students were interrogated by insurance representatives and university medical staff about why they needed these prescriptions and whether they were lying about their symptoms. For my friend, and 20% of women in her situation, she never got the insurance company to cover her prescription, despite verification of her illness from her doctor. Her claim was denied repeatedly on the assumption that she really wanted the birth control to prevent pregnancy. She's gay, so clearly polycystic ovarian syndrome was a much more urgent concern than accidental pregnancy. After months of paying over \$100 out of pocket, she just couldn't afford her medication anymore and had to stop taking it. I learned about all of this when I walked out of a test and got a message from her that in the middle of her final exam period she'd been in the emergency room all night in excruciating pain. She wrote, "It was so painful, I woke up thinking I'd been shot." Without her taking the birth control, a massive cyst the size of a tennis ball had grown on her ovary. She had to have surgery to remove her entire ovary. On the morning I was originally scheduled to give this testimony, she sat in a doctor's office. Since last year's surgery, she's been experiencing night sweats, weight gain, and other symptoms of early menopause as a result of the

removal of her ovary. She's 32 years old. As she put it: "If my body indeed does enter early menopause, no fertility specialist in the world will be able to help me have my own children. I will have no chance at giving my mother her desperately desired grandbabies, simply because the insurance policy that I paid for totally unsubsidized by my school wouldn't cover my prescription for birth control when I needed it." Now, in addition to potentially facing the health complications that come with having menopause at an early age-- increased risk of cancer, heart disease, and osteoporosis, she may never be able to conceive a child.

Perhaps you think my friend's tragic story is rare. It's not. One woman told us doctors believe she has endometriosis, but it can't be proven without surgery, so the insurance hasn't been willing to cover her medication. Recently, another friend of mine told me that she also has polycystic ovarian syndrome. She's struggling to pay for her medication and is terrified to not have access to it. Due to the barriers erected by Georgetown's policy, she hasn't been reimbursed for her medication since last August. I sincerely pray that we don't have to wait until she loses an ovary or is diagnosed with cancer before her needs and the needs of all of these women are taken seriously.

This is the message that not requiring coverage of contraception sends. A woman's reproductive healthcare isn't a necessity, isn't a priority. One student told us that she knew birth control wasn't covered, and she assumed that's how Georgetown's insurance handled all of women's sexual healthcare, so when she was raped, she didn't go to the doctor even to be examined or tested for sexually transmitted infections because she thought insurance wasn't going to cover something like that, something that was related to a woman's reproductive health. As one student put it, "this policy communicates to female students that our school doesn't understand our needs." These are not feelings that male fellow students experience. And they're not burdens that male students must shoulder.

In the media lately, conservative Catholic organizations have been asking: what did we expect when we enrolled at a Catholic school? We can only answer that we expected women to be treated equally, to not have our school create untenable burdens that impede our academic success. We expected that our schools would live up to the Jesuit creed of *cura personalis*, to care for the whole person, by meeting all of our medical needs. We expected that when we told our universities of the problems this policy created for students, they would help us. We expected that when 94% of students opposed the policy, the university would respect our choices regarding insurance students pay for completely unsubsidized by the university. We did not expect that women would be told in the national media that if we wanted comprehensive insurance that met our needs, not just those of men, we should have gone to school elsewhere, even if that meant a less prestigious university. We refuse to pick between a quality education and our health, and we

resent that, in the 21st century, anyone thinks it's acceptable to ask us to make this choice simply because we are women.

Many of the women whose stories I've shared are Catholic women, so ours is not a war against the church. It is a struggle for access to the healthcare we need. The President of the Association of Jesuit Colleges has shared that Jesuit colleges and universities appreciate the modification to the rule announced last week. Religious concerns are addressed and women get the healthcare they need. That is something we can all agree on. Thank you.

Material submitted by the Honorable Mike Quigley, a Representative in Congress from the State of Illinois, and Member, Committee on the Judiciary



Attacks on Contraceptive Coverage: The Latest Front in the War on Women

Testimony presented by

Nancy Keenan
President

On behalf of:

Illinois Choice Action Team
NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Maryland
NARAL Pro-Choice Massachusetts
NARAL Pro-Choice Minnesota
NARAL Pro-Choice Missouri
NARAL Pro-Choice Montana
NARAL Pro-Choice New Hampshire
NARAL Pro-Choice New Mexico
NARAL Pro-Choice New York
NARAL Pro-Choice North Carolina
NARAL Pro-Choice Ohio
NARAL Pro-Choice Oregon
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Texas
NARAL Pro-Choice Virginia
NARAL Pro-Choice Washington
NARAL Pro-Choice Wisconsin
NARAL Pro-Choice Wyoming

U.S. House of Representatives
Committee on the Judiciary

February 28, 2012

Members of the Judiciary Committee: I am honored to submit this testimony.

The question before the panel today is whether corporations that oppose birth control should be allowed to impose those beliefs on their employees. NARAL Pro-Choice America strongly believes that all women should have access to reproductive-health care, regardless of their employer.

Family Planning is Basic Health Care for Women

Access to family planning is essential to women's health. The average woman wants only two children and will spend five years of her life pregnant or trying to get pregnant and nearly three decades trying to avoid pregnancy.¹ If a woman does not have access to contraception, she could have between 12 and 15 pregnancies, endangering her health and the health of her children.²

Moreover, family-planning services reduce the negative health outcomes strongly associated with unplanned pregnancy. These include delayed or inadequate prenatal care, increased fetal exposure to tobacco and alcohol, increased likelihood of low birth weight and death in the first year of life, and higher risk of abuse and failure to receive sufficient resources for healthy development.³ When women have access to affordable family-planning services, rates of low-birth-weight births, infant deaths, and neonatal deaths considerably decrease.⁴

The Affordable Care Act Offers an Historic Opportunity to Expand Women's Access to Contraception

The federal health-reform law presents an unprecedented opportunity to improve women's access to comprehensive, preventive health care by ensuring the affordability of family-planning services for almost all U.S. women. In particular, Section 2713(a)(4), known as the Women's Health Amendment, removes significant obstacles for women seeking preventive reproductive-health care.⁵

In August 2011, the Department of Health and Human Services adopted the recommendation of an independent expert panel appointed by the Institute of Medicine that family-planning services, including the full range of FDA-approved contraceptive methods, be recognized as a women's preventive-health service that should be covered by insurance plans without additional costs to individuals.⁶ The administration adopted this recommendation in full, albeit with the proposal that certain employers be permitted to opt out.⁷ Explicitly religious organizations, namely churches and other houses of worship, are exempt from the requirement. Other religiously affiliated employers that presently refuse to offer their employees contraceptive coverage will be allowed one year to come into compliance with the new requirement. And women who work at religiously affiliated organizations that oppose contraception will be guaranteed coverage for birth control directly through their health plans. These organizations – hospitals, universities, and social-service organizations – will be allowed

to refuse to pay or refer for coverage of birth control – and in those instances, insurance companies will be responsible for ensuring that the women who work at these organizations receive coverage of contraceptives at no additional cost. While we believe that all women should have contraceptive coverage, the fact that most women will receive this coverage seamlessly is an acceptable accommodation that should satisfy reasonable parties.

Do Employers Have Consciences?

Birth control is entirely noncontroversial. Ninety-nine percent of sexually active women have used contraception.⁸ Despite this, some still attempt to block women's access to family-planning services, and in particular are actively opposing the new contraceptive-coverage policy. One approach to undermining the new family-planning benefit is to claim that employers have "consciences" that override women's rights. And despite the fact that churches and other explicitly religious organizations are already exempted, and religiously affiliated organizations can refuse to pay or refer for birth-control coverage for their employees, anti-contraception forces continue to move the goal posts, most recently pushing for a refusal policy that would allow any private employer to refuse coverage of a vast array of health-care services for virtually any reason.

These elected officials and their allies' comments are framed as concern for an employer's "conscience" – but their baseline position is opposition to contraception altogether. In this view, they are far out of the mainstream. And precisely because Americans correctly see birth control as noncontroversial, the public supports the administration's contraceptive-coverage policy.⁹ The majority of Americans agree that "employers should be required to provide their employees with health-care plans that cover contraception and birth control at no cost."¹⁰ Moreover, 58 percent of Catholics similarly agree that employers should offer their employees plans that cover birth control.¹¹ Simply put, the public does not agree that an employer has a "conscience" that overrules an employee's.

Moreover, as a substantive matter, prioritizing the "conscience" of private employers over the health-care needs of women risks opening the door to further discrimination beyond the contraception context. Legislation proposed by anti-contraception lawmakers to broaden the refusal around contraceptive coverage goes so far as to allow any private employer to object to covering any preventive-health services or essential health benefit. This has the potential to unravel one of the law's key provisions altogether. For example, an employer could claim a moral objection to providing HIV/AIDS counseling to LGBT employees. Likewise, an employer could refuse to cover prenatal care for unmarried women if he doesn't believe in having a child out of wedlock. The effects of this kind of legislation could be incredibly far-reaching.

Finally, some claim that employers should not be forced to pay for a service they oppose on religious or moral grounds. We live in a pluralistic society; such a claim is at least impractical, if not entirely untenable. The Church of Jesus Christ of Latter-Day Saints opposes tobacco use; may a Mormon employer deny his employees smoking-cessation benefits? Is every employer to

be allowed to force its view on its employees – even if the employees do not share the same beliefs? That in essence is what those requesting a broad refusal right from contraception and other health services are demanding.

Can “Any Woman in America” Get Contraception?

Some family-planning skeptics also blithely claim that anyone can and should be able to afford the high price of contraception – or to obtain it at no cost if they cannot. This view demonstrates a stunning lack of awareness about many American families’ financial circumstances.

Simply put, for many women, contraception is too expensive.¹² Paying out of pocket for contraception can result in annual fees of more than \$700.¹³ Over the span of a woman’s reproductive years (15-44),¹⁴ the cost of contraception can amount to more than \$20,000. Given these figures, unsurprisingly, one in three women has struggled with the cost of prescription birth control at some point, and research shows that even small cost-sharing requirements can put contraception out of reach.¹⁵

And in our current economic climate, financial obstacles to health care have become even more acute. A 2009 survey found that because of the economic recession, 23 percent of women reported having trouble paying for birth control and 24 percent put off a gynecological or birth-control exam due to cost.¹⁶

Publicly funded family-planning programs for low-income women fall far short of the need. The Medicaid program covers contraception, but its eligibility is extremely limited. Title X, the only federal program exclusively dedicated to family-planning and reproductive-health care, is designed to fill the gap between Medicaid and private health insurance, but it does not come even close to doing so, because of chronic underfunding. If Title X funding had increased at only the rate of inflation from its FY’80 funding level of \$162 million, it would now be funded at more than \$725 million. Currently, Title X’s funding level is less than half that amount.¹⁷ All told, that means millions of Americans fall into the cracks, unable to afford family-planning services privately but unable to obtain them through public programs.

Despite these sobering facts, opponents of contraception claim there is no need to ensure health plans cover this basic benefit. Rep. Tom Price (R-GA) says there is “not one” woman in this country who is unable to access contraceptive coverage.¹⁸ Sen. Ron Johnson (R-WI) made light of the importance of contraceptive coverage, noting (incorrectly) that “any woman in America can get free contraceptives if they can’t afford to pay for them.”¹⁹ And a major supporter of presidential candidate and former Sen. Rick Santorum (R-PA) even went so far as to mock contraception and its cost. “Back in my day,” he said, “they used Bayer aspirin for contraceptives. The gals put it between their knees and it wasn’t that costly.”²⁰

It is difficult to know whether comments like these arise from plain ignorance of many women's financial circumstances or are merely another attempt to deflect from plain opposition to birth control on ideological grounds. Either way, these views must be rejected wholesale.

All Women Should Have Access to Family-Planning Care

A key promise of the health-care law is that women will no longer be subject to extra charges for necessary preventive care. This benefit has the potential to help millions of women and will be one of the most impactful provisions of the Affordable Care Act. Denying benefits to large populations of women undermines one of the most important public-health goals of the Women's Health Amendment. Those who wish to block their employees' access to a full range of contraceptive services are not required to prescribe or take birth control against their beliefs, nor are they being asked to endorse it. They are free to continue opposing the use of contraception in their personal capacity. But they may not use their own beliefs to discriminate against those who believe otherwise, and deny others their right of conscience to use birth control, should they so choose.

On behalf of NARAL Pro-Choice America and its more than one million member activists around the country, we urge the committee to ensure that all women, regardless of where they work, are able to realize the full benefits of comprehensive reproductive-health care.

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² Abigail Trafford, *Viagra and the Other Sex Pill*, WASH. POST, May 19, 1998, at Z6.

³ Committee on Unintended Pregnancy, Institute of Medicine, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* (Sarah S. Brown & Leon Eisenberg, eds. 1995).

⁴ Guttmacher Institute, *Issues in Brief: The U.S. Family Planning Program Faces Challenges and Change*, at <http://www.guttmacher.org/pubs/ib3.html> (last visited Oct. 31, 2011).

⁵ P.L. 111-148, 111th Cong. (2010) § 2713(a)(4).

⁶ INSTITUTE OF MEDICINE, *CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS* (2011).

⁷ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 149 (proposed August 3, 2011) (to be codified at 45 C.F.R. pt. 147).

⁸ Rachel K. Jones and Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, Guttmacher Institute 4 (Apr. 2011), at <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf> (last visited Oct. 31, 2011).

⁹ Greenberg Quinlan Rosner Research, *New Phase and Shifting Balance: Democrats consolidate progressive base while Republicans in deepening trouble*, at <http://www.democracycorps.com/wp-content/files/February-National-Memo.pdf>.

¹⁰ Greenberg Quinlan Rosner Research, *New Phase and Shifting Balance: Democrats consolidate progressive base while Republicans in deepening trouble*, at <http://www.democracycorps.com/wp-content/files/February-National-Memo.pdf>.

¹¹ Cathy Lynn Grossman, *New surveys: Catholics want birth control coverage*, at <http://content.usatoday.com/communities/Religion/post/2012/02/contraception-catholic-bishops-obama-hhs/1#.T0gBG3nQdyU> (last visited Feb. 24, 2012).

¹² Guttmacher Institute, *Contraceptive Needs and Services: National and State Data, 2008 Update* (May 2010), at <http://www.guttmacher.org/pubs/win/contraceptive-needs-2008.pdf> (last visited Oct. 31, 2011).

¹³ Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services And Supplies Without Cost-Sharing*, 14 GUTTMACHER POLICY REVIEW (2011), at <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html> (last visited Oct. 26, 2011).

¹⁴ Guttmacher Institute, *In Brief: Facts on Contraceptive Use in the United States*, June 2010, at http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Oct. 31, 2011).

¹⁵ Adam Sonfield, *Contraception: An Integral Component of Preventive Care for Women*, 13 GUTTMACHER POLICY REVIEW (2010) at <http://www.guttmacher.org/pubs/gpr/13/2/gpr130202.html> (last visited Sept. 27, 2011).

¹⁶ Guttmacher Institute, *A Real Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, (Sept. 2009), at <http://www.guttmacher.org/pubs/RecessionFP.pdf> (last visited Oct. 28, 2011).

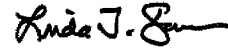
¹⁷ National Family Planning & Reproductive Health Association (NFPRA), *Title X National Family Planning Program: Critical Women's Health Program Struggles to Meet Increasing Demand*, at http://www.nfprha.org/images/pdf/facts/Title_X.pdf (last visited Oct. 20, 2011).

¹⁸ Scott Keyes and Travis Waldron, *House Republican Leader Price: 'There's Not One Woman' Who Doesn't Have Access To Birth Control*, ThinkProgress.com, at <http://thinkprogress.org/health/2012/02/10/422862/toin-price-women-birth-control/> (last visited Feb. 25, 2012).

¹⁹ *Republicans Say Contraception Rule Fight is Not Over*, PoliticoPro, at http://www.politico.com/news/stories/0212/72833_Page2.html (last visited Feb. 25, 2012).

²⁰ Frank Jaimes, *Santorum Ally Friess Praises Old-School 'Contraceptive': Aspirin Between Knees*, NPR, at <http://www.npr.org/blogs/itsallpolitics/2012/02/17/146999566/santorum-backer-friess-praises-old-school-contraceptive-aspirin> (last visited Feb. 24, 2012).

**Prepared Statement of the Honorable Linda T. Sánchez, a Representative
in Congress from the State of California, and Member, Committee on the
Judiciary**



Congresswoman Linda T. Sánchez
Statement for the Record
February 28, 2012

Hearing on: "Executive Overreach: The HHS Mandate Versus Religious Liberty"

Thank you Mr. Chairman.

Before I begin, I want to applaud the Chairman for inviting Mrs. Uddin, Dr. Rosenstock, and Ms. Monahan to join us today.

I believe it's crucially important for committees to hear from women when it comes to women's health issues. It greatly pleases me that we have three women here today! I'm hopeful that my colleagues benefitted from their testimony, because women make up 75% of this panel. So, thank you all for coming.

I also want to note the presence of Bishop Lori on today's panel. His presence reminds me that this is not the first time that public officials have spoken on issues that some would argue are the realm of the clergy.

I remember former New York Governor Mario Cuomo was one elected official who often spoke about his dual role as a legislator and as a Catholic. In a noteworthy speech at the University of Notre Dame, Cuomo said that "all religiously based values don't have an *a priori* place in our public morality." I think that's important to remember here today.

My colleagues have framed this hearing as a debate between regulations—developed by an objective, non-partisan panel—and "religious liberty." I'd like to remind us all about some of the reasons why the Institute of Medicine made these recommendations.

Dr. Rosenstock states in her testimony that IOM took its task of focusing on women's unique health needs very seriously.

With that, I'm sure the IOM considered that fourteen percent of women use the Pill, not for contraceptive purposes, but for other health reasons. I'm certain that the IOM recognized that millions of women would be denied this medical care should these regulations not go into effect.

I am also certain that IOM considered that the Pill has prevented 100,000 deaths and 200,000 occurrences of ovarian cancer.

It is clear that IOM also realized that -- contrary to what some of my colleagues may believe - contraceptives are not a cheap, easily accessible solution for all women. Nearly 29% of women risk health problems by inconsistently using birth control pills to save money.

Finally, we should acknowledge that many insurance companies know that the cost of adding contraceptive coverage to a health plan is more than covered by the in-cost savings.

Judiciary Committee Hearing:
HHS and Preventative Care
Submitted for the Record
by: Sanchez(2.28.12)

These regulations were developed to protect the health needs of women—period. These regulations were not designed to jeopardize anyone's religious freedom. Whether these regulations are an appropriate way to protect those health needs is a valid topic for a hearing. However, I'm not certain if we've had that debate today.