



September 29, 2011

**Submitted Electronically**

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9992-IFC2  
P.O. Box 8010  
Baltimore, MD 21244-8010

**Re:** *Interim Final Rules on Preventive Services, File Code CMS-9992-IFC2:*  
The Legal Necessity for Comprehensive Exemptions for All Religious Objections  
to Providing, Participating in or Paying for Health Insurance Coverage of  
Abortion, Abortifacients, Contraception, Sterilization, and Counseling and  
Information Regarding the Same

Dear Sir or Madam,

The Alliance Defense Fund writes on behalf of The Center for the Advancement of Catholic Higher Education, a division of The Cardinal Newman Society; Aquinas College in Nashville, Tennessee; Ave Maria University in Ave Maria, Florida; Benedictine College in Atchison, Kansas; Catholic Distance University in Hamilton, Virginia; Christendom College in Front Royal, Virginia; the College of Saint Mary Magdalen in Warner, New Hampshire; the College of Saint Thomas More in Fort Worth, Texas; DeSales University in Center Valley, Pennsylvania; the Franciscan University of Steubenville in Steubenville, Ohio; Holy Apostles College and Seminary in Cromwell, Connecticut; John Paul the Great Catholic University in San Diego, California; Mount St. Mary's University in Emmitsburg, Maryland; St. Gregory's University in Shawnee, Oklahoma; Thomas Aquinas College in Santa Paula, California; Thomas More College of Liberal Arts in Merrimack, New Hampshire; the University of Mary in Bismarck, North Dakota; the University of St. Thomas in Houston, Texas; Wyoming Catholic College in Lander, Wyoming; Most Rev. Thomas J. Curry, Auxiliary Bishop of Los Angeles; and the Society of Catholic Social Scientists.

These parties are gravely concerned about the illegal violations of religious freedom implicated in the interim final rule on preventive services, 76 Fed. Reg. 46621 (Aug. 3, 2011). That rule's mandate that all health plans cover "contraception" (including but not limited to drugs that can cause the demise of embryos both after and before uterine implantation), as well as sterilization, and associated patient education and counseling (hereinafter "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 Mandate blatantly violates the right to religious freedom protected throughout federal law, including under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb-1(c), and the First and Fourteenth Amendments to the U.S. Constitution. The Mandate's existing "religious exemption" is insulting in its diminishment of what constitutes a "religious group," a definition that may be further limited at the discretion of the Health Resources and Services Administration (HRSA). And regardless of the exemption's exact scope, it would not save the Mandate from its illegal violation of the rights of any entity or individual that is not exempted.

No federal rule has defined being "religious" as narrowly and discriminatorily as the Mandate appears to do, and no regulation has ever so directly proposed to violate plain statutory and constitutional religious freedoms.

Entities such as Catholic Colleges and Universities have a legal right not to be required to offer or pay for health insurance coverage that includes practices to which they have a religious or moral objection, and not to be forced to choose between offering such coverage, paying a fine, or offering no coverage at all. Other employers, too, whether operating for profit or not, have the same right not to have their religious and moral beliefs burdened. Insurance companies have a right not to be forced to offer such coverage. And individuals have the same right not to be forced to enroll in or purchase coverage as the result of the Mandate's imposition on all available plans. Federal law simply prohibits the federal government from violating the religious and moral beliefs of *any* of these stakeholders.

For this reason we urge HHS (and the Departments of Labor and of the Treasury that jointly issued the interim final rule) to exempt *all* stakeholders with a religious or moral objection to "contraceptives" (including abortifacients as well as non-abortifacient mechanisms of action), sterilization, and related education and counseling, from having to *provide, offer, pay for* or in any way participate in health insurance that includes such coverage. The right to religious freedom requires no less.

### **Interest of the Commenting Parties**

The Center for the Advancement of Catholic Higher Education is a division of The Cardinal Newman Society, a nonprofit organization established in 1993 for religious and educational purposes to help renew and strengthen the Catholic identity of Catholic Colleges and Universities. The Center supports mission-centered teaching, policies and programs at Catholic Colleges and Universities, according to the spirit and letter of the Vatican constitution on Catholic higher education, *Ex corde Ecclesiae*. The Center is located at Mount St. Mary's University in Emmitsburg, Maryland, and The Cardinal Newman Society's office is located in Manassas, Virginia.

Aquinas College in Nashville, Tennessee, is a Catholic college founded in 1961 and governed by the Dominican Sisters of the Congregation of Saint Cecilia, a Catholic religious congregation of sisters in the Order of St. Dominic.

Ave Maria University in Ave Maria, Florida, was founded in 2003 by Catholic lay people as a religious university committed to Catholic teaching and values.

Benedictine College in Atchison, Kansas, is a Catholic college established in 1971 and affiliated with Mount St. Scholastica Monastery and St. Benedict's Abbey, Catholic religious communities of monks and sisters in the Order of St. Benedict.

Catholic Distance University in Hamilton, Virginia, is a Catholic, degree-granting online university founded in 1983. The board of trustees is chaired by Most Rev. Paul Loverde, Bishop of Arlington, and includes three additional bishops.

Christendom College in Front Royal, Virginia, is a Catholic college founded in 1977 by Catholic lay people to provide a faithful Catholic education.

The College of Saint Mary Magdalen in Warner, New Hampshire, is a Catholic college founded in 1973 by Catholic lay people to provide a faithful Catholic education.

The College of Saint Thomas More in Fort Worth, Texas, is a Catholic college founded in 1981 by Catholic lay people to provide a faithful Catholic education.

DeSales University in Center Valley, Pennsylvania, is a Catholic university founded in 1965 and affiliated with the Oblates of Saint Francis de Sales, a Catholic religious congregation of priests and brothers.

The Franciscan University of Steubenville in Steubenville, Ohio, is a Catholic university founded in 1946 and governed by the Third Order Regular of Saint Francis, a Catholic religious order of friars.

Holy Apostles College and Seminary in Cromwell, Connecticut, is a Catholic college for lay students and a seminary for men preparing for the priesthood. It was founded in 1972 and is affiliated with the Society of the Missionaries of the Holy Apostles, a Catholic religious society of priests and brothers.

John Paul the Great Catholic University in San Diego, California, is a Catholic university founded in 2003 by Catholic lay people to provide a faithful Catholic education.

Mount St. Mary's University in Emmitsburg, Maryland, is a Catholic university for lay students and a seminary for men preparing for the priesthood. It was founded in 1808 and includes four bishops on its Board of Trustees.

St. Gregory's University in Shawnee, Oklahoma, is a Catholic university founded in 1875 and affiliated with St. Gregory's Abbey, a Catholic religious community of monks.

Thomas Aquinas College in Santa Paula, California, is a Catholic college founded in 1971 by Catholic lay people to provide a faithful Catholic education.

Thomas More College of Liberal Arts in Merrimack, New Hampshire, is a Catholic college founded in 1978 by Catholic lay people to provide a faithful Catholic education.

The University of Mary in Bismarck, North Dakota, is a Catholic university founded in 1955 and affiliated with the Benedictine Sisters of the Annunciation, a Catholic religious community of sisters in the Order of St. Benedict.

The University of St. Thomas in Houston, Texas, is a Catholic university founded in 1947 and affiliated with the Congregation of St. Basil, a Catholic religious congregation of priests and brothers.

Wyoming Catholic College in Lander, Wyoming, is a Catholic college founded in 2005 founded by lay Catholics in association with the Bishop of Cheyenne, who is *ex officio* chairman of the board of trustees, to provide a faithful Catholic education.

Most Rev. Thomas J. Curry is Auxiliary Bishop of the Archdiocese of Los Angeles.

The Society of Catholic Social Scientists, founded in 1992, is an association of Catholic scholars, professors, researchers, practitioners, and writers that combines objective scholarly analysis in the social sciences with fidelity to Catholic teaching. Members are Catholics who demonstrate fidelity to Catholic teaching and a reasonable knowledge of and interest in deepening their understanding of the Catholic Church's social teachings. The Society's office is located at the Franciscan University of Steubenville in Steubenville, Ohio.

These parties on whose behalf this comment is submitted hold firmly to the teachings and practices of the Roman Catholic Church. All institutions are religious entities and religious employers under federal law.

Sterilization, abortion and artificial means of preventing pregnancy are gravely sinful according to the clear teachings of the Catholic Church. These are summarized authoritatively in the *Catechism of the Catholic Church*:

2270 Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.

Before I formed you in the womb I knew you, and before you were born I consecrated you. [*Jer.* 1:5]

My frame was not hidden from you, when I was being made in secret, intricately wrought in the depths of the earth. [*Ps.* 139:15]

2271 Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law:

You shall not kill the embryo by abortion and shall not cause the newborn to perish. [*Didache* 2, 2: *SCh* 248, 148]

God, the Lord of life, has entrusted to men the noble mission of safeguarding life, and men must carry it out in a manner worthy of themselves. Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes. [*Gaudium et Spes* 51 § 3]

2272 Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life. "A person who procures a completed abortion incurs excommunication *latae sententiae*," "by the very commission of the offense," and subject to the conditions provided by Canon Law. ...

2370 Periodic continence, that is, the methods of birth regulation based on self-observation and the use of infertile periods, is in conformity with the objective criteria of morality. These methods respect the bodies of the spouses, encourage tenderness between them, and favor the education of an authentic freedom. In contrast, "every action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible" is intrinsically evil:

Thus the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.... the difference, both anthropological and moral, between contraception and recourse to the rhythm of the cycle . . . involves in the final analysis two irreconcilable concepts of the human person and of human sexuality. [*Familiaris Consortium* 32]

In Catholic teaching, abortion (which includes human embryos from their fertilization/conception) is as much a violation of justice as it is a violation of morality. The

Catholic Church teaches the equal right to life of all persons, a right that is fundamental to a free society:

As far as the right to life is concerned, every innocent human being is absolutely equal to all others. This equality is the basis of all authentic social relationships which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used. Before the moral norm which prohibits the direct taking of the life of an innocent human being "there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the 'poorest of the poor' on the face of the earth. Before the demands of morality we are all absolutely equal." [*Evangelium Vitae* 57]

Catholic Colleges and Universities are committed to these teachings according to the very nature of Catholic higher education. That nature is defined by the Catholic Church's apostolic constitution *Ex corde Ecclesiae* and the United States Catholic bishops' *Application of Ex corde Ecclesiae for the United States*, which are binding under the Church's Canon Law for all institutions of higher learning not directly controlled or chartered by the Vatican.

*Ex corde Ecclesiae* cites four essential characteristics of the Catholic College or University, one of which is "Fidelity to the Christian message in conformity with the magisterium [the teaching office] of the Church." (Para. 13.) In the *Application of Ex corde Ecclesiae for the United States*, the United States Catholic bishops cite particular expectations of Catholic Colleges and Universities, including the following which relate to the provision of health insurance benefits to employees and students:

- [1.] Commitment to be faithful to the teachings of the Catholic Church;
- [2.] Commitment to Catholic ideals, principles and attitudes in carrying out research, teaching and all other university activities, including activities of officially-recognized student and faculty organizations and associations, and with due regard for academic freedom and the conscience of every individual;
- [3.] Commitment to serve others, particularly the poor, underprivileged and vulnerable members of society;
- [4.] Commitment of witness of the Catholic faith by Catholic administrators and teachers, especially those teaching the theological disciplines, and acknowledgment and respect on the part of non-Catholic teachers and administrators of the university's Catholic identity and mission; ...

- [5.] Commitment to provide personal services (health care, counseling and guidance) to students, as well as administration and faculty, in conformity with the Church's ethical and religious teaching and directives;<sup>1</sup> and
- [6.] Commitment to create a campus culture and environment that is expressive and supportive of a Catholic way of life.

With regard to health insurance, all of the parties on whose behalf this document is submitted understand the Catholic mission in higher education to include the commitment to:

- provide adequate benefits to full-time employees, including health insurance, to ensure their well-being and physical health;
- ensure that students are protected financially and physically by adequate health insurance coverage;
- conform to Catholic teaching in all official actions and commitments, including the provision of health insurance coverage;
- encourage moral behavior among employees and students, according to the teachings of the Catholic Church; and
- promote a campus environment that is morally and physically healthy for students, including the expectation that students do not engage in sexual activity outside of marriage.

### **The Mandate Is Illegal**

The Mandate, with its inadequate "exemption," violates multiple federal laws, including the Religious Freedom Restoration Act, the First and Fourteenth Amendments to the U.S. Constitution, the Administrative Procedures Act, and the Patient Protection and Affordable Care Act ("PPACA") itself.

- *The Mandate Violates RFRA*

The Mandate is an unquestionable violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb-1(c). That federal statute authorizes judicial relief against the federal government if it "substantially burden[s] a person's exercise of religion," unless "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling

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<sup>1</sup> The United States Conference of Catholic Bishops has approved *Ethical and Religious Directives for Catholic Health Care Services* (2009) which note, "The first right of the human person, the right to life, entails a right to the means for the proper development of life, such as adequate health care." Also, "the biblical mandate to care for the poor requires us to express this in concrete action at all levels of Catholic health care. ...In Catholic institutions, particular attention should be given to the health care needs of the poor, the uninsured, and the underinsured."

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” To the extent that the Mandate imposes a burden on the religious or moral objections of *anyone*, it is illegal and enjoined under RFRA.

The Mandate, particularly in operation with PPACA, imposes burdens that violate RFRA on a large swath of persons and entities if HRSA determines them to be unprotected by the narrow and discretionary “religious exemption.” Individuals are required to enroll in health insurance. Employers are required to provide or contribute to health insurance. Some state laws require private colleges to provide health insurance coverage to their students, while some Christian colleges provide such coverage out of their own religious duty. And religious insurance providers cannot operate without providing insurance. All such plans, under the Mandate, must include religiously and morally objectionable items that substantially burden the beliefs of providers, issuers, payers and the insured.

The only exceptions to this requirement are plans “grandfathered” under PPACA, or employers who meet the Mandate’s “religious exemption.” But whether an employer’s plan is grandfathered is now out of the employer’s hands. An entity whose employee plan is not presently grandfathered cannot now obtain that status. And PPACA lists a host of plan-changes that trigger the loss of grandfathered status, and that will inevitably occur to nearly all plans. The lack of grandfathered status results in the full force of the Mandate’s religious freedom violations.

Likewise the Mandate’s “religious exemption” is, as many commenters have pointed out, potentially so narrow as to be not only nearly inconsequential but insulting to religious entities, in particular to Catholic Colleges and Universities. First, the exemption only applies to “religious employers.” 76 Fed. Reg. at 46626. This omits a variety of stakeholders who are compelled to violate their beliefs under the Mandate. It is unclear whether the exemption would apply to religious colleges and universities in their provision of health plans to *non-employees*, such as to students. The exemption does not protect individuals, such as students, who may be forced to enroll in or contribute to plans that cover services in violation of their religious beliefs. The exemption does not protect insurers and insurance companies, who either have a religious objection to providing certain coverage, or who sell morally acceptable plans to customers who have such an objection. It is unclear whether the exemption, even if met, applies to anything but the “requirement to cover *contraceptive services*,” *id.* (emphasis added). Therefore the exemption might, due to its lack of clarity, still compel the provision of other components of the Mandate: sterilization, as well as counseling and education about all of the objectionable practices in the Mandate.

Second, because the exemption is merely permissive—providing that HRSA “may,” *id.*, (or, one supposes, might not) exempt such entities—any religious entity’s hope for an exemption appears to be subject to the whim of HRSA bureaucrats. This is certainly not reassuring to Catholic Colleges and Universities, especially based on suggestions made in the interim final rule’s own summary. In that text, the rule indicates that one reason it was rushed to finalization prior to the notice and comment period was precisely to ensure that collegiate women would have access to “contraception,” abortifacients, sterilization and the like as quickly and as freely



as possible. *Id.* at 46624. This inherently threatens the prospects of any college or university that is subject to the discretion of HRSA in deciding whether or not HHS will break the laws described below by mandating that entities provide health plans that cover practices to which they have a religious or moral objection. Moreover, the rule's summary also indicates that its religious "exemption" is intended to *merely* cover "the unique relationship between a house of worship and its employees in ministerial positions." *Id.* at 46623. This interpretation could render the already tiny "exemption" so microscopic as to impose the Mandate even on churches themselves, with regards to employees not deemed "ministerial."

Third, considering the heart of the Mandate's definition of a "religious employer," it is exceedingly narrow. It defines an entity as not "religious" if it does not (1) have as its purpose the inculcation of religious values; *or* (2) if it does not primarily hire persons who share the organization's religious tenets; *or* (3) if it does not primarily serve persons who share those tenets; *or* (4) 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. *Id.* at 46626. Fail any one of these elements, and an entity fails the entire test. Taking the last requirement first, it appears to declare to be religious employers *only* entities that are themselves "churches, their integrated auxiliaries, and conventions or associations of churches," or "the exclusively religious activities of any religious order." Many Catholic or 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. HRSA may choose to interpret the last requirement to categorically omit many Catholic Colleges and Universities from this exemption and subject them to the full illegal force of the Mandate. Further, many Catholic Colleges and Universities do not limit their student body (persons they serve) to Catholics and do not hire only Catholics, even if service and hiring of such persons is an important focus of their work. The Mandate does not define "religious tenets" so as to specify to what extent students or hires must "share" them. Nor is it clear what the Mandate means, or what HRSA may interpret it to mean, that "the" purpose of a qualifying entity must be "the inculcation of religious values." How catechetical and heavy-handed must such "inculcation" be in the eyes of HRSA? Many Catholic Colleges and Universities, while they exist to promote the Catholic faith from a posture that adheres to Catholic teaching, do so in a way that invites students to consider and discuss views in a non-impositional manner.

Thus the Mandate's "religious exemption" appears to allow HRSA the discretion to omit most if not all Catholic Colleges and Universities and most other religious employers. HRSA could apparently decide that Jesus Christ himself would fail this test, since He did not choose to heal or offer forgiveness only to existing Christians.

As a result of imposing its requirements on so many entities and individuals, the Mandate violates RFRA. The Mandate cannot possibly satisfy the "strict scrutiny" test imposed by RFRA. The government has no compelling interest in the wholly unprecedented action of imposing a national mandate that all health plans cover abortifacients, contraception, sterilization, and information thereon. Congress did not even propose that such an interest exists, because it did not require HHS to mandate these contraception-related items—it allowed preventive care to be defined to omit them all. Nor is there any compelling interest in failing to exempt religious and

moral objectors. Moreover, there is obviously a less restrictive alternative to burdening any objecting college, employer, insurer, entity, or individual's religious objection to these practices: the federal government could, if the political will existed, simply provide women with these things itself, rather than forcing objecting entities and persons to do so.<sup>2</sup> Furthermore, the federal government cannot possibly show that the women who get health insurance from religious entities could not otherwise obtain contraception apart from the application of this Mandate to religious and moral objectors. As a result, the Mandate is blatantly illegal under federal statute and is subject to injunctive and other appropriate relief in federal court.

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

The Mandate is also a violation of a variety of protections guaranteed by the First and Fourteenth Amendments of the United States Constitution. Just a few of those ways are mentioned here. The Mandate engages in illegal religious discrimination in violation of the free exercise and establishment clauses of the First Amendment, because it is inherently targeted against employers who do not offer such coverage on religious grounds, and Catholics in particular. The Mandate's religious employer "exemption" is worded almost the same as the ACLU's version of a similar provision in California that it intended to be so narrow as to not include organizations such as Catholic service entities.<sup>3</sup> The Mandate's actual effect in overwhelmingly harming objecting entities betrays its discriminatory character. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532, 535 (1993).

The Mandate has been imposed according to a system of individualized assessments and exemptions rendering them unconstitutional under *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). These include the Mandate itself that was imposed as a discretionary matter in the first place, the system's exemptions for grandfathered plans, the narrow religious employer exemption test and each of its specific requirements, and HRSA's discretion to apply that test. The Mandate also proposes to unconstitutionally entangle the federal government in questions over whether an entity's "inculcation purpose," its hiring, and its service focus are (in effect) "religious enough," and to discriminate between entities on this basis, rendering some sufficiently religious for an exemption but not others.

HRSA's discretion over the exemptions for specific entities renders the Mandate unconstitutionally vague under the Fourteenth Amendment because it gives unfettered discretion to HRSA and therefore risks discriminatory enforcement. And by compelling the coverage of education, counseling and information about and in favor of the Mandate's objectionable

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<sup>2</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.

<sup>3</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>).

practices, the Mandate violates the freedom of speech, religion and expressive association of objecting entities and individuals, as protected by the First Amendment.

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

The Mandate also violates the Administrative Procedures Act. 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 is not in accordance with law. Furthermore, the Mandate violates the APA for giving the public no prior notice and opportunity to comment *before* its finalization, and for not—despite the Mandate’s claim—having a “public interest” basis for doing so. 76 Fed. Reg. at 46624.

In addition, because the Mandate includes drugs that cause early abortions, including after an embryo’s uterine implantation, it violates various federal laws against requiring the same. The Mandate includes whatever 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 (mifepristone).<sup>4</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. 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>5</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 PPACA would not be construed so as to require coverage of abortion.

Flying in the face of all these provisions, the Mandate has written 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.

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<sup>4</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>5</sup> See Consolidated Appropriations Act, 2010, Pub. L. 111-117, Div. D, § 508(d) (Dec. 16, 2009).

**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 violations of the same, the Departments of HHS, Labor and the Treasury are legally required to

- (1) 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
- (2) provide a blanket, non-discretionary exemption from the Mandate for any employer, issuer, payer, individual, or entity who in his or its own determination has any religious or moral 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.

Yours truly,

Kevin Theriot, Senior Counsel  
Matthew S. Bowman, Legal Counsel  
Alliance Defense Fund

for

The Center for the Advancement of Catholic Higher  
Education, of The Cardinal Newman Society

Aquinas College in Nashville, Tennessee

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