



April 8, 2013

**Submitted Electronically**

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9968-P  
P.O. Box 8013  
Baltimore, MD 21244-1850

**Re:** *Comment on Notice of Proposed Rulemaking, File Code CMS-9968-P:  
The Legal Necessity for Comprehensive Exemptions for All Religious Objections  
from the PPACA Mandate to Provide, Participate in or Pay for Health Insurance  
Coverage of Abortion, Abortifacients, Contraception, Sterilization and  
Counseling and Information Regarding the Same*

Dear Sir or Madam:

Alliance Defending Freedom writes this comment on behalf of Biola University (La Mirada, California), Grace College and Seminary (Winona Lake, Indiana), Geneva College (Beaver Falls, Pennsylvania), and Louisiana College (Pineville, Louisiana).

These institutions of higher education are gravely concerned about the illegal violations of religious freedom that continue to be implicated in the notice of proposed rulemaking (“NPRM”), 78 Fed. Reg. 8,456 (Feb. 6, 2013). That proposal and the underlying mandate it defends (finalized at 77 Fed. Reg. 8,725 (Feb. 15, 2012)) (hereinafter “the Mandate”) illegally require religious objectors to issue health plans that cause coverage of “contraception” (including but not limited to drugs that can cause the demise of embryos both before and after uterine implantation, hereinafter, abortion-inducing drugs or abortifacients), as well as sterilization, and associated patient education and counseling. The Mandate poses a direct violation of the rights of entities and individuals not to participate in such activities to which they have a religious objection. The NPRM, far from alleviating this violation, promises to perpetuate it.

The Mandate and suggested “accommodations” in the NPRM blatantly violate the right to religious freedom protected throughout federal law, including the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb-1 *et seq.*, and the First Amendment to the U.S. Constitution. The NPRM’s refusal to expand the Mandate’s exemption beyond houses of worship is offensive because it drastically minimizes what counts as a religious employer. Applying the Mandate to *any* entity or individual possessing a religious objection is illegal.

No other federal rule has so narrowly and discriminatorily defined what it means to exercise religious conscience, and no regulation has ever so directly violated plain statutory and constitutional religious freedoms. The NPRM does nothing to change that fact.

Entities such as the colleges and universities submitting this comment, and indeed any religiously objecting employer, have a legal right not to be required to facilitate, cause, offer or pay for health insurance coverage that includes practices to which they have a religious or moral objection. Religiously objecting entities of any kind have a right not to be forced to choose between causing such coverage, paying a fine and suffering lawsuits, or offering no health insurance coverage at all. Whether operating for profit or not, all employers with religious beliefs have the same right under RFRA to *not* have their religious and moral beliefs burdened by the federal government. Likewise, insurance companies have a right not to be forced to offer such coverage. Individuals have the same right not to be forced to enroll in or purchase objectionable coverage. Federal law simply prohibits the federal government from violating the religious and moral beliefs of *any* of these stakeholders.

The Mandate offers no explanation of how it conforms to RFRA. It also makes no concession to the already 16 federal court decisions against this Mandate lost by the Departments of Health and Human Services, Treasury, and Labor. To the extent the Mandate commands any religious objector to facilitate coverage in violation of that stakeholder's beliefs, it imposes a substantial burden on those beliefs. Those burdens, in turn, cannot possibly be the least restrictive means of satisfying the allegedly compelling interest that the Mandate allegedly advances. The federal government could achieve its stated goals by, among other methods, directly subsidizing the coverage itself (if the political will existed to do so), instead of by compelling the participation of objecting employers. Yet there can be no serious claim that the Mandate is supported by a compelling interest when Congress and the Departments already exempt scores of millions of women from this Mandate for secular reasons. These reasons include exemption of "grandfathered" plans not directly subject to the Mandate. A government content to leave those women without the Mandate's "benefits" cannot possibly claim a compelling interest to burden religious employers. Such underinclusiveness also shows that the Mandate is not "generally applicable," and therefore it violates the Free Exercise Clause of the First Amendment in addition to violating RFRA.

The NPRM does not propose to solve any of these problems. It refuses to exempt all employers with religious beliefs as RFRA requires, and it admits that the Departments refuse to expand the exemption beyond houses of worship. The NPRM proposes to merely "accommodate" free exercise of religion, and to do that merely for nonprofits. Yet it would still force nonprofits to provide plans that specifically cause and enable the objectionable coverage. The NPRM claims that such items will be paid for by the insurer, third party administrator, or some other party, but this is irrelevant to the fact that employers object not merely to *paying*, but to a variety of means of enabling the coverage to be provided by virtue of their own plans. It is false to theorize that there are no front-end costs of these items, or that they are in any circumstances "free." For example, surgical sterilization and several forms of contraception cost hundreds or thousands of dollars. The Mandate's underlying statute gives no authority to the government to force an insurer or a third party to provide coverage apart from the employer's own plan. Employers would necessarily be impacted when their insurers and third party

administrators are forced to assume new and additional duties to cause the religiously objectionable coverage.

The NPRM’s “accommodation” imposes its mandate on all employees and their families even if the employees and their families do not want coverage of these items. Some of those families are working at religiously-led entities precisely so that they can have morally acceptable health insurance, and the NPRM deprives them of that choice. This not only forces objecting employees to participate in problematic coverage, but it forces them to enable morally objectionable coverage for their children over and against their religious objections. In the case of self-insured employers, the NPRM apparently compels the release of private employee health information to an outside insurance company without the employer’s or the employees’ consent, in order to impose the coverage of the objectionable items on the employees.

For these reasons we urge HHS (and the Departments of Labor and of the Treasury that jointly issued the Mandate and the NPRM) to *conform the Mandate to RFRA and the First Amendment*, by completely exempting *all* stakeholders with a religious or moral objection from being forced by the federal government to provide, offer, pay for or in *any way* participate in a health insurance plan that covers or specifically triggers coverage of “contraceptives” (including abortifacients as well as non-abortifacient mechanisms of action), sterilization, and related education and counseling. Religious freedom requires no less.

### **Interests of the Commenting Entities**

#### **Geneva College**

Geneva College is a Christ-centered institution of higher learning located in Beaver Falls, Pennsylvania. Geneva College was established in 1848 by the Reformed Presbyterian Church of North America (RPCNA). Geneva College’s mission is to glorify God by educating and ministering to a diverse community of students in order to develop servant-leaders who will transform society for the kingdom of Christ.

Geneva College pursues this mission through biblically-based programs and services anchored in the historic, evangelical, and Reformed Christian faith. The vocationally-focused curriculum is rooted in the liberal arts and sciences and is delivered through traditional and specialized programs. Central to the mission of Geneva College is its desire to glorify God. Geneva College believes that the Bible teaches that the lives of all people (especially followers of Jesus Christ) should glorify God. Geneva College embraces the oft-quoted statement of the Westminster Shorter Catechism: “Man’s chief end is to glorify God and enjoy Him forever.”

Geneva College follows the creedal commitment in the application to many of its policies and practices that flow from the RPCNA. That commitment is derived from the Holy Bible and is articulated in the Westminster Confession of Faith, the Westminster Larger and Shorter Catechisms, and the Testimony of the RPCNA. These sources affirm the sanctity and inviolability of every human being from the moment of his or her conception-fertilization.

Geneva College unreservedly shares the RPCNA's religious views regarding abortion, believing that the procurement, participation in, facilitation of, or payment for abortion (including abortion-causing drugs like Plan B and "Ella") violates the Commandment against murder and is inconsistent with the dignity conferred by God on creatures made in His image.

Geneva College draws its faculty, staff, and administration from among those who profess faith in Christ and otherwise agree with Geneva College's Christian convictions. Although Geneva College does not require a profession of faith as a prerequisite for student admission, it does give priority in its recruitment to the evangelical Christian community and seeks to create a Christian peer influence among students. All students are expected to live by the standards of historic Christian morality, including those expressed in the Ten Commandments.

Geneva College has a long history of providing education to individuals from segments of society that have been disenfranchised. In the years following the Emancipation Proclamation of 1863, a significant percentage of the students were freed black slaves. Geneva College was among the earliest schools to matriculate women to a full degree program. Geneva College is building on that history through special efforts to recruit and retain African-American, Latino, other minority, and international students, believing that its student body should reflect the diversity of our world.

At certain points in its history, Geneva College has found it necessary to engage in civil disobedience of unjust laws. In the 1860s, Geneva College was a station on the Underground Railroad, which sought, against the law of the land, to hide and transport escaped slaves. Geneva College believed that the institution of slavery was inimical to biblical faith.

Geneva College, its faculty and its students have participated in a variety of educational and advocacy activities to uphold the sanctity of the lives of the unborn.

Consistent with its religious beliefs about the sanctity of life, Geneva College's contract for employee health coverage states that it excludes "[a]ny drugs used to abort a pregnancy."

### Louisiana College

Louisiana College is a Christian university located in Pineville, Louisiana. Established in 1906, the mission of Louisiana College is to provide liberal arts, professional, and graduate programs characterized by devotion to the preeminence of the Lord Jesus, allegiance to the authority of the Holy Scriptures, dedication to academic excellence for the glory of God, and commitment to change the world for Christ by the power of the Holy Spirit. A Southern Baptist institution, owned by the Louisiana Baptist Convention, this mission is explicated by requiring the hiring of all employees to be Christians who adhere to the Baptist Faith and Message 2000 and the College's Christian Commitment Statement. The Biblical Worldview of Louisiana College is built upon a belief that the Word of God, The Holy Bible, is the God-breathed inerrant Word of Almighty God. the mission of Louisiana College is to provide liberal arts, professional, and graduate programs characterized by dedication to academic excellence for the glory of God.

Faith is central to the mission and identity of Louisiana College. It describes itself as a “private Baptist co-educational college of liberal arts” and commits, in its mission, to provide educational programs with a “dedication to academic excellence for the glory of God.” Consistent with its mission, Louisiana College works to manifest its Christian faith in all aspects of its administration.

Louisiana College’s religious beliefs include traditional Christian teachings on the sanctity of life. Its doctrinal statement states, “We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.”

Louisiana College adheres to, as its doctrinal statement, the Baptist Faith and Message 2000 of the Southern Baptist Convention. Louisiana College is affiliated with the Southern Baptist Convention which has passed Resolutions from as early as 1984 condemning the use of the abortion drug RU-486 as a violation of its sincerely held religious beliefs and urging SBC members to oppose the usage and proliferation of RU-486. Louisiana College therefore believes and teaches that abortion, or methods that harm an embryo from the moment of conception/fertilization, ends a human life and is a sin.

Louisiana College has more than 1,450 graduate and undergraduate students. Louisiana College has approximately 180 full-time and 80 part-time employees. As part of fulfilling its commitment and duty in Christian education, Louisiana College also promotes the well-being and health of its employees, spiritual and physical. This includes provision of generous health services and health insurance for its employees.

As part of its religious commitment, Louisiana College has ensured that its insurance policies do not cover drugs, devices, services or procedures inconsistent with its faith. In particular, its insurance plans do not cover abortion. As part of that same commitment, Louisiana College has ensured that its insurance policies do not cover drugs, devices, services or procedures that it believes may cause the death of an early human embryo, such as Plan B or “ella.”

### Biola University

Biola University was founded in 1908 as the Bible Institute of Los Angeles. The mission of Biola University is biblically centered education, scholarship and service – equipping men and women in mind and character to impact the world for the Lord Jesus Christ. Biola’s vision is to be an exemplary Christian university characterized as a community of grace that promotes and inspires personal life transformation in Christ which illuminates the world with His light and truth. As a global center for Christian thought and an influential evangelical voice that addresses crucial cultural issues, Biola University aspires to lead, with confidence and compassion, an intellectual and spiritual renewal that advances the purpose of Christ.

Biola’s “Doctrinal Statement,” which is part of its Articles of Incorporation, declares that “[t]he Bible is clear in its teaching on the sanctity of life. Life begins at conception. We reject the destruction or termination of innocent human life through human intervention in any form

after conception including, but not limited to, abortion, infanticide or euthanasia because it is unbiblical and contrary to God's will. Life is precious and in God's hands."

The Biola University Employee Handbook, in a section entitled "Standard of Conduct," states in part as follows: "Consistent with the example and command of Jesus Christ, we believe that life within a Christian community must be lived to the glory of God, with love for God and for our neighbors. Being indwelt by the Holy Spirit, we strive to walk by the Spirit, 'crucifying the flesh with its passions and desires' (Galatians 5:24). To this end, members of the Biola community are not to engage in activities that Scripture forbids. Such activities include . . . the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia."

Biola's Student Handbook provides in part as follows: "The University wants to assist those involved in unplanned pregnancy while at Biola to consider the options available to them within the Christian moral framework. These include marriage of the parents, single parenthood, or offering the child for adoption. Because the Bible is clear in its teaching on the sanctity of human life, life begins at conception; we abhor the destruction of innocent life through abortion on demand. Student Development stands ready to help those involved to cope effectively with the complexity of needs that a crisis pregnancy presents."

Biola supports the physical, emotional, and spiritual well-being of its employees and their dependents by offering health insurance coverage as a benefit of employment. The health insurance plans it makes available to employees and their dependents do not cover abortion-inducing drugs such as ella and Plan B. The plan does provide coverage of other drugs characterized by the Food and Drug Administration as "contraceptives."

Biola facilitates health insurance for its students who are not otherwise covered by health insurance. The University requires its students to have health insurance coverage. It facilitates coverage through a third-party provider. Students who enroll in this plan pay the premium to Biola and the University remits payment to the carrier on behalf of the students. Ella and Plan B are excluded from this plan

### Grace College and Seminary

Grace College and Seminary was founded in 1937 under the leadership of Dr. Alva J. McClain, President. The College's mission is to be "an evangelical Christian community of higher education which applies biblical values in strengthening character, sharpening competence, and preparing for service." Grace is a learning community dedicated to teaching, training, and transforming the whole person for local church and global ministry. Grace's aspirational vision is to "be an exceptional learning community that transforms people to live their lives for God and others." At Grace, the students, administration, faculty, and staff aim together to make Christ preeminent in all things. Students learn this by living, studying, working, worshipping, and achieving academic success with other young people who share similar Christian ideals in a setting where the community lifestyle fosters devotion to serious academic inquiry, wholesome recreation and relaxation, and mature spiritual growth.

Grace College and Seminary is affiliated with the Fellowship of Grace Brethren Churches. The Fellowship of Grace Brethren Churches believes that human life is worthy of protection and respect at all stages from the time of conception. The Fellowship of Grace Brethren Churches believes that the sanctity of human life is established by creation (Gen. 1:26-27), social protection (Gen. 9:6) and redemption (John 3:16). The College agrees with the Fellowship of Grace Brethren Churches' religious views regarding abortion, believing that the procurement, participation in, facilitation of, or payment for abortion (including abortion-causing drugs like Plan B and ella) violates the Sixth Commandment and is inconsistent with the dignity conferred by God on creatures made in His image. By "conception," "pregnancy," "abortion" and related concepts referenced herein regarding the sanctity of innocent human life and prohibitions on its destruction, Grace College understands such concepts to recognize and protect the lives of human beings from the moment of fertilization.

Grace College promotes the physical, spiritual and well-being and health of its employees. This includes provision of generous health insurance. Consistent with its religious commitments, Grace College provides a self-insured group plan for its employees, acting as its own insurer. Under the terms of Grace's plan for its employees, coverage excludes abortifacient drugs like Plan B and ella. The plan does, however, include a variety of contraceptive methods that Grace does not consider to be morally objectionable. Grace requires all registered residential students to have health insurance. If a student does not submit proof of coverage to the College, it will enroll the student in a health insurance plan. The College will bill enrolled students for the cost of the coverage.

Geneva, Grace, Biola, and Louisiana College are all represented by Alliance Defending Freedom in lawsuits against the federal government seeking to declare the Mandate illegal and unconstitutional under various federal provisions. *Louisiana College v. Sebelius*, No. 1:12-cv-00463 (W.D. La.) (filed Feb. 18, 2012); *Geneva College v. Sebelius*, No. 2:2012-cv-00207 (W.D. Pa.) (filed Feb. 21, 2012); and *Grace Schools and Biola University v. Sebelius*, No. 3:12-cv-00459 (N.D. Ind.) (filed Aug. 23, 2012).

### **The Mandate Is Illegal.**

The Mandate, with its inadequate "religious employer" exemption, violates multiple federal laws, including the Religious Freedom Restoration Act, the First Amendment to the U.S. Constitution, the Administrative Procedure Act, and the Patient Protection and Affordable Care Act ("PPACA") itself. The NPRM does not even propose to correct these inadequacies, because it does not propose to exempt all religious objectors.

- *The Mandate Violates RFRA.*

The Mandate is an unquestionable violation of RFRA. That federal statute authorizes judicial relief against the federal government if it "substantially burden[s] a person's exercise of religion," (including an entity) unless the government "demonstrates 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." 42 U.S.C. 2000bb-

1. To the extent that the Mandate imposes a burden on the religious or moral objections of *anyone*, it is illegal under RFRA.

- *The Mandate Substantially Burdens Religious Beliefs.*

The Mandate directly burdens the beliefs of many who object to causing coverage of abortifacients, contraception, sterilization, or education and counseling regarding the same. It requires them to facilitate coverage of objectionable items even though they have a religious belief against doing so. This is the very definition of a burden on religious beliefs: the government mandating that people violate their beliefs.

The NPRM fails to propose a correction that would conform the Mandate to federal law. To comply with RFRA, the Mandate would have to exempt all religiously objecting stakeholders. But the NPRM admits that it refuses to expand its exemption beyond houses of worship. It proposes only to “accommodate” some, but not many, stakeholders, and as discussed below, the accommodation does not address the religious objection that many stakeholders possess in the first place.

- *The Mandate Fails to Protect Individuals, Insurance Companies, or Businesses Run by Religious Persons.*

The Mandate and the NPRM leave entire categories of stakeholders unprotected. These include religious individuals, whom the PPACA requires to enroll in health insurance and therefore forces to enroll in plans that cover items to which they object. Likewise ignored are religious insurance providers whom the Mandate forces to violate their beliefs. The Mandate also does not exempt, and the NPRM does not propose to exempt, families that run for-profit companies and adhere to religious beliefs. Ironically, the Departments have been subject to 16 injunctions already for burdening the beliefs of religious families in business in violation of RFRA, yet the NPRM fails to take steps to remedy those violations. All employers with religious beliefs, whether they are for-profit or not, must be exempted entirely to conform the Mandate to RFRA.

- *The Mandate’s “Religious Employer” Exemption Is Disturbingly Narrow.*

Regarding stakeholders whom the Mandate and the NPRM do acknowledge, the rules fall far short of the requirements of RFRA. The Mandate’s “religious employer” exemption is so narrow that it fails to exempt most employers with religious beliefs. That “religious employer” exemption is, as many commenters have pointed out, offensive to religion itself, because it proposes to define religion essentially as only including houses of worship. It defines an entity as *not* a “religious employer” if it is not a nonprofit as described in sections 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. These subsections, used to establish requirements with regard to taxation, specifically include only “churches, their integrated auxiliaries, and conventions or associations of churches,” or “the exclusively religious activities of any religious order.” *Id.* at 46626.

Free exercise of religion as protected by RFRA applies to all Americans, not just to churches. Many religious colleges and universities, not to mention vast other kinds of religious employers, are not themselves churches or religious orders, or the “exclusive” or “integrated” activities thereof. It violates RFRA to omit any college, university, or other employer with religious objections.

Anyone not exempt by the Mandate’s religious employer exemption is subject to its penalties for non-compliance. These penalties are severe, and because they are leveled for violating a legal command, they are by definition substantial burdens. The Mandate triggers heavy fines on entities that offer generous insurance but omit objectionable items. 26 U.S.C. § 4980D. It also imposes extreme fines if large employers drop insurance altogether in order to comply with their consciences. 26 U.S.C. § 4980H. Further, the Mandate triggers the ability of the Secretary of Labor, and of employees themselves, to sue objecting entities and force them to offer coverage against their beliefs. 29 U.S.C. § 1132. The Mandate requires insurance companies to provide coverage of items even if the insurer, the contracting employer, or the insured, object. *See, e.g.*, 42 U.S.C. §300gg-22(b)(2)(C)(i). By this mechanism, the Mandate also compels objecting colleges and universities to include morally problematic items in their student health plans. Even if they self-insure, it is problematic.

- *The NPRM’s Proposed “Accommodation” Is Likewise Illegal.*

The NPRM’s proposed “accommodation” fails to bring the Mandate into compliance with RFRA, for several reasons.

- *The “accommodation” still compels entities to facilitate objectionable coverage in violation of their beliefs*

Under the “accommodation,” the NPRM proposes to force religiously objecting entities’ insurance companies or third party administrators to provide insurance coverage of abortifacients, contraception, sterilization, and related education and counseling, to possessors of the religious entities’ plans. The NPRM theorizes that in this arrangement the objecting employer will not be required to pay for or provide the coverage.

The accommodation fails to address the heart of many entities’ religious objections. It attempts to resolve a religious and moral problem by using an accounting gimmick. The NPRM then adopts the government’s own theological imprimatur to absolve its approach. Then it imposes that viewpoint on all non-exempt religious entities even if they disagree with the government’s moral theology.

The accommodation’s failure is reflected in the way it operates. It requires a religious entity to sign a certification asserting that it meets the required religious criteria, to keep the certification in its records “for examination upon request so that regulators, issuers, third party administrators, and plan participants and beneficiaries,” and then to provide the certification to the insurance issuer(s) and/or its self-insurance plan administrator(s) that the group pays for their ordinary duties. Once the religious entity’s insurer or administrator receives that certification,

the insurer or administrator is required to “automatically” provide the religious entity’s employees and plan beneficiaries with insurance covering the objectionable items.

If the religious entity uses an insurer, that insurer also becomes the insurer for the objectionable items. The NPRM calls this insurance coverage “separate” even though it comes from the same insurer, and goes to the same insureds, solely because they are insured by the religious entity buying the primary coverage. The NPRM claims that religious entities will not pay for the objectionable coverage, but it admits elsewhere that the items have up-front costs.

Under the NPRM’s proposed accommodation, therefore, religious entities would still be causing objectionable coverage in several specific ways. They would be required to provide a health insurance plan for their employees, and that plan would be the *sine qua non* by which the entity’s employees would be enrolled in the exact coverage the religious entity does not wish to enable. The coverage would come from the same insurer that the religious entity has paid to provide its base plan, *because* the religious entity has paid that insurer to provide its base plan. Without the religious entity’s provision of insurance to its employees, those employees would not receive the automatic coverage imposed in the accommodation. The religious entity’s employees and their families would be “automatically” enrolled in the objectionable coverage, even if the employees object, or even if they work at a religious entity in part because they want to receive morally acceptable insurance coverage. The objectionable coverage would be triggered by the religious entity’s required certification of beliefs and required submission of it to its insurer or administrator. And according to the NPRM, the “cost” of the abortifacients, contraception and sterilization for an insured religious entity is offset specifically by the base level of coverage that the religious entity is buying from its insurer.

Based on these concerns, many religious entities reasonably conclude that under the NPRM’s accommodation they would still be specifically causing their employees to obtain abortifacients, contraception, sterilization and related education and counseling. Nor does the NPRM resolve a religious entity’s moral quandary merely by declaring that the religious entity will not pay for these items. Payment is only one way that a moral actor helps someone else. There are other ways to facilitate evil, and it is the facilitation of these items to which many entities object. The NPRM would still force religious entities to cause the coverage in other, closely connected and specifically triggered ways.

It is fictional to deem abortifacients, contraception, and surgical sterilization to be “cost neutral,” especially since many forms of them are very costly. And by going to great lengths to determine who would pay for these items when a religious entity is self-insured, the NPRM is tacitly admitting that these items have significant costs. These costs will inevitably be passed on to consumers. And although some supporters of the Mandate have contended that the accommodation proposal is no more objectionable than an employer’s provision of salary, these triggers cause enrollment in particular objectionable coverage and are all more specific and less fungible than merely paying a monetary wage.

The misdirected character of the accommodation can be illustrated by an analogy. If the government forced a Christian college to provide its students or employees with the benefit of cable television, and then declared that it would force each cable company to offer pornographic

channels to those students or employees, the college's religious objection to facilitating access to pornography would not be mollified if the government merely declared that the channel is provided "for free," and that the mandate is against the cable company rather than being against the college. Such a college would still be forced to provide a student or employee a direct mechanism for him or her to access specifically provided objectionable items, at no student- or employee-cost, in violation of the college's beliefs.

The NPRM's "accommodation" proposal is the adoption of *moral theology* on the part of the government. The government has decided that lenient views of moral cooperation are acceptable, but more cautious theological views are subject to government coercion. This is a violation of the very idea of religious freedom. The fact that some religious entities and theologians might find this accommodation morally acceptable does not justify forcing all other religious entities to conform their consciences to the consciences of those groups. RFRA does not allow the administration to favor lenient religious beliefs and punish all others.

The NPRM makes it clear that colleges and universities that provide student health insurance coverage must suffer under the Mandate to the same extent as they will for their employee plans, unless entities self-insure the student plans. But self-insurance of student plans is not cost-effective for many schools. In some instances colleges are required to provide student insurance, such as for participation in athletic conferences. The NPRM therefore would force many religiously objecting schools to choose between their beliefs against providing objectionable coverage and their beliefs in favor of the well-being of their students. RFRA allows for no such federally-coerced dilemma. It is shocking that in the name of "Patient Protection and Affordable Care," the administration is willing to cause college students to lose health insurance provided by religious schools.

- *The "accommodation" has no statutory authority.*

The NPRM's theorized "accommodation" is also legally inadequate because the statutory basis for the Mandate gives the government no legal authority to compel insurers or third party administrators to provide preventive services coverage apart from the employer's plan. The statute only authorizes coverage to be included as part of the "plan" or "coverage" to which the statute applies. 42 U.S.C. § 300gg-13. There is no freestanding authority in the preventive services statute for the government to engage in roaming coercion of insurance companies, much less third party administrators, to provide coverage of contraception and other objectionable items.

Therefore, only two possibilities exist regarding the NPRM's proposed "accommodation." If the objectionable coverage is being required as part of the employer's plan or coverage, then the NPRM does not alleviate what many religious employers morally object to covering. In contrast, if the coverage would be mandated on the insurer or third-party administrator "separate" from the employer's plan, it would be a lawless action of bureaucratic regulation wholly unauthorized by its underlying statute (and the employer would still be forced to facilitate that coverage). Thus, the Mandate is either a burden on religious beliefs or it imposes a coercion that Congress did not authorize.

- *The “accommodation” is a direct threat to self-insured entities.*

For self-insured entities, the NPRM does not fully explain how costs will be offset, or whether those possible approaches will be either practical or legal. Independent of the cost issue, the accommodation for self-insured entities will impose unprecedented burdens and fiduciary duties on insurers and plan administrators with whom religious groups contract, and it will impose those burdens because religious groups wish to engage in that contract. These burdens will inevitably be reflected in the ability of and cost for self-insured religious groups to contract with plan administrators in the first place. Compelling coverage on third-party administrators necessarily increases the cost that religious entities will pay for those administrators, possibly pricing them out of the third-party administrator business altogether. Any compulsion of those administrators adds to their duties, and necessarily penalizes employers who contract with them.

The compulsion of coverage on self-insuring entities cannot be justified on the theory that they will have the option of dropping self-insurance and purchasing insurance from the market. This forced-choice is still a violation of religious freedom, because it conditions one’s exercise of religious beliefs on giving up the financial and administrative benefit of self-insurance that other entities possess. Moreover, as described above, externally insured plans under the “accommodation” still subject non-exempt groups to burdens on their religious beliefs.

- *The “accommodation” creates a religious caste system.*

The NPRM’s “accommodation” additionally fails to satisfy RFRA because it creates a federally-imposed religious caste system. The most privileged members of this federally dictated system are houses of worship and their integrated auxiliaries. These entities, and these alone, receive the largesse of a complete exemption from the Mandate by means of its “religious employer” definition. The administration admits that it has the discretion to extend religious exemptions beyond this group to all objectors—or to not impose the Mandate at all. See 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. But the NPRM refuses to universalize the religious employer exemption to all who exercise religious beliefs, as required by RFRA.

The NPRM then proposes to create a second caste level covering religious nonprofits. This semi-privileged “beta” caste of religious believers is given the “accommodation” but not an exemption from the Mandate. This caste must engage in what many of them consider a fictional idea that they are not really causing coverage of objectionable items. Yet, under that accommodation, they must still pay to provide their employees a plan that specifically causes their employees to be automatically enrolled in objectionable coverage.

Below this second caste are the federal government’s new religious untouchables: every other believer in the country. The government treats these citizens as if they have no religious beliefs at all. Religious people who run businesses are subject to the full force of the Mandate, regardless of its violation of their beliefs. Ironically, the government has lost as many as 16 different motions for injunctive relief against this Mandate for religious families in business. Yet the NPRM makes no effort whatsoever to resolve that illegal coercion against religious freedom. As mentioned above, stakeholders who are insurers or insured also bear the force of the Mandate.

Christian colleges and universities, like the commenters, particularly object to this determination that lay religious believers have no claim to religious freedom in the way they conduct their daily lives and business. The undersigned schools are committed to educating their students to incorporate their religious beliefs into every aspect of their lives. Students are taught that their values are relevant not only to philosophy and theology fields, but also, and in some ways especially, in business and other vocations. Business and economic decisions desperately need to incorporate religious and moral concerns so as to consider the common good of workers and their families, the community, the environment, and society at large. Yet the Departments have contended in litigation defending this Mandate that business activity is inherently “secular” in a way that excludes religion, and therefore that families in business are not even capable of religious exercise. This position is not only bad law and shoddy theology, it is terrible public policy.

The Mandate’s absurd treatment of different religious believers’ free exercise with different levels of allowance is illegal under RFRA, which requires that all burdens on free exercise of religion in this regard be respected equally and fully. The NPRM’s system is instead the establishment of a minimalistic theological dogma about what religion is, and about which kinds of cooperation in evil are morally acceptable.

- *The “accommodation” compels unwilling employees and their children to receive objectionable coverage.*

The NPRM actually creates a new burden on religious beliefs of employers: instead of letting employees individually opt-in to the mandated coverage by a mere “offer” of coverage to them, as was previously suggested in 77 Fed. Reg. at 8728, the NPRM declares that employees will “automatically” receive the coverage.

Employees of religious nonprofit groups who do not want free abortion-pill, contraception, sterilization and counseling coverage will be forced to receive that coverage. And perhaps most egregiously, because the NPRM proposes that the automatic coverage will apply to employee “beneficiaries,” the NPRM forces religious employers to cause this objectionable coverage to the **minor children and college students** of employees who, as parents, object to offering that coverage. Under the NPRM, if an employer objects to providing such coverage and his employee shares that objection, they both are forced to enable the employee’s children cost-free access to items to which they object, and which due to privacy they may never be allowed to know about or prevent. Employees will be forced to cause coverage of objectionable items to their children against their will, and employers will be forced to provide plans that cause that same coverage.

This is not only an assault on parental rights, but it exacerbates the Mandate’s burden on religious beliefs of objecting employers. Morally acceptable health insurance coverage not only benefits the employer, but also provides a safe haven to employees who share those same beliefs. The Mandate destroys that safe haven.

- *The Mandate and NPRM Cannot Possibly Satisfy Strict Scrutiny.*

The Mandate and NPRM have no hope of satisfying strict scrutiny due to their substantial burden on religious beliefs. RFRA imposes “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The government cannot show under 42 U.S.C. § 2000bb-1 that its Mandate is supported by a “compelling governmental interest,” or that it is “the least restrictive means of furthering” the same. To date, 16 federal courts have issued injunctive relief, holding that the plaintiffs are likely to succeed on the merits of their RFRA claim because the Mandate fails to satisfy strict scrutiny.

- *No compelling interest justifies the Mandate.*

The government has no compelling interest in imposing a wholly unprecedented national mandate that all health plans cover abortifacients, contraception, sterilization, and related counseling even if plan sponsors have a religious objection. A “compelling” interest involves only “the gravest abuses, endangering paramount interests.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But Congress did not even propose that such an interest exists, because it did not require HHS to mandate cost-free coverage of these objectionable items. 42 U.S.C. § 300gg-13.

Never in the history of the United States has the federal government forced religiously objecting employers to cover contraception, abortifacients, and sterilization in their health plans. Yet a large majority of Americans seem to already have contraceptive coverage.<sup>1</sup> HHS Secretary Sebelius has admitted that “contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support.”<sup>2</sup> Such “income-based support” is available through federal government subsidies in Title XIX/Medicaid and Title X/Family Planning Services, as well as through subsidies by state governments.<sup>3</sup> And the availability of contraceptive items for sale is ubiquitous, now reaching even vending machines on some public university campuses. The federal government cannot claim any grave interest in the alleged scarcity of contraception. But a merely *marginal* interest in increasing contraception access does not qualify as “compelling.” See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741 (2011).

The government cannot show, as it must, a compelling interest specific to employees of religious objectors. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S.

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<sup>1</sup> One report claims that nine out of ten employers, pre-Mandate, already provide a “full range” of contraceptive coverage. Guttmacher Institute, “Facts on Contraceptive Use in the United States,” June 2010, *available at* [http://www.guttmacher.org/pubs/fb\\_contr\\_use.html](http://www.guttmacher.org/pubs/fb_contr_use.html) (last accessed Apr. 28, 2012).

<sup>2</sup> “A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius,” (Jan. 20, 2012), *available at* <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> (last accessed Apr. 28, 2012).

<sup>3</sup> Recently HHS showed that the Administration itself does not believe a compelling interest exists to promote contraceptive access. In Texas, HHS has decided to cease providing 90% of funding of a \$40 million Texas Women’s Health family planning program. Texas had been using that funding to provide thousands of women with family planning, but Texas required funding providers to not, directly or indirectly, provide abortion. On this basis alone HHS withdrew federal funding, which Secretary Sebelius admitted would cause “a huge gap in family planning.” HHS decided that protecting the interests of abortion providers is more important than providing contraception access. See CBS News “Feds to stop funding Texas women’s health program” (Mar. 9, 2012), *available at* [http://www.cbsnews.com/8301-501363\\_162-57394686/feds-to-stop-funding-texas-womens-health-program/](http://www.cbsnews.com/8301-501363_162-57394686/feds-to-stop-funding-texas-womens-health-program/) (last accessed Apr. 28, 2012).

418, 430–32 (2006). No scientific and compelling data about employees of religious objectors exists, much less is there data showing that grave harm threatens these employees. There is no rash of deaths among employees of religiously devout employers who are unwilling to provide cost-free coverage of morally objectionable items. There is no pandemic of unwanted births causing catastrophic consequences among such employees. Defendants cannot connect the Mandate to *causation* of grave harm among religious objectors’ employees. For all the government knows, it could be that employees of religious objectors have better health and well-being due to the generous benefits that their caring employers customarily provide.

Even if evidence existed for the absurd notion that religious objectors’ employees are gravely at-risk from contraceptive deprivation, the government cannot show that such outcomes are actually caused by the lack of insurance coverage, because it is possible that this purported class of employees obtain the mandated items with their own money. The government possesses the legal burden to prove a compelling interest, and if the evidence is uncertain, the government’s actions are illegal. *Brown*, 131 S. Ct. at 2739. The fact that no scientific evidence of causation of grave harm exists at all specific to religious objectors shows that the government’s “evidence is not compelling.” *Id.*

The most glaring flaw in the notion that a compelling interest exists for the Mandate is that the federal government itself has voluntarily omitted scores of millions of employees from the Mandate for secular and religious reasons, but the Mandate and the NPRM still refuse to exempt religious objectors universally, as required by RFRA. The Mandate, by its own terms, does not apply to thousands of plans that are “grandfathered” under the PPACA. See Mandate, 76 Fed. Reg. at 46623 & n.4. Even in 2013, close to 100 million people will be participating grandfathered plans *not* subject to the Mandate.<sup>4</sup> If a compelling interest really existed to mandate contraceptive coverage, it would not be possible to omit tens of millions of women. Other exemptions from the Mandate likewise add to its non-compelling character. The Mandate does not apply to members of a “recognized religious sect or division” that conscientiously objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And as discussed above, the Mandate exempts from its requirements “religious employers” limited generally to houses of worship.

These massive exemptions cannot coexist with a compelling interest. “[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). No compelling interest exists when the government “fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort.” *Id.* at 546–47; *see also United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). The exemptions to the Mandate “fatally undermine[] the Government’s broader contention that [its law] will be ‘necessarily . . . undercut’” if religious objectors beyond the current “religious employer” definition are exempted, too. *O Centro Espirita*, 546 U.S. at 434.

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<sup>4</sup> HealthReform.gov, “Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and “Grandfathered” Health Plans,” *available at* [http://www.healthreform.gov/newsroom/keeping\\_the\\_health\\_plan\\_you\\_have.html](http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html) (last accessed Apr. 28, 2012) (estimating that 55% of 113 million large-employer employees, and 34% of 43 million small-employer employees, will be in grandfathered plans in 2013).

Notably, the immense grandfathering exemption has nothing to do with a determination that those nearly 100 million Americans do not “need” contraceptive coverage while employees of religious objectors somehow do. There is no difference in physiology between human beings working for an entity with a grandfathered plan and human beings working for employers like the Christian colleges submitting this comment, such that a compelling interest exists to mandate contraceptive coverage for the latter but not for the former. Instead, the grandfathering exemption was a political maneuver to garner votes for the PPACA by letting the president claim, “If you like your health care plan, you can keep your health care plan.” By definition, pure political expediency is not a “paramount” or “grave” interest to justify coercing religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (“Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts”).

The Mandate on its face also is inconsistent with any alleged compelling interest. The government has used its discretion to write a “religious employer” exemption, and an “accommodation.” Thus the government admits that religious exemptions do not undermine its compelling interest. There is therefore no reason not to expand the exemption to all religious objectors. No nexus exists between the Mandate limit of its exemptions to churches and the alleged compelling interest.

In *O Centro Espirita* the Supreme Court held that no compelling interest existed behind a law that had a much more urgent goal—regulating extremely dangerous controlled substances—and that had many fewer exemptions than the broad swath of omissions from the Mandate. But the Court held that the government could not meet its compelling interest burden even based on its interest in preventing illegal drug use. 546 U.S. at 433. Halting the use of extremely dangerous drugs is far more urgent than forcing religious objectors to provide contraception coverage. The government’s grant of secular and religious exemptions for tens of millions of women in grandfathered plans betrays any alleged compelling interest they may have in refusing to exempt religious objectors under the Mandate or the NPRM.

- *The government could possibly pursue its interests by many alternatives that are less restrictive of religious beliefs.*

There are obviously less restrictive alternatives to burdening an objecting religious employer, insurer, entity, or individual under the Mandate or its “accommodation.” The fact that these alternatives exist completely invalidates the Mandate and the NPRM under RFRA.

The federal government could, if the political will existed, simply provide women with the mandated items itself, rather than forcing objecting entities and persons to do so.<sup>5</sup> Rather than coerce religious objectors to provide problematic coverage in their plan, the government

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<sup>5</sup> Of course, no such political will exists, which is why the Departments have attempted to impose this illegal Mandate by regulation rather than by statute. Since 1997, at least 21 bills have been introduced in Congress to mandate prescription contraceptive coverage in private health plans. No committee or subcommittee of Congress has ever reported out any of these bills.

could pass a statute creating its own “contraception insurance” plan covering all the items the Mandate requires, and then allow free enrollment in that plan for whomever the government seeks to cover. The government might pass a law directly compensating providers of contraception or sterilization. The government could possibly legislate to offer tax credits or deductions for contraceptive purchases. Or the government might enact a statute that imposes a mandate on the contraception manufacturing industry to give its items away for free.<sup>6</sup>

The undersigned do not necessarily support any of these options, and it bears noting that the American people have never sent a majority of representatives to Congress to vote for them (which further illustrates the public’s disbelief that the Mandate’s interest is “compelling”). But under RFRA, the fact that these options and many others could theoretically be enacted to achieve the goal of universal free contraception is wholly dispositive against the government’s Mandate. There is no essential need to coerce religious objectors to provide the mandated coverage themselves. Abortifacient drugs are not more effective when delivered through government coercion of objecting employers.

The government knows very well that it could achieve its goal through means less restrictive of religious beliefs than the Mandate. The very existence of the NPRM, and its proposals to create an “accommodation,” prove that the Mandate is not the least restrictive means to achieve the government’s goal. Moreover, the federal government and many states already directly subsidize birth control coverage for many citizens through Title XIX/Medicaid and Title X/Family Planning Services funding. The government cannot even show that the employees of religious entities could not otherwise obtain contraception on their own without any further government intervention, since low income women qualify for existing subsidies. Since many methods less restrictive of religious beliefs exist to advance the government’s alleged interest in the Mandate, the Mandate is blatantly illegal under RFRA.

- *The Mandate Violates the U.S. Constitution.*

The Mandate and NPRM also violate a variety of protections guaranteed by the First Amendment of the United States Constitution. Just a few of those are mentioned here.

The Mandate engages in illegal religious discrimination in violation of the Free Exercise and Establishment Clauses of the First Amendment. The Mandate violates the Free Exercise Clause because it is neither neutral nor generally applicable under *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). This lack of neutrality and general applicability subjects the Mandate to strict scrutiny, and as demonstrated above, strict scrutiny cannot possibly be satisfied to save the Mandate. As likewise explained above, the Mandate does not apply to scores of millions of women, and contains multiple secular and religious exceptions. This renders the law not generally applicable. The fact that the “religious employer” exemption is discretionary, yet the government applies it only narrowly based on arbitrary criteria and refuses to extend it to all objectors, further illustrates the Mandate’s lack of general applicability.

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<sup>6</sup> None of these options can be achieved by the Departments’ bureaucracies without the enactment of additional statutory authority. But that is irrelevant to the analysis under RFRA that these options are all theoretically possible measures that Congress itself could pass.

Because the religious employer exemption favors some kinds of religious entities over others, the Mandate is not neutral towards religion. The NPRM's religious caste system described above, applying different kinds of treatment for different kinds of religious beliefs and entities, is anathema to both religion clauses of the First Amendment. Furthermore, the Mandate disproportionately affects religious objectors since many other employers already cover contraception, and the "religious employer" definition was taken from the ACLU's draft of a similar provision in California.<sup>7</sup> These characteristics illustrate the Mandate's discriminatory character which renders it unconstitutional. *See Lukumi*, 508 U.S. at 532, 535.

The government's discretion over exemptions (secular or religious) for specific entities renders the Mandate unconstitutional under the Fourteenth Amendment because it provides unfettered discretion and thereby risks discriminatory enforcement. And by compelling the coverage of education, counseling and information about and in favor of the Mandate's objectionable practices, the Mandate violates the freedom of speech, religion and expressive association of objecting entities.

- *The Mandate Violates the APA and Federal Laws Against Abortion Mandates.*

The Mandate and NPRM also violate the Administrative Procedure Act ("APA"). 5 U.S.C. § 706 authorizes a court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As described above, the Mandate and NPRM are not in accordance with law. Furthermore, the Mandate and NPRM's selection of criteria for different kinds of religious objectors to receive different kinds of treatment are arbitrary and capricious under § 706.

The Mandate also violated the APA when it rushed its rule forward with "interim final" status in August 2011 without giving the public *prior* notice and an opportunity to comment. 76 Fed. Reg. at 46624. The APA generally requires bureaucratic regulations to receive public notice and comment in advance of the rule's finalization, so that stakeholders threatened by a problematic rule might propose that it be fixed before it goes into effect, and because the agency is legally bound to answer their objections. The very fact that the administration has now issued an NPRM asking a myriad of unanswered questions proves that no "public interest" justified finalizing the rule in 2011 without prior public notice and comment.

Because the Mandate includes drugs that cause early abortions, it violates various federal laws. The Mandate includes any drug or device the FDA has chosen or will choose in the future to name as a "contraceptive," regardless of whether it actually and merely prevents conception. Already the FDA has approved in this category an abortion drug, ulipristal (HRP 2000, or ella), which can cause abortions after an embryo implants in the womb (and therefore is a first trimester abortion by any definition) and is a close analogue to the abortion drug RU-486

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<sup>7</sup> ACLU Press Release, "ACLU Applauds CA Supreme Court Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage" (Mar. 1, 2004) ("The ACLU crafted the statutory exemption [at issue]...")(available at <http://www.aclu.org/reproductivefreedom/aclu-applauds-ca-supreme-court-decision-promoting-womens-health-and-ending-gend>).

(mifepristone).<sup>8</sup> Moreover, a variety of “contraceptives” function in part to prevent an already conceived embryo from implanting in the womb, including but not limited to IUDs.<sup>9</sup> These abortifacient effects are not “contraceptive” at all, despite the attempt by pro-abortion-choice advocates to unscientifically change the definition of when a human life begins from conception-fertilization to implantation.

By compelling coverage of present and future abortion and abortifacient drugs, the Mandate violates: the Weldon Amendment prohibiting any federal program from requiring entities to provide coverage for abortion<sup>10</sup>; PPACA § 1303(b)(1)(A) prohibiting the preventive services Mandate from requiring coverage of abortion; PPACA § 1303(c)(1) providing that PPACA does not preempt state laws regarding abortion coverage, and several of which restrict abortion coverage in various health plans; and President Obama’s public assurances in conjunction with Executive Order 13535, 75 Fed. Reg. 15599, that the PPACA would not be construed so as to require coverage of abortion.

Flying in the face of all these provisions, the Mandate writes the FDA a blank check to define any abortion drug as a “contraceptive,” such as it has already done with “ella,” and thereby mandate its coverage in all health insurance plans.

- *The Mandate Should Protect Moral as Well as Religious Objections.*

The Mandate breaks with practically universal statutory tradition in federal health law by not only compelling violations of religious beliefs but also by forcing the violation of moral convictions. Since 1973 Congress has repeatedly enshrined conscience protections in federal health law for “religious beliefs and moral convictions.” These laws include:

- 42 U.S.C. § 300a-7 (1973 and years thereafter), containing multiple protections for “religious beliefs or moral convictions” for persons and entities in the health care field;
- 42 U.S.C. § 2996f(b) (1974), prohibiting the use of certain funds to compel a person or entity to assist abortions against “religious beliefs or moral convictions”;

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<sup>8</sup> See A. Tarantal, et al., “Effects of Two Antiprogestins on Early Pregnancy in the Long-Tailed Macaque (*Macaca fascicularis*),” 54 *Contraception* 107-115 (1996), at 114 (“studies with mifepristone and HRP 2000 have shown both antiprogestins to have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation”); G. Bernagiano & H. von Hertzen, “Towards more effective emergency contraception?,” 375 *The Lancet* 527-28 (Feb. 13, 2010), at 527 (“Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion”).

<sup>9</sup> To the extent Mandate supporters object to this assertion, the objection is essentially a semantic dispute. The government itself admits that many of the Mandated items act by “inhibiting implantation” of a newly conceived/fertilized human embryo. U.S. Department of Justice, representing Kathleen Sebelius and U.S. Department of Health and Human Services, January 18, 2013, in “Brief for the Appellants,” pages 4-5, in *Newland v. Sebelius*, No. 12-1380 (10th Cir.). Defendant Sebelius likewise insists that the Mandated items “are designed to prevent implantation.” Interview, available at <http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771> (last visited February 19, 2013).

<sup>10</sup> See Consolidated Appropriations Act, 2010, Pub. L. 111-117, Div. D, § 508(d) (Dec. 16, 2009).

- Title III of Division I (Department of State, Foreign Operations, and Related Programs Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 1986, prohibiting discrimination in the provision of family planning funds against applicants due to their “religious or conscientious commitment to offer only natural family planning”;
- 20 U.S.C. § 1688 (1988), blocking a federal sex discrimination law from forcing anyone to participate in an abortion for any reason;
- 18 U.S.C. § 3597 (1994), protecting the “moral or religious convictions” of persons who object to participating in federal executions or prosecutions;
- In 1994, in an attempt to pass health care reform, Senator Daniel Patrick Moynihan (D-NY) gained committee approval for and brought to the Senate floor a “Health Security Act,” which protected “any employer” and any insurance company from participating in a health plan that contained abortion “or other services,” if they objected to “such services on the basis of a religious belief or moral conviction”;
- 42 U.S.C. § 238n (1996), prohibiting government discrimination against persons or entities who object to participating in abortion for any reason;
- 8 U.S.C. § 1182(g) (1996), protecting aliens who object to vaccinations based on “religious beliefs or moral convictions”;
- 42 U.S.C. § 1396u-2(b)(3) (1997), protects Medicaid managed care plans from being forced to provide counseling or referral services if they have “moral or religious grounds” for objecting;
- 42 U.S.C. § 1395w-22(j)(3)(B) (1997), protects Medicare+Choice managed care plans from being forced to provide counseling or referral services if they have “moral or religious grounds” for objecting;
- Also in 1997, Senator Edward Kennedy (D-MA) sponsored the Health Insurance Bill of Rights Act of 1997 (S. 353), which allowed insurance companies to limit coverage in their plans “based on the religious or moral convictions of the issuer.”
- 48 C.F.R. § 1609.7001(c)(7) (1998), protects providers, health care workers, and health plan sponsoring organizations from being required to discuss treatment options if it violates their “professional judgment or ethical, moral or religious beliefs”;
- Sec. 727 of Title VII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 1999, protects religious health plans in the federal employees’ health benefits program from being forced to

provide contraceptive coverage, and prohibits any plan in the program from discriminating against individuals who refuse to provide for contraceptives if it is contrary to the individual's "religious beliefs or moral convictions";

- Sec. 808 of Title VIII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 2000, affirming that the District of Columbia must respect the "religious beliefs and moral convictions" of those who object to providing contraceptive coverage in health plans;
- 22 U.S.C. §7631(d) (2003), protects recipients of funds to combat HIV/AIDS from being required to do so in ways that are contrary to their "religious or moral objection"; and
- Sec. 507 (d) of Title V of Division F (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 2004, protects persons and entities from government discrimination due to their objection to abortion for any reason.

Even the PPACA itself declares: that health plans cannot be required to cover abortion services no matter why they object (Sec. 1303(b)(1)(A)) (a provision that the Mandate itself violates by compelling coverage of post-implantation abortifacient drugs like "ella"); that exchange plans cannot discriminate against persons or entities who object to being involved in abortion for any reason; that federal laws protecting conscience (see above) are not to be undermined; and that governments and PPACA fund recipients cannot discriminate against people who object to assisted suicide or euthanasia no matter why they object (Sec. 1553).

The Mandate sharply breaks from this bipartisan consensus in favor of respecting religious beliefs and moral convictions in federal health law. Its refusal to respect those deeply held beliefs is extremely troubling and unjustified, and raises grave concerns under the freedom of association and speech protected by the First Amendment.

### **The Final Rule Must Exempt All Religious or Moral Objectors of Any Status.**

As a result of the requirements of RFRA, the U.S. Constitution, and other laws discussed above, and the Mandate's and NPRM's violations of the same, the undersigned urge the Departments of HHS, Labor and the Treasury to:

- (1) provide a blanket, non-discretionary exemption from the Mandate for any employer, insurance company, payer, individual, or entity who in his or its own determination has any religious objection to providing, issuing, enrolling in, participating in, paying for or otherwise facilitating or cooperating in coverage of any required practice or of any required provision of information;

- (2) consistent with bipartisan federal health law going back nearly 40 years, provide equal and comprehensive conscience protections for moral convictions as well as religious beliefs; and
- (3) omit all drugs that can cause the demise of conceived human embryos, including but not limited to “ella,” from the scope of what the Mandate requires for anyone; and

Sincerely,

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