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American Center
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February 21, 2012

Sent via Federal Express

Kathleen Sebelius, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: HHS Comprehensive Guidelines

Dear Secretary Sebelius:

The following letter provides a legal analysis of the recently announced final regulations regarding women's preventive care along with the religious "exemptions" and "accommodation." This letter is supported by nearly 70,000 concerned Americans who have signed on to the American Center for Law and Justice's petition urging reversal of this regulation.

By way of introduction, the 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).

STATEMENT OF FACTS

In 2010, pursuant to § 2713(4) of the Public Health Service Act, as amended by the Affordable Care Act, 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 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 Health Resources and Services Administration (HRSA) expected to release the comprehensive guidelines on or before August 1, 2011.[3] HRSA commissioned the Institute of Medicine (IoM) to recommend comprehensive guidelines.[4] On July 19, 2011 the IoM released their report with recommended guidelines. The HRSA adopted the recommended guidelines 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, HHS released an amendment to the interim final regulations to take effect August 1, 2011 that purports to protect certain religious organizations from being required to participate in providing contraceptives.[7] According to the amendment to the interim final regulations,

> in response to the request for comments on the interim final regulations, the 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. However, several commenters asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom.[8]

In response to these comments, the amendment to exempt certain religious organizations was issued.[9] This amendment, however, exempts only religious organizations that meet the following criteria:

> (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. Section 6033(a)(3)(A)(i) and (iii)

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[1] 75 Fed. Reg. 41726 (July 19, 2010) *available at* http://www.healthcare.gov/center/regulations/prevention/regs.html.
[2] *Id.*
[3] *Id.*
[4] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines/.
[5] *Id.*
[6] *Id.*
[7] 76 Fed. Reg. 46621 (August 3, 2011).
[8] *Id.*
[9] *Id.*

> refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.[10]

On January 20, 2012, 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 are given an extra year to comply (August 1, 2013 instead of August 1, 2012).[11]

On February 10, 2012, whether in response to popular outcry or as part of the plan all along,[12] the 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 free of charge.[13] The same day, however, HHS published the final regulations without any "accommodation" language or any deadline for the promised language. The final rules (*sans* "accommodation") were published in the Federal Register on Tuesday, February 14, 2012, and are to take effect on April 16, 2012.[14]

Under the 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.[15] 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.[16]

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, it is fined $2,000 a year times its number of full-time employees minus 30.[17]

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.[18] It will be penalized using the same formula an employer who does not provide coverage is punished with, or by multiplying

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[10] *Id.*
[11] Press Release, *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, HHS, Jan. 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html.
[12] *Immaculate Contraception: An 'accommodation' that makes the birth-control mandate worse*, WALL ST. J., Feb. 13, 2012, at 14, *available at* 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'").
[13] Press Release, *FACT SHEET: Women's Preventive Services and Religious Institutions*, WhiteHouse.gov, Feb. 10, 2012, http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.
[14] 77 Fed. Reg. 8668 (Feb. 14, 2012).
[15] Patient Protection and Affordable Care Act § 1513, 26 I.R.C. § 4980H(a) (2006).
[16] *See* Patient Protection and Affordable Care Act § 1411, 26 I.R.C. § 36B(b) (2006).
[17] Health Care and Education Reconciliation Act of 2010 § 1003, 26 I.R.C. § 4980H(c)(2)(D) (2006).
[18] Health Care and Education Reconciliation Act of 2010 § 1003, 26 I.R.C. § 4980H(b)(1)(B) (2006).

the number of employees that received the premium tax credit times $3,000, whichever amount is less.[19]

ANALYSIS

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

The Final Rule, with its mandate 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 sincere religious beliefs. The Catholic Church's longstanding moral opposition to artificial contraception and sterilization is a given. 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:

> . . . [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.

A. The Mandate Burdens Employers' Exercise of Religion

The religious practice of countless individuals and organizations that are invaluable to their communities remains substantially burdened despite the current "exemption" or the promised "accommodation." To be eligible for the exemption from the current contraception mandate, religious organizations must, "serve[] primarily persons who share the same religious tenets of the organization."[20] 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 they serve people from all walks-of-life, including those of different religious beliefs. In addition, for-profit and non-profit corporations owned by employers with religious objections to providing contraceptives and abortifacients are not exempt. This rule serves, in effect, to make second class citizens of those religious employers who do not fall within the narrow exception. The exemption is inadequate to remove the burden on religious exercise imposed by the contraception mandate.

The recently promised "accommodation" for some religious employers in the HHS regulations, does not remove the burden on religious exercise imposed by the contraception mandate. Whether or not an employer is "excepted" from the mandate, if an employer wishes to provide insurance for its employees, the only option is to pay for insurance that provides contraception, in violation of the employer's conscience. The promised "accommodation" is, in effect, a smoke

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[19] Health Care and Education Reconciliation Act of 2010 § 1003, 26 I.R.C. § 4980H(c)(2)(D) (2006).
[20] 76 Fed. Reg. 46626.

and mirrors game that shifts the burden from employers to violate their conscience by paying for contraceptives directly to making them pay "indirectly" through insurance providers. There is no choice. If an employer provides insurance coverage for its employees, the only option is to pay an insurer that provides contraceptive coverage. Thus, employers still directly fund contraceptive coverage in violation of their religious beliefs.

Furthermore, under the Affordable Care Act, many employers do not have the choice to not pay for the contraceptive-providing insurance 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.[21] 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.[22]

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, it is fined $2,000 a year times its number of full-time employees minus 30. [23] For example, if an employer with 50 employees does not provide coverage, its annual fine would be (50-30) x $2,000, which is $40,000.

Even if an employer provides coverage, it may still be penalized.[24] The choice between paying for an insurance plan that provides contraception, something many religious employers are deeply morally opposed to, and a fine that will more times than not be $40,000 or more 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. At the core of our First Amendment is the right to freedom of religion. Employers are not free when they are forced to pay a fine for practicing what is at the very core of their beliefs.

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[21] Patient Protection and Affordable Care Act § 1513, 26 I.R.C. § 4980H(a) (2006).
[22] *See* Patient Protection and Affordable Care Act § 1411, 26 I.R.C. § 36B(b) (2006).
[23] Health Care and Education Reconciliation Act of 2010 § 1003, 26 I.R.C. § 4980H(c)(2)(D) (2006).
[24] 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, 26 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, 26 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.

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

The Affordable Care Act mandates, in general, that all individuals be covered by insurance or pay a penalty. When combined with the contraceptive regulation, the Act then requires individuals to purchase a product that may violate their sincerely held religious belief. Basic economic principles dictate that whether or not an individual chooses to utilize the offered contraceptives, they are 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 math is used to say that it is not.

II. The Mandate Violates the First Amendment's 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. The government must demonstrate that laws challenged under the Free Exercise Clause serve a compelling state interest and are narrowly tailored to advance that compelling interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). 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." *Lukumi*, 508 U.S. at 534 (quotation and citation omitted). 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. *Employment Div., Dept. Of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). But, because the Rule's contraceptive mandate is neither neutral nor generally applicable, it will be subjected to "the most rigorous of scrutiny," a scrutiny it cannot survive. *Lukumi*, 508 U.S. at 520.

A. The Mandate Is Not Neutral.

While arguably neutral on its face, the mandate is clearly directed at one 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 who are clearly outspoken on this issue. In *Lukumi,* the Court held that evidence of impermissible targeting of religious groups or beliefs in the enactment or operation of laws could be proved 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." 508 U.S. at 540.

In forming these regulations the administration was fully aware that it would be targeting for profit and non-profit organizations whose owners or whose organizational mission require that they not provide access to contraceptives or abortifacients. The Catholic Church is for all intents and purposes the primary institution in the country 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 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 the practices of "insular, sectarian institutions" standing in the way of universal contraceptive access and seeking to impose their beliefs "in the public, secular world." The only "insular, sectarian institution" mentioned by name in the entire report is the Catholic Church.[25]

Given the history of efforts to impose universal, free access to contraception in this country culminating in the contraceptive mandate, and the consistent singling out in all of those efforts of the Catholic Church as the major obstacle to achieving that goal, 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 is not neutral under controlling Supreme Court case law and will be subjected to "the most rigorous of scrutiny."

B. The Mandate Is Not Generally Applicable.

The other qualification to the teaching of *Employment Div. v. Smith* is that, to avoid strict scrutiny, laws must be generally applicable. And *Smith* cautions that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Here, the mandate on its face sets up a system of "individualized exemptions." True, the exemption purports to be available precisely for religious objectors, but only for those religious objectors determined to be sufficiently "religious" by officials of the U.S. Department of Health and Human Services. Even if such a procedure—government officials deciding which institutions meet the government's standards of religiousness (see argument below)—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 applicability as readily as would a system of exemptions that exempts only non-religious objectors.

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[25] 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. (See inset.) 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.

Weiss, Catherine, *Religious Refusals and Reproductive Rights, ACLU Reproductive Freedom Project* (2002).

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

The "religious employer" exemption puts into the hands of anonymous HHS officials the power 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 blatantly unconstitutional. *Larson v. Valente*, 456 U.S. 228 (1982) (state may not discriminate among religious organizations in imposing burdens).

It is likewise axiomatic in our legal system that the state has no authority to decide "what is or is not secular, what is or is not religious." *Lemon v. Kurtzman*, 403 U.S. 602, at 637 (Douglas, J., concurring). Nor may the government "troll through a person's or institution's religious beliefs" to determine whether its purpose is to inculcate "religious values," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 at 1341-42 (D.C. Cir. 2002) and try to limit an exemption to religious institutions that engage in "hard-nosed proselytizing." *Id.* at 1346. 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, religious-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 employee and serve members of their community, to the Rule's onerous and objectionable requirements.

Thus, religious entities with strong missionary and evangelizing charisms that provide services to their community are subjected to the Rule, while religious entities that traditionally have refrained from such activity, *e.g.,* Orthodox Judaism, Old Order Amish, etc., need not comply with the Rule at all. This is precisely the flaw identified in *Larson.*

Laying 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 problematic from a practical standpoint. 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.

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 as 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. 42 U.S.C. 2000bb-1(c).

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 strict scrutiny. *Id.* at 403. 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." *Sherbert,* 374 U.S. at 404. Religious institutional and individuals whose religion mandates their opposition to contraceptive use have little difficulty demonstrating "substantial burden" here. The Final Rule compels them to act in violation of their core beliefs and practices or pay ruinous penalties.

Thus, the only way the Rule could survive strict scrutiny under RFRA would be upon a showing by the government that it is justified by a "compelling state interest" and is "narrowly tailored" to advance that interest. But even assuming that ensuring universal access to free birth control is a "compelling state interest," the means chosen by the government to advance that interest is hardly "narrowly tailored." Requiring employers to purchase health insurance policies that cover contraceptives pursuant to a Rule that, on its face, allows for some exemptions, as part of a general statutory scheme (PPACA) that itself allows for numerous 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 clear that strict scrutiny will be applied and that the Final Rule under the comprehensive guidelines will not survive that scrutiny.

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, and RFRA. The HHS should revise the comprehensive guidelines and remove the requirement that all insurance companies make contraceptives an obligatory part of every insurance package.

Sincerely,

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