The Mandate infringes the religious liberty of non-profit religious organizations in at least two basic ways: 1) its exemption for churches but not other religious organizations is far too narrow; and 2) the so-called "accommodation" promotes the Mandate's unconstitutional requirement that religious organizations facilitate access to drugs that violate their religious convictions.

For two years, the government has seemed bent on casting the narrowest net possible in order to protect the fewest religious employers possible. The Mandate exempts only a small subset of religious employers from having to provide coverage for contraceptive methods, including Plan B and *ella*, which many persons regard as abortion-inducing drugs.[1]

The Mandate leaves any exemption for religious organizations entirely to the discretion of the Health Resources and Services Administration (HRSA) of the Department of Health and Human Services. 76 Fed. Reg. 46621, 46623 (published Aug. 3, 2011). In August 2011, HRSA issued a "religious employer" exemption that protects only a severely circumscribed subset of religious organizations. *Id.* at

[1] According to the FDA, an effect of Plan B (Levonorgestrel) is the likely interference with the implantation of the developing human embryo in the uterus. Ella (ulipristal acetate) is an analog of RU-486 (mifepristone), the abortion drug that causes death of the developing human embryo. *See* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (last visited Sept. 16, 2013).

46623; 45 C.F.R. § 146.130. To qualify as a "religious employer" for purposes of the exemption, a religious organization was required to: 1) inculcate values as its purpose; 2) primarily employ members of its own faith; 3) serve primarily members of its own faith; and 4) be an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). 45 C.F.R. § 147.130(a)(1)(iv)(B). The fourth criteria refers only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

The exemption failed to protect most religious employers, including colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other religious organizations. This failure was intentional. HHS itself stated that its intent was "to provide for a religious accommodation that respects the unique relationship between *a house of worship and its employees in ministerial positions.*" 76 Fed. Reg. at 46623. *See also* 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012).

Arbitrarily transforming the majority of *religious* employers into *nonreligious* employers, HHS reached for a controversial definition of religious employer that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state courts. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). The fact that these state

mandates had been challenged by Catholic Charities as a violation of their religious liberty demonstrated that HHS officials knew the exemption would be unacceptable to many religious organizations. But at least religious organizations could avoid *state* contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the *federal* Mandate.

As soon as this definition was made public, forty-four Protestant, Jewish, and Catholic organizations immediately sent a letter to the Administration explaining the severe problems with the proposed definition of "religious employer." [2] Their critique of the exemption was two-fold. First the definition of "religious employer" was unacceptably narrow. Even many houses of worship failed to fit the Mandate's procrustean bed because of the exemption's peculiar design. To qualify as a "religious employer," a house of worship would have to serve primarily persons of the same faith. But many houses of worship – indeed, many religious charities – would deem it to be a violation of their core religious beliefs to turn away persons in need because they did not share their religious beliefs.[3]

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[2] *See* Letter to Joshua DuBois, Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322 (last visited Oct. 21, 2013).

[3] Consider Jesus' most basic teaching to "love your neighbor as yourself." A legal expert asked Him, "Who is my neighbor?" Jesus responded with the Parable of the

Second, the Mandate's definition of "religious employer" created a two-class bifurcation among religious organizations.[4] As one hundred twenty-five religious organizations explained in a subsequent letter to the Secretary, the government should not divide the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations – outwardly oriented and given a lesser degree of protection." The letter reasoned:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (*James* 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes both religion and authentic ministry.[5]

Good Samaritan, in which two religious leaders walked past a robbery victim who had been left half-dead beside the road. Finally, a man from Samaria (which to Jesus' listeners signaled he was a religious outsider) stopped to care for the helpless man. Jesus then asked the legal expert, "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" When the legal expert replied, "The one who had mercy on him," Jesus replied, "Go and do likewise." *Luke* 10:25-37.

[4] *See* note 7, *supra.*

[5] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367 (last visited Oct. 21, 2013).

Nonetheless, over the sustained protest of wide swaths of the religious community,[6] in February 2012, the government codified into law its excessively narrow definition of "religious employer." While the definition was amended in July 2013 by dropping three of the four criteria, 78 Fed. Reg. 39,870 (July 2, 2013), the current definition remains too narrow because it continues to protect only churches, associations or conventions of churches, integrated auxiliaries, or religious orders' religious activities.

The revised exemption perpetuates the second-class treatment of religious colleges and charities. The government made it clear that its elimination of the first three criteria was not intended to "expand the universe of employer plans that would qualify for the exemption." 78 Fed. Reg. at 8458-59.

Clinging to its definition of "religious employer," the government links a vital religious exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as "preferred" § 6033 organizations because many faith-based organizations are not

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[6] The March 2013 NPRM received 408,907 comments, a new record for comments. *See* http://www.regulations.gov/#!documentDetail;
D=CMS-2012-0031-63161 (government's website tally of comments); Nancy Watzman, *Contraceptives Remain Most Controversial Health Care Provision*, Sunlight Foundation (Mar. 22, 2013), *available at* http://reporting.sunlightfoundation.com/2013/contraceptives-remain-most-controversial-health-care-provision/(last visited Sept. 16, 2013).

formally affiliated with a religious congregation or denomination.[7] For example, Evangelical Christian institutions often are collaborative efforts across numerous denominations and intentionally independent of any specific denomination. The exemption denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation. Similarly, Catholic organizations often are not formally affiliated with their diocese and also are denied the exemption.

The final definition of "religious employer" actually squeezed the exemption further. Under the version of the exemption adopted in February 2012, before amendment in June 2013, a church could plausibly include church-affiliated religious organizations, such as schools and other ministries that did not otherwise qualify for the exemption, in the church's insurance plan. 77 Fed. Reg. 16501, 16502. But the June 2013 regulation foreclosed that option by restricting the exemption solely to the qualifying religious employer and not to any affiliated organizations covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the

[7] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, Dec. 21, 2011, *available at* http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.") In so doing, the government rejected the comments of the Church Alliance, "an organization composed of the chief executives of thirty-eight church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions," that urged the government to "abandon the employer-by-employer approach and adopt instead a broader plan-based exemption," specifically, "a plan-based exemption for all employers participating in 'church plans.'"[8]

To justify its differential treatment between churches and other religious organizations, the government asserts that employees of religious non-profit organizations are less likely to share their employers' religious beliefs than are the employees of a church. Yet no evidence is given for this bald assertion. Given the pay differential between most religious non-profits and other employers, it seems highly likely that employees of religious non-profits share their employers' religious beliefs. That is, persons choose to work for religious non-profits because they agree with their religious employers' mission and, therefore, make the

[8] Comment Letter to Centers for Medicare and Medicaid Services from Stephen H. Cooper on behalf of the Church Alliance, April 8, 2013, *available at* http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf (commenting on HHS Mandate NPRM) at pp. 1, 2, & 4 (last visited March 3, 2014).

necessary financial sacrifices. For example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[9]

Thus the exemption excludes religious ministries that serve as society's safety net for the most vulnerable. Through the exemption, the government has unilaterally re-defined what it means to be a religious organization. Religious organizations that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded with a government mandate that assails their conscience rights.

[9] According to *amicus* Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. *See* http://www.acsiglobal.org/acsi-2012-13-school-survey (last visited Oct. 21, 2013).