

United States Senate

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COMMITTEES:
ARMED SERVICES
BUDGET
ENERGY AND
NATURAL RESOURCES
HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

February 6, 2012

Hon. Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

Last year, the Department of Health and Human Services (HHS) adopted a regulation that forces thousands of religious schools, hospitals, and charities in America to make a painful choice: pay for medical services that violate their religious beliefs, or incur a massive government fine.¹ Two weeks ago, HHS responded to concerns voiced by the affected religious organizations by granting a one-year reprieve from the mandate — as though their faith-based objections will fade away in 12 months. This affront to the right of conscience runs counter to our nation’s tradition of religious liberty and pluralism. I believe it is also unlawful. I write today to urge the Department of Justice to advise HHS to withdraw and revise this rule to comply with the Religious Freedom Restoration Act of 1993.

A bipartisan law signed by President Bill Clinton, the Religious Freedom Restoration Act (RFRA) requires the government to reasonably accommodate religious beliefs and practices that conflict with general regulation. As President Clinton explained at the signing ceremony for RFRA, “the Government should be held to a very high level of proof before it interferes with someone’s free exercise of religion.”² This letter explains why the HHS mandate falls far short of that high level of proof.

Specifically, RFRA bars all federal agencies from “substantially burdening a person’s exercise of religion ... unless the government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”³ As the Supreme Court has recognized, this statute requires the federal

¹ See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under PPACA, 76 Fed. Reg. 46621 (Aug. 3, 2011) (amending 45 C.F.R. § 147) (hereinafter “the HHS mandate”).

² Remarks on Signing RFRA, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993).

³ *Boerne v. Flores*, 521 U.S. 507, 515 (1997) (brackets omitted) (quoting RFRA) (invalidating RFRA as applied to the States).

government to abide by the robust religious liberty protections announced by the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and its progeny.⁴

Remarkably, in announcing this sweeping mandate under the Patient Protection and Affordable Care Act, HHS did not even mention RFRA, much less attempt to justify its actions under the strict scrutiny test that RFRA requires.⁵

The HHS mandate violates RFRA because it punishes religious employers who decline to participate in coverage of certain medical services — in particular, sterilization and contraception — that contradict their faith-based commitments. And crucially, the mandate is not the “least restrictive means” to achieve the agency’s regulatory goals, as HHS’s own actions attest. This letter addresses each element in turn: (1) the employers’ protected “exercise of religion;” (2) the mandate’s “substantial burden” on that protected exercise; and (3) HHS’s inability to show that its mandate is the “least restrictive means” available.

First, the law is clear that individuals engage in protected “exercise of religion” under RFRA when, for *bona fide* religious reasons, they choose not to engage in certain conduct. Consider the choices that the Supreme Court viewed as an “exercise of religion” in several leading cases: In *Sherbert*, an individual’s religious beliefs forbade her from working on a Sabbath day. In *Thomas v. Review Board*, 450 U.S. 707 (1981), an individual’s religious beliefs barred him from participating in production of weapons. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a family’s religious beliefs did not permit them to send their children to high school. In each of these cases, the Court held that the law burdened constitutionally protected “exercise of religion.” The decision of a Catholic hospital, a Christian school, or a similar religious enterprise to decline to participate in insurance coverage of certain medical services that violate their sincere religious beliefs is likewise an “exercise of religion.” Indeed, HHS conceded this point, admitting that the mandate *will* have an “effect on the religious beliefs of certain religious employers.”⁶

Second, HHS’s threat of punitive fines for noncompliance with the mandate is a “substantial burden” under RFRA. The Supreme Court has held that religious liberty is burdened not only by direct compulsion, but also by indirect coercion that forces religious entities to make a painful choice.⁷ In *Sherbert*, for example, the Court found that a state’s denial of unemployment benefits to a woman who was fired for refusing to work on her Sabbath day was an unlawful burden. As Justice Brennan wrote for the Court, the state’s action impermissibly forced her “to

⁴ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (upholding RFRA as applied to the federal government).

⁵ See 76 Fed. Reg. 46621.

⁶ *Id.* at 46623. See Edward Whelan, The HHS Contraception Mandate, Ethics & Pub. Policy Center, Jan. 30, 2012, available at http://eppc.org/publications/pubID.4654/pub_detail.asp.

⁷ *Sherbert*, 374 U.S. at 404; *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 438, 450 (1988) (state action with a “tendency to coerce individuals into acting contrary to their religious beliefs” requires a compelling justification).

choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her]" for her religious practice.⁸

This case is even more clear-cut. HHS is not merely conditioning a government benefit on compliance with a burdensome rule, as the state did in *Sherbert*. Instead, HHS intends to fine religious employers approximately \$2,000 per employee⁹ — unless they subsidize medical services that violate the tenets of their faith.

That penalty could devastate groups that refuse to subordinate their religious beliefs to this bureaucratic edict. The second largest anti-poverty agency in America, Catholic Charities, employs 70,000 people nationwide; under the HHS mandate, Catholic Charities could face an annual fine in excess of \$100 million. It appears that one Catholic not-for-profit health system in Ohio could stand to pay millions of dollars in annual fines under the mandate.¹⁰ Considering that the Supreme Court has found a substantial burden based on a fine as little as \$5,¹¹ the burden imposed by the HHS mandate is plainly substantial.

Third, because the HHS mandate substantially burdens the exercise of religion, it can survive scrutiny under RFRA only if the mandate is the “least restrictive means” available to serve a compelling government interest.¹² The government must show that the wooden and inflexible application of its insurance mandate to religious objectors “is *essential* to accomplish an overriding governmental interest.”¹³

HHS can make no such showing. To the contrary, the agency has demonstrated by its own actions that an exceptionless mandate is not necessary to achieve its insurance coverage goals under the Patient Protection and Affordable Care Act. HHS has granted over 1,400 waivers — affecting more than 3 million employees — to employers ranging from large fast-food chains like McDonald’s, to major labor unions like the Teamsters.¹⁴ It has done so primarily to mitigate the economic damage and loss of employer-sponsored coverage that the new health care law threatens. After granting innumerable waivers based on economic considerations, HHS cannot

⁸ *Sherbert*, 374 U.S. at 404.

⁹ Kaiser Family Foundation, Penalties for Employers, available at http://healthreform.kff.org/~media/Files/KHS/Flowcharts/employer_penalty_flowchart_1.pdf (accessed Feb. 4, 2012); Contraception mandate outrages religious groups, Wall St. J., Feb. 3, 2012.

¹⁰ See David Yonke, Bishops condemn insurance mandate, Toledo Blade, Jan. 29, 2012 (noting a northwest Ohio Catholic employer that employs 7,500 people).

¹¹ *Yoder*, 405 U.S. at 208.

¹² This letter does not address whether the HHS mandate serves a compelling government interest. HHS’s own actions demonstrate that whatever the end, this categorical mandate is not means least restrictive of religious liberty.

¹³ *U.S. v. Lee*, 455 U.S. 252, 257-258 (1982) (emphasis added).

¹⁴ J. Adamy, Waivers Granted To Many, Wall St. J., Feb. 2, 2011; Robert Pear, Program Offering Waivers for Health Law Is Ending, N.Y. Times, June 17, 2011.

now argue that an exemption based on religious considerations would impede its regulatory goals.¹⁵ An agency cannot credibly insist on an iron-clad approach for religious employers, while applying a Swiss-cheese approach to others.

In response to mounting criticism, the Administration has pointed to a carve-out for churches in the HHS mandate. But that discretionary exemption is exceedingly narrow. To even be eligible for the exemption, a religious hospital, school, or social service agency would have to turn away people of other faiths.¹⁶ Cardinal Theodore McCarrick summed up the implications:

That means we can't say what we've been saying for 200 years, 'Are you hungry?'
We have to say, 'Are you Catholic?' We don't do that.

An exemption that asks religious groups to abandon their mission of charity is no exemption at all.

In short, I believe it is clear that the HHS insurance coverage mandate, as drafted, violates the Religious Freedom Restoration Act of 1993.

The Justice Department has had a disappointing record on religious liberty over the past three years — including the Department's attempt to undermine the long-standing "ministerial exception," which the Supreme Court unanimously rejected last month.¹⁷ This latest regulatory overreach presents an opportunity to improve that record and protect the legal rights of Americans of all faiths. I respectfully urge you to take swift action and advise the Department of Health and Human Services that it cannot violate the conscience rights of millions of Americans.

Thank you for your consideration.

Sincerely,



Senator Rob Portman

cc: Hon. Kathleen Sebelius, Secretary, Department of Health and Human Services

¹⁵ See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 537-38 (1993) (“[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (the government’s “decision to provide medical exemptions while refusing religious exemptions” suggested a discriminatory intent) (Alito, J.).

¹⁶ See 45 C.F.R. § 147.130(a)(iv) (permitting the Health Resources and Services Administration to exempt only religious employers that “serve[] primarily persons who share the religious tenets of the organization” and “primarily employ[] persons who share the religious tenets of the organization.”).

¹⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, slip. op. (U.S. Jan. 11, 2012).