ACLJ
American Center
for Law & Justice

June 19, 2012

Centers for Medicare & Medicaid Services
Department of Health and Human Services
[redacted]

RE: Preventive Services Under the Patient Protection and Affordable Care Act

Dear Departments of Health and Human Services, Labor, and the Treasury:

The following comments are in response to the Advanced Notice of Proposed Rulemaking (ANPRM) issued on March 21, 2012 (77 Fed. Reg. 16501) by the Treasury Department, the Department of Labor, and the Department of Health and Human Services concerning certain preventive services under the Patient Protection and Affordable Care Act.

By way of introduction, the American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving religious liberties. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

Factual Background

In 2010, pursuant to § 2713(4) of the Public Health Service Act (PHS Act), as amended by the Patient Protection and Affordable Care Act (PPACA), the Department of Health and Human Services (HHS) issued "interim final regulations" which required that "evidence-informed preventive care and screening provided for in comprehensive guidelines supported by [the Health Resources and Services Administration (HRSA)]" be provided free, without cost sharing by group insurance providers.[1] The regulations did not include the "comprehensive guidelines," but invited comments on what should be included, "due on or before September 17, 2010."[2] The regulations noted that the HHS expected to release the comprehensive guidelines "no later than August 1, 2011."[3] The HRSA commissioned the Institute of Medicine (IOM) to recommend comprehensive guidelines.[4] The IOM made its guideline recommendations, and the HRSA adopted the recommendations and declared that they take effect immediately starting August 1, 2011.[5] These guidelines require insurance companies to provide contraceptives to insured members free of any cost-sharing requirements.[6]

In addition, the HHS released an amendment to the interim final regulations to take effect August 1, 2011 that purported to protect certain religious organizations from the requirement of providing contraceptives.[7] According to this amendment, the Departments of Health and Human Services, Labor, the Treasury (Departments) "received considerable feedback regarding which preventive services for women should be considered for coverage under PHS Act section 2713(a)(4). Most commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemption."[8] Several commenters asserted the opposite position, in that requiring group health plans sponsored by religious employers to cover contraceptive services, contrary to their religious tenets, would infringe upon their religious freedom.[9]

In response to these comments, an amendment exempting certain religious organizations was issued.[10] This amendment, however, exempts only religious organizations and provides HRSA with the discretion to define a religious organization as one that:

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[1] Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA, 75 Fed. Reg. 41726, 41728 (July 19, 2010).
[2] *Id*.
[3] *Id*.
[4] U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited June 7, 2012).
[5] *Id*.
[6] *Id*.
[7] *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA, 76 Fed. Reg. 46621(August 3, 2011).
[8] *Id*. at 46623.
[9] *Id*.
[10] *Id*.

> (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 under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.[11]

Under the Mandate/Final Rule being challenged herein, employers with more than 50 full-time employees are required to include, in group health plans, coverage "for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'"[12] Coverage includes prescriptions such as Plan B, which contains a high dose of birth control pills, preventing pregnancy if taken with three days of unprotected sex by blocking ovulation or fertilization. This type of "emergency contraception" is essentially an abortion pill as it works "by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the uterus (womb)."[13] This is contrary to Section 1303(b)(1)(A) of the PPACA, which provides that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."[14]

On January 20, 2012, the HHS announced that it had adopted the interim final regulations with one slight change: Non-profit employers who certify that compliance with the regulation violates their religious beliefs would be given an extra year to comply (August 1, 2013 instead of August 1, 2012).[15]

On February 10, 2012, whether in response to popular outcry, or as part of the plan all along,[16] the Obama Administration (Administration) announced that it would be issuing an "accommodation" that would, according to the Administration, shift the mandate from requiring religious non-profit organizations to directly fund contraceptives to simply continuing to require all health insurance providers to provide contraceptives

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[11] *Id.*
[12] *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16502 (March 21, 2012).
[13] U.S. Food and Drug Administration, *Plan B Questions and Answers*, http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109783.htm (last visited June 8, 2012).
[14] 42 U.S.C.A. § 18023(b)(1)(A)(i) (West 2010).
[15] Press Release, U.S. Dep't of Health & Human Servs., A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html.
[16] *Immaculate Contraception: An 'accommodation' that makes the birth-control mandate worse*, WALL ST. J. (Feb. 13, 2012), http://online.wsj.com/article/SB10001424052970203646004577215150068215494.html?mod=WSJ_Opinion_LEADTop (noting that an administration official "claimed that the new plan was 'our intention all along'").

free of charge.[17] The Administration announced plans to propose changes to the final regulations, implement section 2713 of the PHS Act, and meet two goals: (1) accommodating non-exempt non-profit organizations' religious objections to covering contraceptive services, and (2) assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing.[18]

Under the PHS Act, large penalties may be assessed against employers that provide limited or no coverage. If any employer with 50 or more employees does not provide health care coverage or "affordable" health care coverage, it will be fined if the employees receive a premium tax credit to obtain health insurance.[19] An employee is eligible for a premium tax credit to obtain health insurance if he or she is making as much as 400 percent above the federal poverty limit.[20] Penalties for not providing coverage vary depending on whether the employer offers health care coverage to its employees. If an employer with more than 50 employees does not offer coverage, it is fined $2,000 a year, multiplied by the number of full-time employees minus 30.[21]

Even if an employer provides coverage, it can still be penalized. If an employer provides a health care plan that the employee must contribute more than 9.5% of his or her total income to, or pays for less than 60 percent of covered expenses, its employee will still be eligible for a premium tax credit if he makes up to 400 percent above the poverty level.[22] It will be penalized using the same formula that an employer who does not provide coverage is punished with, or by multiplying the number of employees that received the premium tax credit times $3,000, whichever amount is less.[23]

Legal Analysis

I. Introduction: The Burden Imposed by the Agency's Contraceptive Mandate

The Mandate/Final Rule, which requires that all health insurance plans cover prescription contraceptives, sterilization, and related patient education and counseling, imposes an insupportable and undue burden on individuals and organizations that oppose the use of contraceptives based on sincerely-held religious beliefs. For instance, the Catholic Church has a longstanding moral opposition to artificial contraception and sterilization. Of critical importance to the issue at hand, however, is the fact that the Church's or an individual's position on these issues is not something that can be carved out from the institution's or individual's religious belief system. As one writer has described it:

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[17] Press Release, The White House, Office of the Press Sec'y, FACT SHEET: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.
[18] Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16502.
[19] Patient Protection and Affordable Care Act § 1513, 26 I.R.C. § 4980H(a) (2006).
[20] *See* Patient Protection and Affordable Care Act § 1411, I.R.C. § 36B(b) (2006).
[21] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1033 (2010).
[22] *See* Health Care and Education Reconciliation Act of 2010 § 1003, I.R.C. § 4980H(b)(1)(B) (2006).
[23] *See* Health Care and Education Reconciliation Act of 2010 § 1003, I.R.C. § 4980H(c)(2)(D) (2006).

> [T]he Church's position on birth control is not a stand-alone item. From the Church's standpoint, its position on birth control is part and parcel of its commitment to the sanctity of life . . . . This need to defend the right to life from beginning to end manifests itself in a cohesive body of beliefs that starts with contraception and runs through abortion, the death penalty, and assisted suicide.[24]

A. The Mandate Burdens Employers' Exercise of Religion

Invaluable religious practices of countless individuals and organizations remain substantially burdened, despite the current "exemption" or the promised "accommodation." To be eligible for an exemption under the current mandate, religious organizations must not only be non-profit, but must also "serve[] primarily persons who share the same religious tenets of the organization." [25] Religious hospitals, charities, and schools, whose very purpose is to serve the larger community without regard to religious belief, do not fit this description because these entities serve people from all walks-of-life, including those of different religious beliefs. In addition, for-profit corporations owned by employers with religious objections to providing contraceptives and abortifacients are not eligible for an exemption. The primary effect of such a rule is to turn those religious employers who do not fall within the narrow exemption into second class citizens. The exemption is a grossly inadequate attempt to remove the burden on religious exercise imposed by the contraception mandate.

The recently promised "accommodation" for some religious employers in the HHS regulations fails to remove the burden on religious exercise imposed by the contraception mandate. Regardless of whether an employer is "exempt" from the mandate, if an employer wishes to provide insurance for its employees, the only available option is to pay for insurance that provides contraception, in violation of the employer's conscience. The promised "accommodation" is, in effect, a smoke and mirrors ploy that shifts the burden from employers to violate their conscience by paying for contraceptives directly to making them pay "indirectly" through insurance providers. In reality, there is no choice. If an employer provides insurance coverage to its employees, the only option for the employer is to pay an insurer that is required by mandate to provide contraceptive coverage. Thus, employers still directly fund contraceptive coverage in violation of their religious beliefs.

Furthermore, under the PPACA, many employers do not have the choice to avoid paying for contraceptive-providing insurance coverage. If any employer with 50 or more employees does not provide health care coverage or "affordable" health care coverage, it

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[24] Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARVARD J. L. & PUB. POL'Y 741, 754 (2005).

[25] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA, 76 Fed. Reg. 46621, 46626 (August 3, 2011).

will be fined if the employees receive a premium tax credit to obtain health insurance.[26] An employee is eligible for a premium tax credit to obtain health insurance if he or she is making as much as 400 percent above the federal poverty limit.[27]

Penalties for not providing coverage vary depending on whether the employer offers health care coverage to its employees. If an employer who has more than 50 employees does not offer coverage, a fine is imposed, which consists of $2,000 a year, multiplied by the number of its full-time employees minus 30.[28] For example, if an employer with 100 employees does not provide coverage due to religious objections, its annual fine would be (100-30) x $2,000, which is $140,000. Again, what this essentially amounts to is a $140,000 fine levied against an employer, solely based on the employer's desire to uphold a sincerely-held religious belief.

In the event that an employer provides coverage, it may still be penalized.[29] The choice between paying for an insurance plan that provides contraception, something many religious employers are deeply morally opposed to, and an annual fine of $140,000[30] is no choice at all. By making religious employers pay this fine if they do not wish to violate their religious beliefs, the government has placed a substantial burden on their free exercise rights. At the core of our First Amendment rights is the freedom of religion. Employers are not free to exercise a religion when they are forced to pay a fine for practicing what is at the very core of their beliefs.

B. The "Exemption" Does not Reduce the Burden on Individuals' Exercise of Religion

The PPACA mandates, in general, that all individuals maintain health insurance coverage, or else pay a penalty. When combined with the contraceptive regulation, the PPACA then requires individuals to purchase a product that may violate their sincerely

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[26] Patient Protection and Affordable Care Act § 1513, I.R.C. § 4980H(a) (2006).
[27] *See* Patient Protection and Affordable Care Act § 1411, I.R.C. § 36B(b) (2006).
[28] *See* I.R.C. § 4980H(c)(2)(D).
[29] If an employer provides a health care plan that the employee must contribute more than 9.5% of his or her total income to or pays for less than 60 percent of covered expenses, its employee will still be eligible for a premium tax credit if he makes up to 400 percent above the poverty level. Health Care and Education Reconciliation Act of 2010 § 1003, I.R.C. § 4980H(c)(2)(D) (2006). Thus, an employer could pay a penalty even if it provides coverage to an employee making as much as $89,400 (As discussed above, 400% of the federal poverty level for a family of 4 is $89,400.). It will be penalized using the same formula an employer who does not provide coverage is punished with, or by multiplying the number of employees that received the premium tax credit times $3,000, whichever amount is less. Health Care and Education Reconciliation Act of 2010 § 1003, I.R.C. § 4980H(b)(1)(B) (2006). It will be penalized using the same formula an employer who does not provide coverage is punished with, or by multiplying the number of employees that received the premium tax credit times $3,000, whichever amount is less. For instance, if an employer with 50 employees has 13 employees who receive a premium tax credit, its annual fine would be 13 x $3,000, which is $39,000. If the number of employees receiving the credit was greater than 13, its annual fine would (50-30) x $2,000, which is $40,000 (the first formula would not be used because the resulting number would be greater than $40,000). Regardless of the number of employees, it still remains a substantial penalty.
[30] $140,000 fine based on an employer with 100 employees. Many religious hospitals obviously employ many more than 100 employees and would consequently be subject to even higher penalty payments.

held religious beliefs. Basic economic principles dictate that regardless of whether an individual chooses to utilize the offered contraceptives, they are still paying for the product's availability. The First Amendment does not distinguish between direct and indirect violations of religious freedom. A violation is a violation, no matter what numerical calculations are used to say that it is not.

II. The Mandate Violates the Free Exercise Clause

The First Amendment protects the free exercise of religion. Laws designed to discriminate against individuals or groups because of their religious practices and beliefs are subject to strict scrutiny. In order for a law to survive a Free Exercise Clause challenge, the government must demonstrate that the law serves a compelling state interest and is narrowly tailored to advance that compelling interest.[31] Because "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt . . . '[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'"[32] At the same time, however, the Supreme Court has held that religiously neutral laws of general applicability are not subject to strict scrutiny even if they incidentally burden religious beliefs or practices.[33] However, because the contraception mandate is neither neutral nor generally applicable, it will be subjected to "the most rigorous of scrutiny," a scrutiny it cannot survive.[34]

A. The Contraception Mandate is not Neutral

While its facial neutrality is debatable, the mandate is clearly directed at one particular religious group—those whose prolife views require them to oppose the use of contraceptives and abortifacients in general, including the Catholic Church and its affiliated individuals and institutions. In *Lukumi*, the Court held that evidence of impermissible targeting of religious groups or beliefs in the enactment or operation of laws could be proven by direct or circumstantial evidence: "[R]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body."[35]

In forming these regulations, the Administration was fully aware that it would be targeting for-profit and non-profit organizations whose owners or organizational missions require that they not provide access to contraceptives or abortifacients. The Catholic Church is, for all intents and purposes, the primary institution in the United States that teaches categorical opposition to artificial contraception and sterilization. In fact, the Church's opposition is frequently cited by proponents of universal access to free

[31] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).
[32] *Id.* at 534 (quotation and citation omitted).
[33] *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).
[34] *Lukumi*, 508 U.S. at 520.
[35] *Id.* at 540.

contraception as a roadblock to achieving their goal. In 2002, in its highly influential "Religious Refusals and Reproductive Rights," the ACLU's Reproductive Freedom Project decried what it described as "insular, sectarian institutions" for standing in the way of universal contraceptive access and seeking to impose their beliefs "in the public, secular world."[36] The only "insular, sectarian institution" mentioned by name in the entire report was the Catholic Church.[37]

There is a history of efforts to impose free and universal access to contraception in this country, culminating in the contraception mandate, and consistent targeting of the Catholic Church as the major obstacle to progress. It will not be difficult to show that the mandate's target is the Catholic Church and others that oppose the use of contraceptives on religious grounds. As such, the mandate should not be considered neutral under controlling Supreme Court case law and will be subjected to "the most rigorous of scrutiny."[38]

B. The Contraception Mandate is not Generally Applicable.

The alternative qualification to the neutral requirement in the *Employment Division., Department Of Human Resources of Oregon v. Smith* holding is that, to avoid strict scrutiny, a law must be generally applicable. *Smith* cautions that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[39] Here, the Mandate is facially problematic because it sets up a system of "individualized exemptions." Granted, the exemption purports to be available precisely for religious objectors, but only for those non-profit, religious objectors determined to be sufficiently "religious" by HHS officials. Even if such a procedure—government officials deciding which institutions meet the government's standards of religiousness—could somehow survive constitutional attack on its own merits, a partial religious exemption, one that exempts some religious objectors but not others at the sole discretion of government bureaucrats, defeats general

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[36] CATHERINE WEISS ET AL., RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS, ACLU REPRODUCTIVE FREEDOM PROJECT (2002), *available at* http://www.aclu.org/FilesPDFs/ACF911.pdf.

[37] The ACLU substitutes the term "refusal clause" for exemption when referring to the religious based objection by Catholics to providing contraceptives. The clear focus of their argument for the elimination of these so-called refusal clauses in healthcare laws is the Catholic church:

> Moreover, significant consolidation within the Catholic system has given it dominance in certain geographic areas. For instance, by 1999, Catholic Healthcare West was the largest operator of hospitals in California, running forty-six hospitals, eighteen of which were formerly secular. And, in more and more communities, Catholic hospitals are the only ones in town. By 1998, ninety-one Catholic hospitals in twenty-seven states were operating as the only hospitals in their counties…[.] This growth in the sectarian health system has given it more bargaining power to insist upon laws that permit religiously affiliated institutions to refuse to provide or cover health services—often reproductive health services—they believe to be sinful.

Id. at 1.

[38] *See Lukumi*, 508 U.S. at 520.

[39] *Smith*, 494 U.S. at 884.

applicability as readily as would a system of exemptions that exempts only non-religious objectors.

C. The "Exception" is Inconsistent with the First Amendment's Religion Clauses

The "religious employer" exemption gives unfettered discretion to anonymous HHS officials to determine which activities of a church or religious group are truly "religious," and thus deserving of protection, and which are merely "secular," and thus subject to regulation. This is a blatant affront to individual liberty and should be summarily dismissed as unconstitutional.[40] Likewise, it is axiomatic to our legal system that the state has no authority to decide "what is or is not secular, [or] what is or is not religious."[41] Nor may the government "troll through a person's or institution's religious beliefs" to determine whether its purpose is to inculcate "religious values,"[42] and try to limit an exemption to religious institutions that engage in "hard-nosed proselytizing."[43] Many religious organizations are not engaged in proselytizing when they deliver social, medical and educational services, yet the very provision of these services is itself a fulfillment of their religious mission; indeed, it is their *raison d'etre* and at its core lies a sincere, religiously-based motivation.

The obvious effect of the exemption's second and third criteria of HHS-approved "religiousness" (employment and serving of co-religionists) is to give favored treatment to those religious employers who employee and serve only their own members (exempt from the Mandate) while subjecting other employers, who employ and serve members of their community, to the mandate's onerous and objectionable requirements.

Thus, religious entities with strong missionary and evangelizing charismas that provide services to their community are subjected to the Mandate, while religious entities that traditionally have refrained from such activity, *e.g.*, Orthodox Judaism, Old Order Amish, etc., need not comply with the Mandate at all. This is precisely the flaw identified in *Larson v. Valente*, 456 U.S. 228 (1982). Setting aside the catastrophic impact such a government policy of forced isolation of religious service providers from the public sector would have on our fragile economy; such a forced choice is offensive, discriminatory, and unconstitutional under the Religion Clauses. The second and third criteria are also prone to a number of practical problems. These criteria would require religious organizations to make potentially intrusive inquiries into the religiosity of all their job applicants and clients, thereby placing employers in the untenable position of potentially violating Title VII's employment discrimination provisions and various public accommodations statutes in an attempt to ensure appropriate levels of "religiosity" to qualify for the HHS exemption. In essence, the second and third criteria would force

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[40] *See Larson v. Valente*, 456 U.S. 228 (1982) (holding that a state may not discriminate among religious organizations when imposing burdens).
[41] *Lemon v. Kurtzman*, 403 U.S. 602, 637 (1971) (Douglas, J., concurring).
[42] *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341–42 (D.C. Cir. 2002).
[43] *Id.* at 1346.

religious entities to be more intrusive into the affairs of their employees, just so the entity could be exempted from the Mandate.

III. The Mandate Violates the Religious Freedom Restoration Act

In addition to the Mandate's constitutional infirmity under the Free Exercise Clause, it also clearly violates the individual and institutional rights protected under the Religious Freedom Restoration Act (RFRA). RFRA, enacted largely in response to the Supreme Court's decision in *Smith*, requires that strict scrutiny be applied to any action of the federal government that substantially burdens the exercise of religion.[44]

The classic exposition of this approach is that of *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the Supreme Court construed the Free Exercise Clause generally to forbid "substantial burdens" on religious exercise, unless they satisfy the strict scrutiny standard.[45] A "substantial burden" is one which forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand."[46] Religious institutions and individuals whose religion mandates their opposition to contraceptive use have little difficulty demonstrating a "substantial burden" in the present case. The Final Rule compels them to act in violation of their core beliefs and practices, or pay significant penalties. Thus, the only way the mandate could survive strict scrutiny under RFRA would be upon a showing by the government that it is justified by a "compelling state interest" and that the mandate is "narrowly tailored" to advance that interest. But even assuming that ensuring universal access to free contraceptive services is a "compelling state interest," the means chosen by the government to advance that interest are hardly "narrowly tailored." Requiring employers to purchase health insurance policies that cover contraceptives pursuant to a rule that, on its face and as part of a general statutory scheme (PPACA), allows for some exemptions, can certainly not be viewed as a "narrowly tailored" means—or even a rational means—to advance the government's stated interest.

In short, whether the matter is analyzed under the Free Exercise Clause or RFRA, it is apparent that strict scrutiny will govern any legal challenge and that the Final Rule under the comprehensive guidelines will not survive such scrutiny.

IV. The Mandate is Not Exclusively a Catholic Church Issue

Though well-known for its religious convictions regarding these issues, the Catholic church is not the sole objector to the Mandate/Final Rule. In February 2012, 2,500 Protestant, evangelical, Jewish, Catholic and other religious leaders signed a letter to President Obama denouncing the Mandate as "a severe blow to our religious

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[44] 42 U.S.C. § 2000bb-1(c) (2006).
[45] *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963).
[46] *Id.* at 404.

liberty."[47] Together, they called upon the Administration to "reverse this decision and protect the conscience rights of those who have biblically-based opposition to funding or providing contraceptives and abortifacients."[48]

Also in February 2012, the President of the Lutheran Missouri Synod, Matthew Harrison, and Rabbi Meir Soloveichik of Yeshiva University appeared with Catholic Bishop William Lori and others before the Committee on Oversight and Government Reform.[49] Each testified as to how the Mandate violates the rights of conscience and religious freedom; that the free exercise of religion does not just involve the right to believe, but the right to act in accordance with one's beliefs.[50] In an eloquent statement, Rabbi Soloveichik pointed out that it was the obligation of Jewish people not to sit idly by when the religious rights of others are at issue:

> Not only does the new regulation threaten religious liberty in the narrow sense, in requiring Catholic communities to violate their religious tenets, but also the administration impedes religious liberty by unilaterally redefining what it means to be religious. . . . Benefiting from two centuries of First Amendment protections in the United States, the Jewish "children of the stock of Abraham" must speak up when the liberties of conscience afforded their fellow Americans are threatened and when the definition of religion itself is being redefined by bureaucratic fiat.[51]

Opposition voiced by religious organizations is about maintaining the freedom to practice one's religion without government interference. The right to access these mandated services causing confliction of conscience for religious organizations is not in question. As the law in this country currently stands, abortion-inducing drugs, sterilization, and contraception are freely available, and, in fact, nothing is stopping the Administration from making them even more widely available.[52] However, the Administration is not authorized to coerce individuals to violate their conscience by providing, paying for, and/or facilitating such services contrary to the individual's personal religious beliefs. "If the Government can force religious institutions to violate their beliefs in such a manner, there is no apparent limit to the Government's power.

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[47] Steven Ertelt, *2,500 Religious Leaders Sign Letter Protesting Obama Mandate*, LIFENEWS.COM (February 20, 2012), http://www.lifenews.com/2012/02/20/2500-religious-leaders-sign-letter-protesting-obama-mandate/.

[48] *Id*.

[49] Committee on Oversight and Government Reform, *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?*, http://oversight.house.gov/hearing/lines-crossed-separation-of-church-and-state-has-the-obama-administration-trampled-on-freedom-of-religion-and-freedom-of-conscience (last visited June 11, 2012).

[50] *Id*.

[51] Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?, Hearing before the Subcommittee on the Constitution of the House Committee on Oversight and Government Reform, 104th Cong., 2d Sess., 368 (2012) (testimony of Rabbi Soloveichik), *available at* http://oversight.house.gov/wp-content/uploads/2012/02/2-16-12_Full_HC_Mandate_Soloveichik.pdf.

[52] *See Facts on Contraceptive Use in America*, GUTTMACHER INST. (June 2012), http://www.guttmacher.org/pubs/fb_contr_use.html.

Such an oppression violates [a religious institution's] clearly established constitutional and statutory rights."[54]

Furthermore, it is not just organizations of faith that should be allowed an exemption. For-profit and/or non-church affiliated employers who have a conscience-based objection to providing such coverage should not be restricted from the exemption simply because they do not fall into the narrow definition of a "religious organization" as it currently stands. A much broader definition should be put in place in order to encompass those employers that may not be deemed by the Administration as "religious employers." The Mandate/Final Rule would require business people to leave their religious beliefs at home every day as a condition of doing business in our society. The HHS mandate tells private business owners that they have to choose between conducting their business in a manner consistent with their moral values, or conducting their business in a manner consistent with the government's values. The constitution does not allow the government to impose such a choice.

Challenging the Mandate/Final Rule is not a Catholic issue, it is a constitutional and a conscience issue.

V. Conclusion

Whether mandating that religious employers or individuals violate their conscience by directly paying for contraceptives, or by contributing to a health insurance plan that is mandated to provide contraceptives, the comprehensive guidelines violate the First Amendment, the PPACA, and RFRA. The Mandate/Final Rule fails to adequately consider the constitutional and statutory implications of the Mandate on for-profit, secular employers. The Mandate coerces employer compliance by presenting employers with no other alternative but to abandon integral components of the employer's religiously-inspired mission and values. The Mandate should be revised so as to remove the requirement that insurance companies make contraceptive services an obligatory part of all insurance packages.

At a minimum, the narrow exemption for a "religious organization" should be changed to exempt "any employer" who opposes the mandate for religious or moral reasons. For an example of such language, attention should be directed to a Missouri bill that passed during this year's General Assembly.[55] Missouri has its own version of a contraception mandate, which also contains a religious and moral exemption,[56] but unlike the federal mandate at issue here, Missouri's "Protection of Conscience Act" contains a complete conscience exemption, not limited to "religious" employers. The bill states:

> *[N]o employer, health plan provider, health plan sponsor, health care provider, or any other person or entity* shall be compelled to provide

[54] Complaint and Demand for Jury Trial, Univ. of Notre Dame v. Sebelius, No. 3:2012cv00253 (N.D. Ind. filed May 21, 2012).
[55] Protection of Conscience Act, S. 749, 96 Gen. Assemb., 2d Reg. Sess. (Mo. 2012).
[56] Mo. Rev. Stat. § 376.1199 (2001).

> coverage for, or be discriminated against or penalized for declining or refusing coverage for, abortion, contraception, or sterilization in a health plan if such items or procedures are contrary to the religious beliefs or moral convictions of such employer, health plan provider, health plan sponsor, health care provider, person, or entity.[58]

Connecticut similarly does not limit its exemption to a religious organization. Connecticut's statute provides that:

> [U]pon the written request of an *individual* who states in writing that prescription contraceptive methods are *contrary to such individual's religious or moral beliefs*, any insurance company, hospital or medical service corporation, or health care center may issue to or on behalf of the individual a policy or rider thereto that excludes coverage for prescription contraceptive methods.[59]

Given that the federal contraception mandate is a violation of the Religion Clauses of the First Amendment and RFRA, the Departments should follow the language of the Missouri bill and the Connecticut statute to ensure that the conscience rights of all employers are respected. No matter how the Departments seek to further the goal of providing contraceptive services to private employees, they should do so only to the extent allowed by federal law and the First Amendment.

Sincerely,

THE AMERICAN CENTER FOR LAW AND JUSTICE

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CIRCULAR 230 DISCLOSURE: Pursuant to Regulations Governing Practice Before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

[58] *Id.* (emphasis added).
[59] Conn. Gen. Stat. § 38a-530e(b)(2) (2012) (emphasis added).