CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

June 19, 2012

Submitted Electronically and by Hand Delivery

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

Re: Advance Notice of Proposed Rulemaking on Preventive Services, File Code No. CMS-9968-ANPRM

Dear Sir or Madam:

The Christian Legal Society respectfully submits the following comments on the Advance Notice of Proposed Rulemaking (ANPRM) on Preventive Services. 77 Fed. Reg. 16501 (Mar. 21, 2012). The ANPRM invites comments on a *possible* accommodation, not yet a specific written proposal, to protect some religious employers from the Health and Human Services mandate (hereinafter "Mandate") that requires most religious employers to provide insurance coverage for certain contraceptives, including Plan B and *ella*, which many consider to be abortifacients.

The Mandate is an extreme departure from the Nation's bipartisan tradition of respect for religious liberty, especially its historic protection of religious conscience rights in the context of participation in, and funding of, abortion. Similarly, in its definition of "religious employer" accompanying the Mandate, the Administration has bypassed tested *federal* definitions of "religious employer" -- most notably the decades-old, preeminent federal definition of "religious employer" found in Title VII of the Civil Rights Act of 1964 – in favor of a controversial, little-used *state* definition. Quite simply, the defects of the Mandate's too-narrow definition of "religious employer" could have been avoided

by adoption of Title VII's definition of religious employer, which protects religious educational institutions, hospitals, associations, and other religious employers that the Administration's definition intentionally excludes.

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

Our comments begin with a brief synopsis in Part I of the events that have led to what could accurately be termed a constitutional crisis between the Administration and the religious liberty community. Part II briefly explains how the Mandate, the current exemption for "religious employer," and the nebulous accommodation are badly out of step with America's bipartisan tradition of broadly protecting religious liberty and religious conscience, particularly in the abortion context.

Part III provides specific comments on the constitutionality and wisdom of the current too-narrow exemption for religious employers, the inadequacy of the "temporary enforcement safe harbor," and the issues raised by the ANPRM and the still nebulous accommodation.

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

In order to understand the comments that follow, it is helpful to briefly review the Administration's action that created this needlessly divisive situation. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (hereinafter "PPACA" or "ACA"),[1] requires all employers to provide employees with insurance coverage, without cost sharing, of certain drugs and procedures identified as women's "preventive care." In July 2011, HHS identified the "preventive services" for women that must be covered. "Preventive services" included all FDA-approved contraceptives (including Plan B and *ella*, which some regard as abortifacients), sterilization procedures, and reproductive education and counseling.

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

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

In response to the sustained outcry from the Catholic, evangelical Christian, and Orthodox Jewish communities against the Mandate and the too-narrow exemption, HHS Secretary Sebelius announced on January 20, 2012, that religious employers who do not qualify for the exemption would have an additional year to come into compliance with the Mandate, if they qualified for a "temporary enforcement safe harbor." A religious employer who does not qualify for the exemption *may* invoke a "temporary enforcement safe harbor" from the Mandate's enforcement for one year, until August 1, 2013, but only if it takes affirmative action to certify that it meets all of the following criteria:

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

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

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

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

While there has been much talk about a nebulous accommodation, no such accommodation yet exists. In approximately seven weeks, beginning August 1, 2012,[2] the Mandate will require most religious organizations to provide employees with contraceptive coverage by which the religious employers pay for drugs or services in violation of their religious conscience.

Right now, if a religious employer does not 1) have a grandfathered plan,[3] 2) qualify for the too-narrow exemption for religious employer, or 3) act to qualify for the temporary safe harbor, the religious employer must provide insurance coverage for all FDA-approved contraceptives, including Plan B and *ella*, sterilization procedures, and reproductive counseling and education, regardless of the employer's religious convictions.[4]

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

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

[4] An employer with fewer than 50 full-time employees may drop all health insurance coverage for employees; however, the employees are then required by the individual mandate to purchase health insurance that includes

On March 21, 2012, the Administration issued an Advance Notice of Proposed Rulemaking (ANPRM), seeking comments on how this indeterminate accommodation might be structured. Again the Administration proposed no specific accommodation language. The ANPRM basically seeks comments as to 1) who among religious employers might be given an accommodation, and 2) who might pay for an accommodation in which neither the employers nor the employees may be asked to pay for the insurance coverage.

Part II: The Mandate, the Too-Narrow Definition of "Religious Employer," and the Possible Accommodation Sharply Depart from America's Bipartisan Tradition of Broad Protection for Religious Liberty and Religious Conscience, Particularly in the Abortion Context.

The first question – *whose religious liberty should be protected* – is a welcome admission by the government that the current "religious employer exemption" is simply inadequate. Finalized into law on February 10, 2012, despite six months of public protest from citizens in the evangelical Christian, Orthodox Jewish, and Catholic communities, the current exemption for religious employers is the narrowest religious exemption ever introduced into federal law. Remarkably, the government chose to protect only churches – and not even all of them – and ignored the reasonable request from other religious employers for respect for their religious consciences. Religious colleges, schools, homeless shelters, pregnancy crisis centers, food pantries, hospitals, and health clinics do not qualify for the exemption because they serve persons of different faiths or no faith. The Administration's choice to penalize religious ministries for caring for society's most vulnerable without regard to their religion is stunning.

The second question – *who will pay for an accommodation if religious employers and employees are not to be charged* – likewise is a welcome admission that the Administration's repeated assurances that for-profit insurance companies will simply absorb the cost of the Mandate, without charging either employer or employee, have been unrealistic. Instead, in the ANPRM, the Administration

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contraceptive coverage, even if they have religious objections. If employees do not purchase the objectionable insurance, they must pay a costly penalty. Employers of 50 or more full-time employees do not have the option of dropping coverage without paying heavy penalties.

finally acknowledges that someone must pay for "free" contraceptives – and that the insurance companies are not volunteering.

The ANPRM raises fundamental questions of whether the government should penalize religious groups for helping their fellow citizens without regard to religion or creed, or whether basic economics theory supports the notion that for-profit companies will absorb the cost of drugs, surgeries, and counseling without charging employers or employees. But the more fundamental question is *why* the Administration has grudgingly treated religious liberty as a nuisance rather than our Nation's first freedom.

Religious liberty is embedded in our Nation's DNA. Respect for religious conscience rights is not an afterthought or a luxury, but the very essence of our political and social compact. America's tradition of protecting religious conscience predates the United States itself. George Washington urged respect for Quakers' exemptions from military service even though his army was perpetually outnumbered in battle. During the struggle against totalitarianism in World War II, the Supreme Court protected religious schoolchildren from compelled pledges of allegiance to the flag. More recently, with overwhelming bipartisan support, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), providing a statutory exemption to all federal laws for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means. 42 U.S.C. § 42 U.S.C. 2000bb-1(a).

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes religious citizens' right to choose not to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by Democrats and Republicans for forty years. *See, e.g.*, Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records*, April 30, 2012, *available at http://www.thepublicdiscourse.com/2012/04/5306* (last visited June 17, 2012).

In the wake of *Roe v. Wade*, 410 U.S. 413 (1973), a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as protecting from

discrimination doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[5] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976). In upholding the constitutionality of the Hyde Amendment, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae,* 448 U.S. 297 (1980). Every Congress since 1976 has passed the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. 42 U.S.C. § 238(n). In 1994, during the debate over President Clinton's health reform legislation, Senate Majority Leader George Mitchell (D-ME) and Senator Daniel Patrick Moynihan (D-NY) brought the "Health Security Act" to the Senate floor, which included robust protection for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded "coverage of abortion or other services." Hospitals, doctors and other health care workers who refused to participate in "the performance of any health care service . . . on the basis of a religious belief or moral conviction" were protected. Commercial insurance companies and self-insurers likewise were protected. *Doerflinger, supra.*

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to

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

"provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). While the Church, Hyde, and Weldon Amendments are the preeminent conscience protections in the abortion context, numerous other federal statutes protect religious conscience.[6]

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

President Obama's Executive Order 13535, without which PPACA would not have been enacted, affirmed that, under PPACA, "longstanding Federal Laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." 75 Fed. Reg. 15599 (Mar. 24, 2010).

[6] *E.g.,* 20 U.S.C. § 1688 (federal sex discrimination law cannot be interpreted to force anyone to participate in an abortion); 18 U.S.C. § 3597 (protecting persons who object for moral or religious reasons to participating in federal executions or prosecutions); 8 U.S.C. § 1182 (g) (protecting aliens who object to vaccinations on religious or moral grounds); 42 U.S.C. § 1396u-2(b)(3) (protecting Medicaid managed care plans from forced provision of counseling or referral if they have religious or moral objections); *id.* § 1395w-22(j)(3)(B) (same for Medicare managed care plans); Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 (since 1999, protects religious health plans in federal employees' health benefits program from forced provision of contraceptives coverage, and protects individual religious objectors from discrimination); Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act, Pub. L. No. 112-74, Div. I, Title III (since 1986, prohibits discrimination in the provision of family planning funds against applicants who offer only natural family planning for religious or conscience reasons).

The Mandate is badly out of step with this tradition of bipartisan protection of religious conscience. In any future accommodation, the Administration should respect this tradition of bipartisan protection of citizens' right not to participate in, or fund, abortion on religious or moral grounds.

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

Comment 1: The current religious employer exemption should be discarded in favor of a broader exemption for numerous reasons.

Confusion exists among religious organizations as to the scope of the current narrow exemption for religious employers. Many organizations mistakenly think that an accommodation for additional religious employers has been adopted, which is not the case. Other organizations misunderstand the limited scope of the "temporary enforcement safe harbor." Others mistakenly think that status as an IRC § 501(c) (3) organization exempts them, or that only organizations receiving federal funding are subject to the Mandate.

Unfortunately, beginning August 1, 2012,[7] the Mandate will take effect for most religious organizations. Only one exemption for religious employers exists, and it is exceedingly narrow. Interim Final Regulation, 76 Fed. Reg. 46621 (Aug. 3, 2011), *finalized* 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). To qualify, religious employers must meet each and every one of four critieria:

1. The employer's purpose must be the inculcation of religious values;
2. It must primarily employ persons who share its religious tenets;
3. *It must serve primarily persons who share its religious tenets*;
4. It must be a nonprofit organization described in Internal Revenue Code § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii). (Note that § 6033 is limited to "churches, their integrated auxiliaries, and conventions or associations of churches," or "the exclusively religious activities of any religious order.")

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

In adopting this definition of "religious employer," the Administration unilaterally re-defined religion. Only inward-focused religions are protected. Religions that provide assistance to all persons, regardless of religion or creed, are penalized for their inclusivity. Churches and charities that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded in return by a government mandate that assails their conscience rights.[8]

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

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

[8]Furthermore, the exemption is entirely discretionary and could be withdrawn at any time. The Mandate speaks in terms of "may", not "must", regarding its grant of religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). The ANPRM creates additional confusion about the scope of the exemption by seeming to suggest that it "is intended solely for purposes of the contraceptive coverage requirement . . . .," which suggests it may not provide an exemption from the sterilization and counseling requirements. 77 Fed. Reg. 16502.

bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Title VII's protections for religious employers should serve as the starting point -- and the floor -- for any federal definition of religious employer. Had the Administration used Title VII's established definition, the controversy likely would have been avoided. It seems exceedingly strange for the federal government to ignore its established definition of religious employer adopted nearly fifty years ago in Title VII for three states' newly minted definition that had been challenged in court by Catholic charities.

Comment 1-2: The Administration chose a too-narrow exemption, knowing that many religious charities could not live with it. The Administration protests that the Mandate was drawn from the California and New York contraceptive mandates that were upheld in *state* court challenges brought by Catholic charities. But by placing such weight on this argument, the Administration admits that it knew *before* it adopted the narrow exemption that Catholic charities could not comply with it. The Administration implicitly concedes that it knew the Catholic Church would be forced to challenge the Mandate and the too-narrow exemption on behalf of Catholic ministries.

Comment 1-3: The current exemption fails to cover all churches. While the exemption purportedly covers all churches,[9] some churches, in fact, likely fail to meet all four criteria. Churches with robust community outreach programs, such as homeless ministries, food pantries, preschools, and Alcoholics Anonymous, may be disqualified from the exemption if they serve too many persons who do not share their religious tenets.

Requiring religious organizations to meet all four criteria seems to be regulatory overkill. Surely an organization that meets the definition of "church, integrated auxiliary, convention or association of churches, or religious activities of religious orders," for purposes of IRC § 6033, should be included within any definition of "religious employer." Yet a religious employer that is a § 6033 organization must also meet three additional criteria: 1) inculcate values as its purpose; 2) hire

[9] For purposes of these comments, "church" denotes churches as well as other faiths' houses of worship.

primarily persons of the same faith; and 3) serve primarily persons of the same faith.

But Seventh-day Adventist hospitals' purpose is to heal, not inculcate values, and they do not serve only Adventists. Many religious universities employ faculty who do not share the institutions' faith. Most ministries to the underprivileged, homeless, and imprisoned serve persons of all faiths.

Which tenets must employees and beneficiaries believe to qualify? The current definition of "religious employer" fails to specify which tenets, or what percentage of the employer's tenets, a beneficiary or employee must hold. Few employees of religious employers agree with every tenet the church holds. For that matter, church members may be quite happy at a church where they agree with only, say, 60% of the church's doctrine. Does that fact somehow diminish the church's freedom to function without governmental interference? Is it appropriate for the government to incentivize churches to become more homogeneous in their employment or in the persons they serve?

How will the government determine whether a church is serving or employing persons who do not share its tenets? That the Administration presumes to assess the religious commitment of a church's employees and beneficiaries is itself an affront to the notion that the First Amendment requires the government to give churches breathing space, and violates any meaningful understanding of "separation of church and state." *See generally Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

Does the exemption cover all church employees? In adopting the exemption, the Administration stated that the exemption was intended to cover "the unique relationship between a house of worship and employees in ministerial positions." 76 Fed. Reg. at 46623. This language raises the prospect that the Administration might grant the exemption only for some of a church's employees (its ministers), but not all employees (its janitors). Given the Administration's highly restrictive understanding of the constitutional protection of churches' relationship with their

ministerial employees, as demonstrated by its position in *Hosanna-Tabor*, this language raises concern.[10]

Comment 1-4: The current exemption admittedly does not cover many religious ministries that serve as society's safety net for the most vulnerable among us. The ANPRM demonstrates that the current definition of religious employer does not cover most religious colleges, schools, preschools, hospitals, homeless shelters, pregnancy crisis centers, food pantries, health clinics, and other basic ministries of churches in communities across the country. 77 Fed. Reg. 16502**.** As already discussed above, many of these ministries serve persons of different faiths or no faith, an automatic disqualification under the current exemption. Furthermore, many of these ministries do not qualify as § 6033 organizations. The Administration seems bent on casting the narrowest net possible, in order to protect the fewest religious employers possible. In so doing, the Administration needlessly damages the safety net for our society's most vulnerable.

Comment 1-5: The exemption creates a two-class concept of religious organizations that is unprecedented. By letter dated June 11, 2012, to Secretary Sebelius, Christian Legal Society joined 125 other Christian organizations, most drawn from the Protestant tradition, to object to the federal government bifurcating the religious community into two classes: churches (supposedly protected by the exemption) and faith-based service organizations (unprotected by the exemption). As the letter explains:

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

[10] *See* Brief for Federal Respondent, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, No. 10-553, http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_federalrespondents.authcheckdam.pdf.

Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, http://www.clsnet.org/document.doc?id=367.

Comment 1-6: There is no basis for the Administration's repeated assertions that the exemption will not be adopted in other federal and state statutes and regulations. The ANPRM asserts that the too-narrow exemption for religious employers will not be transferred to any other regulatory context. 77 Fed. Reg. 16502. But that is simply not credible.

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

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

We agree with the Administration that the exemption *ought* not be used in any other context. But we would respectfully submit that if it is not a sound exemption for other purposes, it is not an acceptable exemption in this context.

Comment 1-7: If the government may force religious employers to pay for contraceptives and abortifacients, nothing prevents the government from ordering them to pay for all abortions. For forty years, it has been a goal of many pro-abortion organizations to compel everyone to pay for abortions. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980). If the Administration succeeds in forcing religious employers to pay for contraceptives and abortifacients, the Mandate can be easily amended at a later date to compel religious employers to pay for all abortions. The arguments advanced for making religious employers pay

for contraceptives and abortifacients – women's economic equality and avoidance of childbirth – are the core arguments used to justify all abortions.

Indeed, the Institute of Medicine report that recommended coerced coverage of contraceptives and abortifacients suggests that coverage of "abortion services" was discussed, when it notes: "Finally, despite the potential health and well-being benefits to some women, abortion services were considered to be outside of the project's scope, given the restrictions contained in the ACA." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011) at 22.[11]

Comment 1-8: Religious employers have been able to bypass any state mandate by self-insuring, dropping prescription drug coverage, or adopting ERISA plans that were not subject to state law regulation. Unlike the 28 states that have some form of contraceptives mandate, the federal mandate is ironclad. In the states, religious employers can structure their insurance coverage to avoid providing coverage for contraceptives and abortifacients. For starters, most states have a much broader explicit exemption for religious employers. But even in the three states from which the federal mandate was lifted, the religious employers can structure their insurance to avoid objectionable coverage by self-insuring, dropping prescription drug coverage, or offering ERISA plans not subject to state regulation. The PPACA forecloses these options, leaving religious employers stranded.

Comment 2: The "temporary enforcement safe harbor" is also too narrow and transient. The ANPRM implicitly asks whether the accommodation should apply "to some or all organizations that qualify for the temporary enforcement safe harbor, and possibly additional organizations." 77 Fed. Reg. 16504. Quite simply, any accommodation must include more organizations than are covered by the limited safe harbor.

The "temporary enforcement safe harbor" set forth in HHS guidelines on February 10, 2012, fails to give shelter to most religious employers, who will become subject to the Mandate beginning August 1, 2012, a few weeks from now. The "safe harbor" lasts only one year, until August 2013.

[11] Presumably "the restrictions contained in the ACA" refers to the conscience provisions in the PPACA discussed *supra* at 8.

While the "safe harbor" takes a step in the right direction by applying to "a non-profit entity" rather than an I.R.C. § 6033 organization, many non-profits will not meet the "safe harbor" criteria because they awoke to the problem too late. The "safe harbor" applies only to nonprofits that did not provide contraceptive coverage as of February 10, 2012. Many non-profits with religious objections to the Mandate had never thought about the issue and did not realize their coverage included objectionable drugs and services. The safe-harbor fails to protect individuals, insurance issuers, third-party administrators, or for-profit organizations that have religious objections to providing coverage of contraceptives and abortifacients.

Comment 3: The tenor of the ANPRM suggests any accommodation offered likely will be too narrow. By its very existence, the current exemption establishes that the Administration realizes the Mandate creates a substantial religious liberty burden on religious employers by forcing them to provide contraceptives and abortifacients in violation of their religious beliefs. Despite that realization, for nearly 10 months, the Administration has resisted broadening the exemption to protect all religious employers with the same religious conscience objections as those protected by the too-narrow exemption.[12]

As Christian Legal Society and 125 other religious organizations recently expressed to Secretary Sebelius:

> [T]here is one adequate remedy: eliminate the two-class scheme of religious organization in the preventive services regulations. Extend to faith-based service organizations the same exemption that the regulations currently limit to churches. This would bring the preventive services regulations into line with the long-standing, respected, and court-tested provisions of Title VII of the 1964 Civil Rights Act [§§702, 703e] which provide a specific employment

[12] Immediately after the exemption was first announced in August 2011, the Christian Legal Society joined 44 other Protestant, Jewish, and Catholic leaders on a letter explaining why the religious exemption was too narrow. See Letter to Joshua DuBois, Executive Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 44 Protestant, Jewish, and Catholic leaders, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322.

> exemption for every kind of religious organization, whether they be defined as 'a religious corporation, association, educational institution, or society.'

Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *supra*.

Comment 3-1: In the context of the "ministerial exception," the Supreme Court recently rejected the Administration's flawed understanding of religious liberty by a unanimous vote. The Mandate and the "religious employer" exemption were both crafted without the benefit of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). The exemption, however, was finalized four weeks after the Court's unanimous decision that broadly protected churches' and religious schools' religious liberty in the employment context.

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

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

we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.*

Comment 3-2: It makes no sense to withhold an accommodation from religious employers who are willing to fund contraceptives that are not abortifacients. The ANPRM requests "comment on whether the definition of religious organization should include religious organizations that provide coverage for some, but not all, FDA-approved contraceptives consistent with their religious beliefs." 77 Fed. Reg. 16505. We can see no basis for such a distinction.

This is an important question for the many religious organizations that do not oppose coverage of some contraceptives, but oppose abortifacients that are mislabeled as "contraceptives". To the degree that there is any merit in the Administration's argument that the Mandate is necessary to increase women's access to contraceptives, which we doubt, that interest would be harmed by giving an accommodation only to those who oppose all contraceptives. Such a policy would pressure religious employers who do not oppose coverage for genuine contraceptives to cease coverage of all contraceptives, in order to avoid coverage of abortifacients. Similarly, those religious employers who do not have a religious objection to providing coverage of drugs typically used for contraceptive purposes for treating medical conditions, rather than birth control, would be pressured to end this coverage in order to avoid the religiously objectionable coverage. The Administration would effectively force religious employers to take absolute positions that are not in the best interests of their employees.

As a practical matter, such a policy would fall particularly heavily on evangelical Christian organizations, whose doctrine typically does not oppose contraceptives that do not act as abortifacients. Such a policy would trigger Establishment Clause concerns because government preference, or discrimination, among religious denominations is the quintessential violation of the Establishment Clause. *Larson v. Valente,* 456 U.S. 228 (1982).

Comment 3-3: Religious organizations that are not associated with churches must be protected. The ANPRM asks whether the definition of religious employer should be limited to "the definition of 'church plans' in IRC Sec. 414(e)

and ERISA Sec. 3(33) . . . thereby limiting the accommodation to religious organizations that are controlled by or associated with a church or a convention of churches." 77 Fed. Reg. 16504. Such a definition is unacceptable because it excludes many religious organizations that are not controlled by or associated with a church. Many Christian ministries, including leading colleges and schools, are unaffiliated with any church, yet their rights of religious conscience are no less valued.

Comment 3-4: Federal conscience protections are not limited to non-profit religious conscientious objectors. The federal conscience protections, described in Part II *supra,* protect both non-profit and for-profit entities. Under these federal laws, hospitals, nurses, and doctors do not forfeit their conscience rights because they are paid for their services. RFRA makes no distinction between for-profit and non-profit institutions in its protection. 42 U.S.C. § 2000bb. The First Amendment protects the religious conscience rights of for-profit businesses. *See, e.g., Stormans, Inc. v. Selecky,* 2012 WL 566775 (W.D. Wash. 2012).

Comment 4: The Administration's quandary as to how to finance a possible accommodation -- by which contraceptives, sterilization procedures, and reproductive counseling are provided to employees without cost sharing and without the employer being charged -- seems insolvable. The ANPRM asks for comments on how to pay for a possible accommodation by which coverage of contraceptives, as well as costly procedures and counseling, are to be paid for by someone other than the employee or employer. 77 Fed. Reg. 16505-16507. Quite frankly, we doubt there is a feasible solution to the problem but offer a few observations.

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

issuers build into their premiums projected costs and savings from a set of services. Premiums from multiple organizations are pooled in a 'book of business' from which the issuer pays for services." 77 Fed. Reg. 16506. Unfortunately, religious employers are still paying for the religiously objectionable drugs if payment is from a pool to which the religious employers have contributed.

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

The Administration posits that insurance companies can fund contraceptives without charging anyone because "covering contraceptive services is at least cost neutral." 77 Fed. Reg. 16506. But that begs the question why the insurance companies, on their own initiative, have not previously funded contraceptives in order to recognize these savings.

The PPACA does not provide statutory authority for the government to order insurance companies or third-party administrators to pick up the Mandate's cost. Indeed, in its comments, filed May 7, 2012, the Self-Insurance Institute of America, Inc., observed that several of the ideas floated in the ANPRM, regarding third-party administrators covering the cost of contraceptives without charging the religious employers and without employee cost sharing, were likely to be unlawful.

The Self-Insurance Institute also explained that "[t]he plans we administer have benefits governed by a written plan document that specifically indicates what is covered by the plan. A TPA can't pay claims not in the plan sponsor's document." The Institute further stressed that once a third-party administrator became responsible for payment, it would become an insurance carrier and, therefore, subject to fiduciary duties under state law, which "directly conflicts with the federal regulatory regime under which TPAs currently operate."

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

Comment 5: The Mandate violates the Religious Freedom Restoration Act.
Our national commitment to exemptions for religious individuals and institutions is exemplified by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb. Passed by overwhelming, bipartisan margins in the Senate (97-3) and the House of Representatives (unanimous voice vote), RFRA was signed into law by President Clinton in 1993.

RFRA provides religious citizens and institutions with a presumptive exemption when federal laws substantially burden their religious consciences. As the Supreme Court recently explained:

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

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

Rather than a law passed by Congress, the Mandate and the religious employer exemption are administrative regulations. Their adoption bypassed the normal Administrative Procedure Act process.[13]

Substantial burden: Failure to comply with the Mandate subjects a non-exempt religious employer to heavy financial penalties as well as potential civil lawsuits brought by the government or employees. The adoption of the "religious employer" exemption itself signifies the Administration's own recognition that a burden exists for religious employers. But the too-narrow exemption fails to alleviate the substantial burden on most religious employers and their employees, as well as religious insurance companies and third-party administrators.

Compelling governmental interest: The government thus has the burden to demonstrate a compelling interest unachievable by less restrictive means to justify burdening the right of religious employers and other religious persons to avoid participating in, or funding, abortions and other drugs and procedures to which they have religious objections. But the government cannot make such a showing. The Mandate does not apply to approximately 100 million employees because they are covered by grandfathered plans exempt from the Mandate's requirement by the PPACA.[14] "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah,* 508 U.S. 520, 547 (1993). *See Gonzales,* 546 U.S. at 434. Employers with fewer than 50 employees need not provide coverage. 26 U.S.C. § 4980H(c)(2)(A). Employers who are members of a 'recognized religious sect or division' that objects, on conscience grounds, to acceptance of public or private insurance funds are exempt. 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(a)(i) and (ii). Of course, the "religious

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

[14] According to HHS estimates, 98 million individuals will be covered by grandfathered group health plans in 2013. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41726, 41732 (July 19, 2010).

employer" exemption itself demonstrates that the government's interest is not compelling.

Least restrictive means: Forcing religious employers to fund contraceptives and abortifacients is hardly the least restrictive means of achieving the government's purported interest of gender equality and childbirth avoidance. This is a solution in search of a problem. No one seriously disputes that contraceptives are widely available. For example, on January 20, 2012, Secretary Sebelius announced that religious employers would have to give specific information to employees, specifically that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." *See* Statement by U.S.Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited June 16, 2012).

Certainly, the government remains free to subsidize contraceptive coverage through its own spending programs, including by providing contraceptives free of charge through an expanded Title X program. Tax credits could be offered to cover the taxpayers' costs for contraceptives.

For these reasons, the Mandate as applied to religious individuals and organizations violates the Religious Freedom Restoration Act. And so we come full circle. Not surprisingly, the Mandate -- and its accompanying narrow exemption for a handful of religious employers and the possible, as yet undefined, accommodation -- violate fundamental federal law because they sharply depart from America's bipartisan tradition of broad protection for religious liberty and religious conscience, particularly in the abortion context.[15]

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

Respectfully submitted,

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