IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, *et al.*, Defendants.	Case No. 1:12-CV-3489-WSD

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

For the reasons set forth in the attached Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs respectfully move the Court for an Order under Fed. R. Civ. P. 65 preliminarily enjoining Defendants from enforcing against Plaintiffs the group of regulations collectively referred to as "the Mandate," which will soon require Plaintiffs, through their employer health-care plans, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling, contrary to their sincerely held religious beliefs. 45 C.F.R. § 147.130(a)(1)(iv); 78 Fed. Reg. 39870. Plaintiffs respectfully request that the Court adjudicate this Motion on an

expedited basis.

Respectfully submitted, this the 19th day of August, 2013.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing *PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION* uses Times New Roman 14 point, as approved by the Northern District of Georgia in Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO.: 1:12-CV-3489-WSD**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
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INTRODUCTION

Plaintiffs -- the Roman Catholic Archdiocese of Atlanta (the "Atlanta Archdiocese"), The Most Reverend Wilton D. Gregory, and his successors ("Archbishop Gregory"), Catholic Charities of the Archdiocese of Atlanta, Inc. ("Catholic Charities"), Catholic Education of North Georgia, Inc. ("CENGI"), the Roman Catholic Diocese of Savannah (the "Diocese of Savannah") and The Most Reverend John Hartmayer (the "Bishop Hartmayer") -- are part of the Roman Catholic Church. As such, they believe that life begins at conception, that sexual union should be reserved to marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government, however, has promulgated a regulation that coerces Plaintiffs into violating this sincerely-held religious belief by requiring them, through their employer health-care plans, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling, *see* 45 C.F.R. § 147.130(a)(1)(iv) (the "Mandate"). The Mandate contains a narrow exemption (the "Exemption") for entities that meet the Government's definition of a "religious employer." But the Exemption applies only

to "houses of worship and religious orders." It thus excludes the numerous Catholic organizations that fulfill the Church's religious mission through service to the poor, sick, and others in need.

More specifically, the Mandate seeks to divide religious institutions like the Catholic Church into two wings: a so-called "religious" wing, which is limited to "houses of worship and religious orders," and a so-called "charitable" wing, which, in the Government's view, provides *secular* services. Only the former can be, in the Government's view, a "religious employer." But this artificial division ignores the reality that many religious groups, including the Catholic Church, engage in charity not as part of a *secular* mission, but as an *exercise of their religious beliefs*. By excluding Catholic charitable organizations from the category of exempt "religious employers," the Mandate seeks to force a substantial part of the Catholic Church to act contrary to the Church's sincerely-held religious beliefs.

The Government claims that the final rule that it promulgated, effective July 1, 2013 (*See* 78 Fed. Reg. 39870 (July 2, 2013) ("Final Rule")), addresses all of the concerns of religious organizations. It most emphatically does not. Indeed, the Government *knew* it would not resolve those concerns, because Plaintiffs and like-minded organizations repeatedly informed the Government that the proposals now codified in the Final Rule were inadequate. Like its predecessors, the Final Rule

narrowly defines "religious employers" so as to exclude Catholic charitable and educational organizations, including Plaintiffs Catholic Charities and CENGI. The Final Rule's so-called "accommodation" for these "non-religious employers," moreover, is illusory: It seeks to address fundamental religious objections solely through accounting gimmicks. As a result, religious organizations, including Plaintiffs, still remain the mule by which the objectionable products and services are delivered to their employees.

Indeed, the Final Rule is significantly *worse* than originally proposed, since it eliminates an important prior protection that allowed "religious employers" (like the Atlanta Archdiocese) to shield their affiliated religious organizations (such as, for example, CENGI) from operation of the Mandate by including such organizations in the insurance plan of the "religious employer." Now, the Atlanta Archdiocese and the Diocese of Savannah are required: (i) to provide the employees of these affiliated organizations with access to the objectionable products and services; or (ii) to expel the organizations from their respective health plans. The Final Rule, therefore, substantially *increases* the number of religious organizations subject to the Mandate.

This sort of oppressive action is irreconcilable with the Religious Freedom Restoration Act ("RFRA"), the First Amendment, the separation of powers, and the

Administrative Procedure Act ("APA"). Put bluntly, there is no legal justification for Defendants' intrusion on Plaintiffs' religious freedom. Absent an injunction, Plaintiffs will, as of January 1, 2014, be forced to decide between violating their religious beliefs or violating the law -- the epitome of irreparable harm. By contrast, a preliminary injunction will impose no substantial harm on the Government. Accordingly, Plaintiffs respectfully request a preliminary injunction to preserve the status quo while this Court adjudicates this vital question of religious liberty.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Affordable Care Act"), requires employer "group health plans" to include insurance coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). Congress did not define what constitutes "preventive care," instead delegating that authority to a division of the Department of Health and Human Services ("HHS"). *See* 42 U.S.C. § 300gg-13(a)(4). HHS, in turn, delegated that legislative task to the Institute of Medicine ("IOM"), a private entity, which recommended that "preventive care" for women be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for [all] women with

reproductive capacity."[1] HHS subsequently adopted that definition in its entirety.[2] Included in the category of mandatory FDA-approved contraceptives are drugs such as the morning-after pill and Ulipristal, which can induce an abortion.

Consequently, under the final definition of "preventive care," the Mandate requires employer health plans to cover abortion-inducing products, contraception, sterilization, and related counseling. Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). Dropping their health plans altogether, moreover, subjects employers to substantial annual penalties of $2,000 per employee. *Id.* § 4980H(a), (c)(1).

From its inception, the Mandate has exempted various categories of health plans covering millions of people. For example, the Act "specifically exempts all firms that have fewer than 50 employees -- 96 percent of all firms in the United States -- from any employer responsibility requirements. Those small firms employ nearly 34 million workers."[3] In addition, certain plans that have not recently

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[1] Inst. Of Med., Clinical Preventive Services for Women: Closing the Gaps," at 109-10 (2011).

[2] *See* "Women's Preventive Services: Required Health Plan Coverage Guidelines," http://www.hrsa.gov/womensguidelines.

[3] WhiteHouse.Gov, The Affordable Care Act Increases Choice and Saving Money for Small Business at 1, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited May 30, 2013). *See also* 26 U.S.C. §§ 4980D(d) (exempting small employers from penalties imposed for failing to provide the objectionable services),

changed certain benefits or employee contributions are "grandfathered" and exempt from the Mandate.[4] By one estimate, the Government has exempted "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp.2d 1287, 1298 (D. Colo. 2012).

The Government, however, refuses to allow a similar exemption for religious organizations, save for a few that qualify under the Government's narrow definition of "religious employer." Originally, the Exemption was available only to entities that met each of four criteria. 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011). As the Government explained, the Exemption was intended "to provide for a religious accommodation that respects" only "the unique relationship between a house of worship and its employees in ministerial positions." *See* 76 Fed. Reg. at 46,623.

The narrowness of the Exemption set off a firestorm of intense criticism. The Government responded by announcing that it would offer "safe harbor from enforcement" for non-exempt religious organizations until August 1, 2013. 77 Fed. Reg. at 8,728 (Feb. 15, 2012). Five weeks later, however, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM"). On February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM"), adopting the

(continued…)

4980H(a) (exempting small employers from the assessable payment for failure to provide health coverage).

[4] 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).

ANPRM's proposals. On June 28, 2013, the Government issued the Final Rule that adopted substantially all of the NPRM's proposal without significant change.

II. THE PROBLEMS WITH THE FINAL RULE

The Final Rule made three changes to the Mandate, none of which relieves the unlawful burdens imposed on religious organizations. Indeed, one of them significantly *increases* the number of religious organizations subject to the Mandate.

First, the Final Rule modified the Exemption by eliminating the first three prongs of the definition, such that, under the new definition, an exempt "religious employer" is simply "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. 39874 (codified at 45 CFR § 147.131(a)). The Government admits that this change was cosmetic and did "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Instead, it continues to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.*

Second, the Final Rule actually *increases* the burden imposed upon religious organizations by expanding the number of religious organizations that are subject to

the Mandate. Under the Government's initial "religious employer" definition, if a nonexempt religious organization "provide[d] health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). For example, the Atlanta Archdiocese operates a self-insurance plan that covers not only itself, but also CENGI and other Catholic organizations. Under the original Exemption, if the Atlanta Archdiocese was an exempt "religious employer," then these other covered entities received the benefit of the Exemption.

The Final Rule, however, eliminates this safeguard, providing instead that "each employer [must] independently meet the definition of religious employer . . . in order to avail itself of the exemption."[5] So, for instance, since CENGI is covered under the Atlanta Archdiocese's self-insurance plan, the Archdiocese now must either (1) sponsor a plan that will provide the employees of that organization with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) expel that organization from the Atlanta Archdiocese's health plan and force it to contract with another insurance provider that *will* provide the

[5] *See* 78 Fed. Reg. 39,886; *see also* 78 Fed. Reg. at 8467 (NPRM).

objectionable coverage. Either way, the Atlanta Archdiocese and its affiliates are forced to act contrary to their sincerely-held religious beliefs.

Third, the Final Rule establishes an illusory "accommodation" for certain nonexempt "eligible organizations."[6] The very self-certification required to qualify for the accomodation, however, has the perverse effect of *requiring* the insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for the objecting organization's employees.[7] Making matters worse, self-insured organizations who submit the self-certification are prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 CFR § 54.9815–2713.

This so-called "accommodation" fails to relieve the burden on religious organizations. Under the original Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, the same organization's decision to offer a group health plan

[6] To qualify, a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services," (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization," and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if the religious organization is self-insured, to its third-party administrator. 26 CFR § 54.9816-2713A(a).

[7] *See* 78 Fed. Reg. at 39,892 (codified at 26 CFR § 54.9816-2713A(a)-(c)).

still results in the provision of coverage -- now in the form of "payments" -- for the same objectionable products and services.[8] In both scenarios, Plaintiffs' decision to provide a group health plan triggers the mandatory delivery of "free" contraceptive coverage to their employees.[9] And for self-insured organizations, the self-certification constitutes the religious entity's "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). As before, Plaintiffs are still being coerced into serving as the vehicle for delivering objectionable products and services to their employees, contrary to their sincerely held religious beliefs.

III. PLAINTIFFS' BACKGROUND

A. THE ATLANTA PLAINTIFFS

Archbishop Gregory is the head of the Alanta Archdiocese. The Atlanta Archdiocese carries out a tripartite spiritual, educational, and social service mission, largely through its 99 parishes. The educational mission is carried out largely through 18 diocesan Catholic schools and the five independent regional Catholic schools that are part of CENGI. Collectively, they serve nearly 12,000 students and employ more than 1,800 full-time and 3,000 part-time teachers and administrators. The diocesan and CENGI Catholic schools welcome students of any or no faith and

[8] *Id.*; 26 CFR § 54.9815-2713A(b)-(c); 29 CFR § 2590.715-2713A; 45 CFR § 147.131(c).

[9] *See* 29 CFR § 2590.715-2713; 45 CFR § 147.131(c)(2)(i)(B).

the Atlanta Archdiocese expends significant funds in tuition assistance programs. The schools provide an education based on Christ's teaching and Catholic values, and focus on the formation of strong moral character, the furtherance of academic excellence, the inspiration to serve others and the motivation to achieve the students' potential in the local and the world communities.

Catholic Charities aims to be a faith-based advocate and friend for individuals and families facing adversity by providing multiple accredited social services. Last year, it directly served more than 21,000 people, without regard to religious affiliation. More than 75 workers at Catholic Charities provide services to those in need, Catholic and non-Catholic alike, and it provides millions of dollars in services annually (excluding administrative and fund-raising costs).

The Roman Catholic Archdiocese of Atlanta Group Health Care Plan (the "Atlanta Plan") is a self-insured plan providing coverage to the employees of, among other organizations, the Atlanta Archdiocese and CENGI. The Atlanta Archdiocese contracts with Meritain Health, a third-party administrator, to provide certain claims and other related administration services. The Atlanta Plan year begins on January 1. Plaintiffs believe that the Atlanta Plan currently meets the Affordable Care Act's definition of a "grandfathered" plan, but it will remain so only so long as it offers substantially the same benefits at substantially the same

costs.[10] The Atlanta Plan will lose its grandfathered status in the near future for reasons that cannot be avoided. For example, the Atlanta Plans' costs have increased by 14% per year since March 23, 2010, but, to remain grandfathered, its contribution to the premium cannot decrease by more than 5% of the cost of coverage compared to the employer contribution on March 23, 2010.[11] The Atlanta Archdiocese anticipates that by January 1, 2014, it will no longer be able to maintain its grandfathered status.

B. THE SAVANNAH PLAINTIFFS

Bishop Hartmayer, in his capacity as Bishop of the Diocese of Savannah, is responsible for 55 parishes and 24 missions in the southern part of Georgia. Since 2011, Bishop Hartmayer has overseen the multifaceted mission of delivering spiritual, educational, and social services to residents, both Catholic and non-Catholic alike. The Diocese of Savannah serves people regardless of their faith and employs hundreds of people, the majority of whom work full-time.

The Diocese also serves the community through its 16 elementary schools, five high schools, and various preschool programs. These Catholic schools, which educate approximately 5,000 students, are open to and serve all children, without

[10] 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).

[11] 26 C.F.R. § 54.9815-1251T(g)(1)(v); 45 C.F.R. § 147.140(g)(1)(v); 29 C.F.R. § 2590.715-1251(g)(1)(v).

regard to their religion, race or financial condition. The Diocese of Savannah expends substantial funds in tuition assistance programs.

The Diocese of Savannah operates two self-insured health plans (collectively, the "Savannah Plan"), managed by Meritain Health, which provide coverage to the employees of the Diocese, the parishes, and the schools within the Diocese. The Savannah Plan year begins on July 1. Plaintiffs believe that the Savannah Plan does not meet the Affordable Care Act's definition of a "grandfathered" plan.

ARGUMENT AND CITATIONS OF AUTHORITY

A district court may grant a preliminary injunction if the movants establish the following four criteria: "(1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Plaintiffs meet all four of those factors.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

While Plaintiffs are likely to succeed on the merits of all of their claims, they have chosen to focus in this brief on their claims that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being

the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 148-158); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Compl. Count II, ¶¶ 159-171); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Compl. Count III, ¶¶ 172-185); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a third-party administrator's decision to provide or procure contraceptive services (Compl. Count IV, ¶¶ 186-190); and (5) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church governance (Compl. Count VI, ¶¶ 199-214).

A. THE MANDATE VIOLATES RFRA

Under RFRA, the Government is prohibited from "substantially burden[ing] a person's exercise of religion 'even if the burden results from a rule of general applicability,'" unless it "'demonstrat[es] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.'"[12] Once

[12] 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente*

Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate to Plaintiffs furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[13] Here, the Government can make no such showing.

Congress passed RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened[.]"[14] RFRA's legislative history confirms that it was enacted to prevent the type of regulation codified in the Mandate. For example, Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment in order to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services."[15]

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União do Vegetal, 546 U.S. 418, 423-24 (2006).

[13] *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 424.

[14] 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31.

[15] The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong., 174, 192 (1992); *see also* 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that post-*Smith*, a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" and that RFRA provides "an opportunity to correct th[is] injustice[]").

Here, the Mandate cannot survive scrutiny under RFRA because: (1) it imposes a "substantial burden" on Plaintiffs' free exercise of religion; (2) the Government has no compelling interest in imposing this burden; and (3) the Mandate is not the least restrictive means of achieving the Government's interest. This is precisely why courts reaching the merits have to date issued preliminary injunctions against the Mandate in the majority of cases brought by *for-profit* companies with religious owners.[16] It necessarily follows that *non-profit religious*

[16] Courts in at least 20 cases have afforded preliminary relief to for-profit plaintiffs challenging the Mandate. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 BL 172106, at *23 (10th Cir. June 27, 2013) (en banc); *Gilardi v. U.S. Dep't of Health & Human Servs*., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. #9); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. 50); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F.Supp.2d 106 (D.D.C. 2012);

charities such as Plaintiffs are entitled to similar relief.

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires courts to (1) identify the particular exercise of religion at issue and (2) assess whether the law substantially burdens that religious practice.[17] Here, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do precisely what their religion forbids: facilitate access to abortion-inducing products, contraception, sterilization, and related counseling.

(i) "Exercise of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Because "[r]eligious exercise necessarily involves an action or practice," *Kaemmerling*, 553 F.3d at 679, RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts[.]" *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). The protected category of religious

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Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

[17] *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008).

exercise includes any act or practice that is "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (quotation marks and alterations omitted).

Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question[.]" *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, courts must accept plaintiffs' description of their beliefs and practices, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714-15 (refusing to question the moral line drawn by plaintiff); *see also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion). Thus, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). The purpose of the sincerity inquiry is simply to screen out manipulative claims based on sham beliefs that can be readily identified as such.

Here, Plaintiffs' refusal to comply with the Mandate is plainly a protected exercise of religion under RFRA. It is undisputed that their sincerely held religious

belief forbids them from providing, paying for, and/or facilitating access to abortion-inducing products, contraception, sterilization, or related counseling, including by contracting with an insurance company or third-party administrator that will, as a result, provide the objectionable products and services to Plaintiffs' employees.[18] Plaintiffs' objection to the Mandate is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.

Nor do Plaintiffs seek to impose their religious beliefs on others, or "to require the government itself to conduct its affairs in conformance with [their] religion." *Kaemmerling*, 553 F.3d at 680. Rather, they invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. By imposing these requirements, the Mandate is a straightforward effort to "force[] [Plaintiffs] to engage in conduct that their religion forbids[.]" *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

[18] The sincerity of Plaintiffs' beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops. *See, e.g.*, Comments of U.S. Conference of Catholic Bishops, at 3 (May 15, 2012), available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf; Comments of U.S. Conference of Catholic Bishop, at 3 (Mar. 20, 2013), available at http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

Since it is undisputed that Plaintiffs' practice of refusing to facilitate the objectionable products and services as required by the Mandate is a protected exercise of religion, the only relevant question for this Court is whether the Mandate puts substantial pressure on Plaintiffs to act contrary to this religious practice.

(ii) "Substantial Burden"

A federal law "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs[.]" *Thomas,* 450 U.S. at 716-18. In *Yoder*, for example, the Court found that a substantial burden was imposed by a $5 penalty imposed on the Amish plaintiffs for refusing to follow a compulsory secondary-education law. In *Thomas*, the Court similarly held that the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713-18. Thus, even the threat of withholding unemployment benefits, or a $5 criminal penalty, exerts enough pressure on a religious believer to qualify as a "substantial burden."

Here, the Mandate plainly imposes enough pressure on Plaintiffs to constitute a "substantial burden." If Plaintiffs refuse to facilitate the objectionable products

and services through their respective health plans, they could be subject to crippling fines of $100 a day per affected beneficiary.[19] But if they seek to exit the insurance market altogether, they could be subject to an annual fine of $2,000 per full-time employee after the first 30 employees.[20] These penalties, which could total millions of dollars, clearly qualify as a substantial burden under RFRA -- far outweighing, for example, the $5 fine found to be a substantial burden in *Yoder*.

The Seventh and Tenth Circuits recently addressed challenges by for-profit companies against a previous version of the Mandate. In the two Seventh Circuit cases, the court granted injunctions pending appeal against enforcement of the Mandate because those plaintiffs had demonstrated a likelihood of success on their RFRA claim. In *Korte v. Sebelius*, the court ruled that the "[t]he contraception mandate applies to [plaintiffs] as an employer of more than 50 employees," and that, as Catholics, they "would have to violate their religious beliefs to operate their company in compliance with it." 2012 WL 6757353, at *3. As such, plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4. In the

[19] *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012) (asserting that this assessment applies to employers who violate the "preventive care" provision of the Affordable Care Act).

[20] *See* 26 U.S.C. § 4980H(a), (c)(1).

companion case, the court found that the Mandate would present an even greater burden on the Catholic employers' religious liberties because there the plaintiffs operated a self-insured health plan. *See Grote,* 708 F.3d at 854.[21] The Tenth Circuit, sitting *en banc*, likewise recently held that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 2013 BL 172106, at *23. The same is true here.

It is no answer to claim that Plaintiffs, unlike for-profit corporations, may be eligible for the Government's so-called "accommodation," as the "accommodation" compels Plaintiffs to contract with an insurance issuer or third-party administrator that will, as a result of that contract, provide or procure the objectionable products and services for Plaintiffs' employees. Indeed, the insurance issuer or third-party administrator's obligation exists *only so long as* Plaintiffs' employees remain on Plaintiffs' insurance plan.[22] Moreover, for self-insured organizations, the required self-certification constitutes the religious organization's specific "*designation* of the

[21] *See also Gilardi v. U.S. Dep't of Health & Human Servs*., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24) (granting injunction pending appeal); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (same); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same).

[22] *See* 29 CFR § 2590.715-2713; 45 CFR § 147.131(c)(2)(i)(B).

third party administrator(s) as plan administrator and claims administrator for contraceptive benefits."[23]

It makes no difference that insurance issuers are required to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 26 CFR § 54.9816-2713A(c)(2)(ii). And it is irrelevent whether, as the Government has asserted, payments for objectionable products and services might be "cost neutral" to Plaintiffs. 78 Fed. Reg. at 8,463. That's so because it is the impermissible *facilitation* of access to objectionable products and services that violates Plaintiffs' sincerely-held religious beliefs. And the Mandate coerces Plaintiffs into engaging in that impermissible facilitation.

In any event, Plaintiffs will almost certainly be required, under the Mandate, to subsidize the objectionable products and services, even if the Government's dubious cost-neutrality assumption is true. The Government claims that the cost to the insurance company of providing or procuring the objectionable products and services should be offset by, among other things, "fewer childbirths" that will result from the use of the objectionable products and services. *Id*. But even if the Mandate sufficiently reduces "childbirths" to achieve cost-neutrality, the premiums

[23] 78 Fed. Reg. 39,879. (emphasis added).

previously going toward childbirths will now be used to provide the objectionable products and services necessary to obtain that reduction in childbirths.[24]

But the Government's cost-neutrality premise is implausible. It depends on the dubious assumption that the cost of contraception will be offset by "lower costs from improvements in women's health and fewer childbirths," 78 Fed. Reg. at 8,463, which in turn depends on the assumption that the Mandate will induce large numbers of women who do not currently use contraception to begin doing so. Of course, Plaintiffs object to the Mandate precisely because it forces them to participate in a scheme *specifically designed to encourage* women to engage in practices contrary to Plaintiffs' sincerely held religious beliefs. Moreover, the Government has adduced *no evidence* that women will change their behavior in sufficient numbers to achieve cost-neutrality.[25] The same is true for self-insured

[24] *See* Scott E. Harrington, Comments on Coverage of Certain Preventive Services Under the Affordable Care Act at 5-6 (Apr. 8, 2013) (noting that "any 'cost savings' from fewer childbirths would be the result of providing contraceptive coverage to which the religious organizations object"); *id.* at 5 ("The premiums paid by eligible religious organizations to issuers . . . remain the source of funding for separately provided individual coverage to employees.") ("Harrington Comments," attached hereto as Exhibit A).

[25] *See* Harrington Comments at 4 ("The evidence that incremental savings . . . would offset the costs to employers . . . is very thin," because "behavioral responses to the mandate and implementation of the Proposed Rules for insured plans would be complex," and would depend on "numerous" factors, "none of which appear to have been analyzed by the [Government agencies] or the studies on which they rely").

organizations. The Government asserts that third-party administrators required to procure the objectionable products and services for self-insured organizations subject to the accommodation will be compensated via reductions in the user fees required for participation in federally-facilitated health exchanges.[26] But such fee reductions would be established through a highly regulated and bureaucratic process, and it appears most unlikely that the reduction in user fees will fully compensate the regulated entities for the costs and risks associated with providing or procuring the objectionable coverage for those religious organizations that qualify for the "accommodation" and with complying with the Final Rule's regulatory framework. As a result, few if any third-party administrators are likely to participate in this regime, and those that do are likely to increase fees charged to self-insured organizations.[27] Consequently, the additional costs of providing the objectionable products and services will almost certainly be passed back to the religious organizations.

In sum, the Mandate forces Plaintiffs either to violate their beliefs by

[26] *See* 78 Fed. Reg. 39,882-86; 26 C.F.R. § 54.9815-2713A(b)(3); 45 C.F.R. § 156.50(d).

[27] *Cf.* Harrington Comments at *7 ("Elaborate cost of service regulation along such lines is well known to have significant drawbacks in insurance and other sectors," including "administrative and compliance costs, the potential for costly disputes and delays in regulatory approval, temporary periods in which permitted rates are not allowed to keep pace with costs, and in the inherent risk and uncertainty about whether adequate fees will be approved over time.").

facilitating access to objectionable products and services, or else to violate the law and face severe penalties. Moreover, the Mandate will almost certainly require Plaintiffs to subsidize the objectionable products and services.

2. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption[.]" *Yoder*, 406 U.S. at 236. It, therefore, must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *O Centro*, 546 U.S. at 430-31. The Government cannot meet this standard.

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). Here, the Government already exempts millions of employees from the Mandate through the Act's small-employer exemptions and grandfathering provisions. It cannot plausibly maintain that Plaintiffs' employees must be covered when it already exempts millions of women. Those broad exemptions "completely undermine[] any compelling interest in applying the preventive care coverage mandate[.]"[28]

The Mandate's narrow Exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca* -- a hallucinogen -- for religious purposes. The Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act already contained an exemption for the religious use of another hallucinogen -- peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote[.]" *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.* Likewise, "everything the

[28] *Newland*, 881 F. Supp. 2d at 1298; *see also, e.g.*, *Hobby Lobby*, 2013 BL 172106, at *25; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *70–72 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 904 F.Supp.2d at 127-28.

Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities that meet the Mandate's definition of "religious employer."

Finally, the Government's interest cannot be compelling where, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available and are covered by "over 85 percent of employer-sponsored health insurance plans."[29] The Government, moreover, has adduced "no empirical data or other evidence . . . that the provision of the FDA-approved emergency contraceptives . . . would result in fewer unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies." *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-00648-EAK-MAP, 2013 BL 171134, at *19 (M.D. Fla. June 25, 2013).

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to have any significant impact on effective contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost

[29] 75 Fed. Reg. at 41,732; Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012).

contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by . . . making [contraception] 'free.'"[30] In such circumstances, the Government cannot show a compelling interest, because the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

3. The Mandate Is Not the Least Restrictive Means to Achieve Its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [the] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another

[30] Helen M. Alvare, No Compelling Interest: The "Birth Control" Mandate and Religious Freedom, 58 VILL. L. REV. 379, 380 (2013).

alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). "Because this burden is placed on the Government, it must be the party to make this comparison." *Id*. Thus, the Government must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005).

Here, the Government has myriad ways to achieve its asserted interests without conscripting Plaintiffs to violate their religious beliefs.[31] For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Plaintiffs to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs

[31] While Plaintiffs oppose many of these alternatives as a matter of policy, the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement.

(*i.e.*, Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women." *Newland*, 881 F. Supp. 2d at 1299. The Government's apparent failure to consider these available alternatives is fatal.

B. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment embodies a "fundamental nonpersecution principle" that prevents the Government from "enact[ing] laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. While the Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that *disfavor* religion. *See Lukumi*, 508 U.S. at 532. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

In *Lukumi*, for example, the Supreme Court invalidated a municipal ordinance that imposed penalties on "[w]hoever . . . unnecessarily . . . kills any animal." *Id*. at 537. Although the ordinance was not facially discriminatory, the Court found that

its practical effect was to disfavor practitioners of Santeria because it allowed exemptions for secular but not for religious reasons. The Court held that, once the city began allowing exemptions, the law was no longer "generally applicable," and the city could not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Id.* at 537-38.

The same reasoning applies here. The Mandate is riddled with broad exemptions, but none for *religious* employers such as Plaintiff CENGI. It makes no difference that the Mandate contains an Exemption for a subset of religious groups. The Free Exercise Clause does not merely require equal treatment for *some* religious groups. Because the Government offers so many secular exemptions, it must give equal consideration to *all* claimants who seek similar exemptions on religious grounds.

In addition, the Mandate is not "neutral" because it targets Plaintiffs' religious practice of refusing to provide or facilitate access to contraception. When the Government promulgated the Mandate, it was acutely aware that the gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government concedes that 85% of health plans already cover contraception, and asserts that adding contraception to the remaining 15% is cost-neutral. If so, then the only reason why the latter plans

would *not* include contraceptive coverage is a religious or moral objection. But instead of trying to increase access to contraception without forcing these religious groups to participate in the effort, the Government chose to force religious groups to provide or facilitate access to contraception in violation of their beliefs.

The record, moreover, establishes that the Mandate was proposed as part of a conscious political strategy to marginalize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, the Mandate was directly modeled on a California statute,[32] whose chief legislative sponsor confirmed that its purpose was to undermine Catholic religious authorities: "Let me point out that 59 percent of all Catholic women of childbearing age practice contraception. [Eighty-eight] percent of Catholics believe in a *New York Times* poll that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing." 11 Cal. App. A003063 (Statement of Sen. Speier). The intended effect of the Mandate has always been to suppress Plaintiffs' religious practices. *Lukumi*, 508 U.S. at 533-35.

Finally, the Mandate is subject to strict scrutiny because it implicates the "hybrid" rights of religious believers. In *Smith*, 494 U.S. at 882, the Supreme Court

[32] *See* 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012) (explaining that Mandate was modeled on state law); *compare* 76 Fed. Reg. at 46,626 *with* Cal. Health and Safety Code § 1376.25(b)(1).

noted that the Free Exercise Clause can serve to "reinforce[]" other constitutional protections, such as freedom of speech and association, which are particularly important when religious beliefs and practices are at stake. The Mandate denies Plaintiffs these freedoms by prohibiting them from forming schools and charities unless they provide or facilitate access to contraception *and* sponsor Government speech in the form of contraceptive "counseling." The effect of these violations is to deny Plaintiffs their ability to engage in religious schooling and charity, which are essential components of their religion.

C. THE MANDATE VIOLATES THE FIRST AMENDMENT PROTECTION AGAINST COMPELLED SPEECH

It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for International Development, et al. v. Alliance for Open Society International, Inc., et al.*, 133 S.Ct. 2321, 2327 (2013) (quotation marks and citation omitted). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Company, et al., v. FDA*, No. 11-5332 (D.C. Cir. Aug. 24, 2012), *slip op*. at 10 (internal citations omitted). The protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of

fact the speaker would rather avoid[.]" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573-74 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to provide, pay for, and/or facilitate access to "counseling" related to abortion-inducing products, contraception, and sterilization for their employees. Because Plaintiffs oppose abortion and contraception, they strongly object to providing any support for "counseling" that encourages or promotes such practices. Consequently, compelling Plaintiffs to support "counseling" in favor of such practices burdens their freedom of speech.

Second, to qualify for the "accommodation," the Mandate requires Plaintiffs to certify their objection to providing abortion-inducing products, contraception, sterilization, and related counseling. This "certification" in turn triggers an obligation on the part of Plaintiffs' third-party administrator to provide or procure those very same objectionable products and services for Plaintiffs' employees. This certification requirement both compels Plaintiffs to engage in speech that triggers provision of the objectionable products and services, and deprives them of the freedom to speak on the issue of abortion and contraception on their own terms, outside of the confines of the Government's regulatory scheme. *See, e.g., Evergreen Assn. v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011) (striking

down law requiring crisis pregnancy centers to issue disclaimers that they did not provide abortion-related services).

D. THE MANDATE IMPOSES A GAG ORDER THAT VIOLATES THE FIRST AMENDMENT PROTECTION OF FREE SPEECH

The First Amendment protects the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

The Mandate, however, prohibits religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 CFR § 54.9815–2713. This sweeping gag order cannot withstand First Amendment scrutiny. Plaintiffs believe that

contraception is immoral, and by expressing that conviction they routinely seek to "influence" or persuade their fellow citizens of that view. The Government has no authority to outlaw such expression.

E. THE MANDATE INTERFERES WITH PLAINTIFFS' RIGHTS OF INTERNAL CHURCH GOVERNANCE

The First Amendment prohibits the Government from interfering with matters of internal church governance. In *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012), for example, the Court held that the Government may not apply anti-discrimination laws to interfere with the freedom of religious groups in the hiring and firing of ministers. The Court explained that the First Amendment prohibits "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. The Mandate violates this principle because the Exemption treats the Catholic Church as having two wings -- a religious one and a charitable one -- and treats only the former as an exempt "religious employer." In fact, however, the Church's religious and charitable arms are one and the same. By refusing to recognize the Church's charitable functions as part of a single, integrated "religious employer," the Mandate directly interferes with the unified structure of the Catholic Church.

The Mandate compounds this error by interfering with the Church hierarchy's ability to ensure that subordinate institutions, including charitable ministries and

schools, adhere to Church teaching through participation in a single health plan. For instance, the Atlanta Archdiocese makes its self-insured health plan available to the employees of its religious affiliates, including CENGI. By serving as the insurance provider, the Atlanta Archdiocese can ensure that its affiliates offer their employees health plans that are consistent with Catholic beliefs. The Mandate disrupts this arrangement by forcing the Archdiocese either to sponsor a plan that provides employees of these organizations access to "free" abortion-inducing products, contraception, sterilization, and related counseling, or to expel its affiliates from the Atlanta Plan, thereby forcing them to enter into a different contract for the objectionable coverage. Either way, the Mandate undermines the Archdiocese's ability to ensure that its affiliates remain faithful to Church teaching.

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

Plaintiffs are entitled to injunctive relief because the Mandate is causing them substantial irreparable harm. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Tyndale House*, 904 F.Supp.2d at 129 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale*

House, 904 F.Supp.2d at 129.

Absent an injunction, the Government can begin enforcing the Mandate against Plaintiffs on January 1, 2014 -- well before the final resolution of this case.[33] Thus, every moment that passes without relief inflicts an ongoing, cumulative harm to Plaintiffs' religious freedoms, confronting them with the impossible choice of either violating their religious beliefs or else violating the law.[34] Because this is not

[33] The Savannah Plan year begins on July 1, so the Mandate can be enforced against the Savannah Plaintiffs on July 1, 2014. *See* 78 Fed. Reg. 39870. The Savannah Plaintiffs must budget and plan for their insurance Plan 14 to 16 months before the start of a plan year. *See* Second Amended and Recast Complaint. ¶ 139. In addition, the Savannah Plaintiffs must budget and plan now for the fines, penalties, and claims they will face if the Savannah Plan does not comply with the Mandate, and any money set aside for that purpose is unavailable for use in the Savannah Plaintiffs' good works. *Id.* ¶ 140. "In light of the extensive planning involved in preparing and providing [their] employee insurance plan, and the uncertainty that this matter will be resolved before the coverage effective date," the Savannah Plaintiffs "have adequately established that they will suffer imminent irreparable harm absent injunctive relief." *Newland*, 881 F.Supp.2d at 1294-95. Moreover, the impending enforcement of the Mandate, and the Mandate's as-yet-undecided illegality is *currently* burdening the Savannah Plaintiffs' rights under the First Amendment and RFRA. That is so because the Savannah Plaintiffs are faced now with a choice between, on one hand, enduring the competitive harms and uncertainty engendered by the Mandate, *see* Second Amended and Recast Complaint ¶¶ 138-42, and, on the other hand, caving in to the Government's demands and adopting a 2014 Plan in violation of core tenets of their religion. *See Elrod*, 427 U.S. at 373-74 (irreparable harm shown where plaintiffs faced choice between loss of jobs and impairment of rights under First Amendment).

[34] It is irrelevant that the Atlanta Plan appears to qualify for grandfathered status. As already discussed, the Atlanta Archdiocese anticipates that, as of January 1, 2014—the date on which the Government can begin enforcing the Mandate—it will no longer be able to maintain the Atlanta Plan's grandfathered status. And, in

the type of harm that can later be remedied by monetary damages, the injury is irreparable. *See, e.g., Cate*, 707 F.2d at 1189.

III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM FROM A PRELIMINARY INJUNCTION

Defendants will not suffer any substantial harm from a preliminary injunction pending final resolution of this case. The Government has not mandated contraceptive coverage for more than two centuries, and has no urgent need to enforce the Mandate against Catholic groups before its legality can be adjudicated. And given that the Mandate already contains exemptions that by some estimates are available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F.Supp.2d at 1298, the Government will not be harmed by this Court's granting a temporary exemption for Plaintiffs.

Indeed, any claim of harm to the Government is fatally undermined by the fact that it has already acquiesced in preliminary injunctive relief in other cases

(continued…)

any event, the maintenance of grandfathered status has required the Atlanta Archdiocese to forego—in the face of ever-rising healthcare costs—desired and financially prudent alterations to the Atlanta Plan that it otherwise would have made (such as increasing employee contributions to premiums or increasing deductible and co-pay requirements). *See* Second Am. And Recast Compl. ¶ 143-144. Thus, even assuming that the Atlanta Plan can maintain grandfathered status, the Mandate inflicts irreparable harm on the Atlanta Plaintiffs, as it impinges their religious freedoms by forcing them to choose between bearing onerous financial burdens (so as to maintain grandfathered status) and violating their religious beliefs (so as to comply with the Mandate). *See Elrod*, 427 U.S. at 373-74 .

challenging the Mandate.[35] The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases."[36]

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

As a general matter, "[i]t is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In particular, "[t]here is a strong public interest in protecting the free exercise of religion, whether this protection derives from a legislative enactment or a constitutional amendment." *Chosen 300 Ministries, Inc. v. City of Philadelphia*, No. 12-3159, 2012 WL 3235317, at *25 (E.D. Pa. 2012) (citations omitted).

Here, if the Government proceeds with enforcement of the Mandate, Plaintiffs may be forced to shut down or restructure their operations, leaving a gap in the network of critical social services relied on by so many in their communities. By contrast, no public harm would come from simply preserving the status quo pending further litigation.

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[35] *See, e.g.*, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, ECF No. 41 (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, ECF No. 9 (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, ECF No. 10 (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, ECF No. 18 (E.D. Mo. Apr. 1, 2013).

[36] *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013), at *37.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' request for a preliminary injunction. Plaintiffs respectfully request that the Court adjudicate this Motion on an expedited basis and enter an injunction exempting Plaintiffs from application of, enforcement of, and compliance with the Mandate.

Respectfully submitted, this the 19th day of August, 2013.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing *Memorandum of Law In Support of Plaintiffs' Motion for Preliminary Injunction* uses Times New Roman 14 point font, as approved by the Northern District of Georgia in Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

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EXHIBIT A

April 8, 2013

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

Re: CMS-9968-P, Comments on coverage of certain preventive services under the Affordable Care Act

Dear Sir or Madam:

My name is Scott E. Harrington. I am the Alan B. Miller Professor in Health Care Management, Insurance and Risk Management, and Business Economics and Public Policy at the Wharton School of the University of Pennsylvania, where I am also a Senior Fellow with the Leonard Davis Institute for Health Economics and Academic Director of the Wharton/Penn Risk and Insurance Program. I have been retained by Bishop David A. Zubik, the Roman Catholic Diocese of Pittsburgh, Catholic Charities of the Diocese of Pittsburgh, Inc., and the Catholic Cemeteries Association of the Diocese of Pittsburgh to analyze the February 6, 2013 Notice of Proposed Rulemaking ("Proposed Rules") regarding Coverage of Certain Preventive Services under the Affordable Care Act and to provide written comments related to the same.

My 35 year career in research and teaching has focused largely on risk management and insurance, including corporate risk management and insurance and insurance pricing, distribution, market performance, and regulation. I am a co-editor of *The Journal of Risk and Insurance*, a premier academic journal focusing on risk and insurance. I have served as president of the American Risk and Insurance Association, the leading U.S. association of academics and other researchers with interests in risk and insurance. I have also served as president of the Risk Theory Society, a smaller scholarly association dealing with the economics of risk and insurance. I have testified before the U.S. House of Representatives and U.S. Senate on insurance regulation, including testimony before the U.S. House on rate review under the Affordable Care Act. I currently teach courses on financial management of health care institutions, health care policy, and empirical research methods in health economics and health services research. A copy of my C.V. is attached.

The Affordable Care Act requires coverage of certain preventive health services for women without cost sharing. Regulations implementing the statute require coverage of services according to guidelines promulgated by the Health Services and Resources Administration, including coverage for contraceptive services encompassing Food and Drug Administration approved contraceptive methods, sterilization procedures, and counseling for women with reproductive capacity.

The Proposed Rules "aim to provide women with contraceptive coverage without cost sharing and to protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds." 78 Fed. Reg. at 8462. By attempting to segregate the provision of contraception coverage from other coverage in their group health plans, the Proposed Rules are presumably intended to reduce the amount of non-pecuniary harm to eligible organizations with religious objections to providing contraceptive coverage to employees ("eligible organizations" or "religious organizations"). The Proposed Rules likewise are presumably intended to protect religious organizations from experiencing financial harm from the provision of contraception coverage to their employees.

Despite those intentions, based on my training, expertise, and review of the Proposed Rules and relevant research, I believe that implementation of the Proposed Rules would adversely affect the ability of religious organizations to obtain insurance or self-insurance services compared to exempting such organizations from the mandate to provide contraceptive coverage, and they would require religious organizations to fund or facilitate the provision of contraceptive coverage. My comments below elaborate the nature of the adverse effects on religious organizations that would result from adoption of the Proposed Rules, first for insured group health plans and then for self-insured health plans.[1]

Insured Plans

The Proposed Rules provide that the insurer ("issuer") providing insured group health coverage to an eligible organization would provide separate contraceptive coverage under individual policies without cost sharing, premiums, or other charges. The issuer would be required to automatically enroll plan participants in such coverage. The Departments believe that "issuers generally would find that providing contraceptive coverage is cost neutral because they would be insuring the same set of individuals under both policies and would experience lower costs from improvements in women's health and fewer childbirths" (78 Fed. Reg. at 8463), thus apparently protecting eligible organizations from having to pay more for their insured group health plans as a result of the mandate to provide contraceptive services.

I do not believe that this proposal for insured plans can reasonably be expected to accommodate religious organizations with objections to having employees receive contraceptive coverage in conjunction with their employment for two main reasons. First, the Proposed Rules for insured plans cannot be presumed to be cost neutral. Second, even if cost neutral, the Proposed Rules would not prevent religious organizations from paying for contraceptive coverage and experiencing non-pecuniary harm.

[1] My comments regarding insured plans focus on organizations for which group health coverage would not be subject to the guaranteed issue, rating, and other requirements for small employer insured plans under the Affordable Care Act.

1. Cost Neutrality Cannot be Presumed. The Departments' rationale for the Proposed Rules for insured plans recognizes that issuers of insured group health plans must be able to price plans to reflect the expected costs of all insured medical claims. However, the Departments' assumption that expected medical claims and premiums generally will not increase when contraceptive coverage is provided without cost sharing to employees of eligible organizations is not supported by any significant analysis and is unlikely to be valid for many or even most such organizations.

The Departments are correct in the assumption that group health insurance premiums over time will reflect the anticipated cost of medical claims for the insured group. In order for an insurer to provide coverage willingly over time, the premiums charged also will need to be sufficient to cover the issuer's administrative costs of arranging for and providing individual coverage to employees of religious organizations and to provide a reasonable expectation of profit, after allowing for possible investment income from premiums received prior to the payment of claims. The Departments' proposal for insured plans therefore also rests on the assumption that premiums will not need to increase to cover additional administrative costs from providing separate, individual coverage of contraception services. In other words, the proposal assumes that any cost savings from "improvements in women's health and fewer childbirths" will be at least as large as the direct costs of paying for contraceptive services and the costs of administering individual policies.

There is evidence that the cost of contraceptive services is likely to be lower than the costs associated with unintended pregnancies that would arise *if women were not to utilize contraception services*. The key issue regarding whether the proposal for insured plans would be cost neutral for religious organizations, however, is whether any incremental cost savings to issuers associated with improved health and fewer childbirths would offset the direct and administrative costs of providing contraceptive services to all of an eligible organization's employees using such services, some or many of whom will likely have been using and paying for contraceptive services prior to implementation of a mandate for contraceptive coverage and others who will not use contraceptive services even if covered by insurance. Other things being equal, the change in premiums that religious organizations will face under the Departments' proposal will equal (a) the full cost of providing contraceptive services to all employees utilizing such services, plus (b) the additional administrative costs to issuers of providing separate contraceptive coverage, less (c) any savings due to improvements in women's health or fewer childbirths that result from any changes in women's behavior from shifting the full cost of contraceptive services to the insured plan in conjunction with separate individual coverage.

There can be no assurance that any savings from changes in employees' behavior will outweigh the direct costs of shifting the obligation to pay for contraceptive services from employees to religious employers and the increased administrative costs to issuers from the Departments' proposal; i.e., that (c) will be at least as great as (a) plus (b). Some employees would likely use the same contraceptive services after the implementation of the proposed

change as before, with the full cost of the services shifted to the health plan, and no incremental savings from improved health or fewer childbirths for those employees. In addition, some employees using and paying for contraceptive services without insurance coverage could opt for more expensive contraceptive services after implementation of the Proposed Rules. That would increase spending for contraceptive services with little or no savings from improved health or fewer childbirths. Other employees may choose not to use contraceptive services notwithstanding insurance coverage.

The bulk of any incremental savings from implementing the Departments' proposal would depend on how many women were induced to consume contraceptive services *who would not have consumed contraceptive services but for the mandate and its proposed implementation.* In order for the proposal for insured plans to be cost neutral from the perspective of premiums payable by the religious organization, any savings in medical costs from improved health and reductions in unintended pregnancies from women who would be induced to consume contraceptive services by the mandate and its implementation would need to equal or exceed the sum of the costs of contraceptive services for those women, the entire cost of contraceptive services for all other women that would be shifted to the plan, and issuers' administrative costs of providing individual policies and coverage.

The evidence that incremental savings from improved health and reduced childbirths would offset the costs to employers of assuming the entire cost of women's contraceptive services is very thin.[2] The behavioral responses to the mandate and implementation of the Proposed Rules for insured plans would be complex and related to employees' age, marital status, education, income, and numerous other factors, none of which appear to have been analyzed by the Departments or the studies on which they rely. Nor is there any analysis or evidence that considers the extent to which the demographics and behavior of employees of religious organizations could differ from those of secular organizations. Given the lack of relevant data and specific inquiry into the potential effects on eligible organizations, there can be no presumption that the amounts that religious organizations would be required to pay for insured group health plans under the Proposed Rules would not be greater than the amounts they would have to pay without a mandate to cover contraceptive services. There is no evidence that the Proposed Rules would likely be cost neutral for eligible organizations on average. Even if there were evidence of cost neutrality for some eligible organizations, there could be no presumption that the Proposed Rules would be cost neutral for most organizations.

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[2] The Proposed Rules cite (78 Fed. Reg. at 8463) a summary of evidence by John Bertko and Sherry Glied, et al., "The Cost of Covering Contraceptives through Health Insurance," February 9, 2012, which refers only to two consultants' reports (released in 2000 and 2007) suggesting that shifting the cost of providing full coverage of contraceptive services to employer sponsors of group health coverage could be cost neutral or cost saving. Those reports, however, are not peer reviewed and are subject to significant methodological limitations for making inferences in this matter, including that they do not consider specific demographic, behavioral, and administrative cost issues associated with requiring coverage of contraceptive services without cost sharing for employees of religious organizations.

It might be asserted that cost neutrality could be assured by a regulatory stipulation that issuers of insurance coverage for religious organizations including separate contraception coverage charge a price equal to what would have been charged had the plan not covered contraceptive services. However, any such requirement would be unworkable and counterproductive. It would require detailed and yet inherently speculative analysis of what issuers were charging religious organizations and the terms of coverage compared to what they would have occurred without the mandate to cover contraceptive services, in an environment of on-going and uncertain increases in the overall cost of providing insured group health coverage. Issuers would not be willing and could not be expected to provide coverage to religious organizations unless they could expect to cover all of the costs of providing coverage and achieve a reasonable expectation of profit. Prices, terms, and conditions of group health insurance in the large group market are commonly buyer-specific and highly negotiated. Over time, premiums and/or other terms of coverage almost certainly would be adjusted to reflect fully the incremental medical and administrative costs to issuers of providing contraceptive coverage, and any attempt to force issuers to disregard certain costs of providing coverage to religious employers would shrink if not eliminate the ability of such organizations to purchase insured plans.

2. Religious Organizations Would Pay for Contraceptive Services and Experience Non-Pecuniary Harm. Regardless of whether the Proposed Rules for insured plans could be cost neutral, they would not "protect eligible organizations from having to . . . pay . . . for contraception coverage." The premiums paid by eligible religious organizations to issuers under the Proposed Rules would remain the source of funding for separately provided individual coverage to employees. The fact that providing such coverage might conceivably result in some savings that would keep the employer's total insurance costs from increasing would not change that basic fact. Eligible organizations' payment of premiums to issuers would be the *sine qua non* for employees' to receive coverage of contraceptive services. If a religious organization were to decline to offer any health benefits under the Proposed Rule, employees would not receive contraceptive coverage in conjunction with employment, even though the organization could be subject to fines and penalties for not offering any coverage. If instead the organization were to offer employees health coverage through an insured plan according the Proposed Rules, employees would only receive coverage of contraceptive services because the employer would be doing so and paying premiums to the issuer.

As an analogy, many employers invest resources in programs designed to improve employees' health and wellness, in significant part because they expect to achieve savings from the programs in the form of reduced benefit costs and improved productivity. The fact that such programs might produce savings that exceed the amount of funding does not imply that the employers are not funding the costs of investment, implementation, and maintenance. Similarly and more generally, businesses routinely make investments that are expected to increase revenues and/or reduce costs by amounts sufficient to recover the amounts invested and achieve

a reasonable return on investment. Businesses nonetheless incur the costs of or "pay" for such investments.

Put another way, even assuming cost neutrality, a religious organization would still be paying for contraceptive coverage because the money that it previously paid for "childbirth" would now be being used to pay for "contraception." Indeed, any "cost savings" from fewer childbirths would be the result of providing contraceptive coverage to which the religious organizations object. Insulating eligible organizations with insured plans from having to pay for contraceptive services without exempting them from the requirement altogether would require a completely separate source of funding for such services.

The possibility that health insurance premiums for some religious organizations might not increase or even might decline if employees were provided with free contraceptive services does not imply that the Proposed Rules would not produce significant non-pecuniary harm to employers who would nonetheless prefer not to have contraceptive services provided to employees in conjunction with their employment. In order to avoid or reduce non-pecuniary harm, it is possible that a religious organization would be willing to incur higher costs if it could be exempt from the mandate to include contraceptive services in its insurance plan. Thus, the Proposed Rules cannot be presumed to hold objecting religious organizations harmless even if they were not to increase their financial costs for insured group health coverage. The resulting non-pecuniary harm and any pecuniary harm could be prevented if religious organizations were exempt from the mandate, which would allow them to purchase insured coverage containing exclusions for contraceptive services.

Self-Insured Plans

Sponsors of self-insured group health plans typically purchase administrative services from a Third Party Administrator (TPA). TPAs provide bundles of services that are customized and individually negotiated to meet the specific objectives of self-insured organizations. Those services can include plan design, network administration, claims processing, claims auditing and utilization review, and design and administration of disease management and wellness programs.

It is difficult to comment precisely on the proposal for self-insured plans, since the Departments have not articulated any specific language, but instead have described several "alternative approaches" under "consider[ation]," 78 Fed. Reg. at 8463. However, under all of the approaches, the Proposed Rules regarding contraceptive coverage for self-insured group health plans sponsored by religious organizations would require the provision of separate, individual coverage of contraceptive services by an issuer, to be arranged by a Third Party Administrator (TPA). Issuers providing such coverage would be compensated by reductions in user fees that they (or an authorized affiliate) otherwise would pay for participating in federally-facilitated health insurance exchanges. The reductions in user fees would also include an amount designed to compensate TPAs for the costs of arranging such coverage.

While the Proposed Rules are intended to insulate self-insured religious organizations from the cost of providing contraceptive services to their employees, they would nonetheless be likely to adversely affect the terms, conditions, and supply of self-insured plan services to eligible religious organizations. As would be the case for insured plans, they also would not prevent such organizations from paying for contraceptive coverage and experiencing other non-pecuniary harm.[3]

The Proposed Rules would establish an elaborate and highly regulated and bureaucratic process for evaluating, approving, and monitoring fees paid as compensation to participating issuers and TPAs for issuing and arranging for provision of contraceptive coverage to employees of self-insured religious organizations. The Proposed Rules would create a public utility style cost of service regulatory regime in an attempt to ensure that compensation to issuers and TPAs would not be excessive. Specifically, the proposed regime would include the following:

- Issuer fees would require regulatory approval based on an evaluation of the projected costs of paying for contraceptive services;
- Regulatory evaluation and approval would involve detailed analysis of issuers' and TPAs' administrative costs, including the magnitude of startup costs and the appropriate amortization of those costs over time;
- Regulators would determine the permissible profit margin for services provided by issuers and TPAs; and
- Issuer and TPA activities and operations would be subject to regulatory investigations and audits.

Elaborate cost of service regulation along such lines is well known to have significant drawbacks in insurance and other sectors. Those drawbacks include administrative and compliance costs, the potential for costly disputes and delays in regulatory approval, temporary periods in which permitted rates are not allowed to keep pace with costs, and the inherent risk and uncertainty about whether adequate fees will be approved over time, which increases the prices needed to compensate issuers for participation.[4] The inherent risks to issuers and TPAs of investing in and participating in such a system include the possibility that future regulatory and political pressures to restrict reimbursement will reduce payment below levels that were anticipated and necessary for the firms to undertake the costly initial investment to provide the required services.

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[3] In addition to these direct effects, and depending on the specific details of overall financing of the exchanges and how the Proposed Rules' reduction in exchange user fees to issuers would be financed, self-insured religious organizations conceivably could contribute indirectly to financing the proposed exchange fee reductions through, for example, their statutory obligation under the Affordable Care Act to pay monies in conjunction with the transitional reinsurance program for individual health coverage during 2014-2016.

[4] In the case of insurance, these drawbacks are elaborated, for example, in my monograph *Insurance Deregulation and the Public Interest* (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2000) and in J. David Cummins, ed., *Deregulating Property-Liability Insurance* (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2002).

The proposed regulatory regime would discourage issuers from investing in the required infrastructure, capabilities, and expertise needed to arrange for and provide separate contraception coverage for employees of self-insured religious organizations. The market for such coverage for religious organizations would likely be very thin, if not non-existent.

Assuming that some issuers would be willing to participate, TPAs would consider the full costs and risks of having to invest and participate in the proposed regulatory regime in order to offer services to self-insured religious organizations. Other things being equal, religious organizations would generally be viewed as less attractive if the Proposed Rules were to be adopted and implemented. Over time, TPAs would need to achieve some combination of higher prices or reductions in services provided to self-insured religious organizations to induce their participation. Because TPA services are complex, customized, and negotiated, it would not be possible for regulatory agencies to ensure that religious organizations would not face less attractive prices and terms than would be the case without the contraceptive service mandate. As a result, eligible organizations would face higher prices and/or reduced services over time. Attempts to prevent changes in prices and terms through additional regulation would make matters worse by further reducing the willingness of TPAs to contract with religious organizations.

Given these problems, the Proposed Rules will adversely affect the availability and affordability of TPA services for religious organizations, even if sufficient numbers of issuers could be induced to participate in the market for separate contraceptive coverage for the employees of religious organizations. The resulting pecuniary harm would be in addition to the non-pecuniary harm to objecting organizations from being forced to comply with the contraceptive mandate. As is true for insured plans, a straightforward and practical solution to this dilemma would be to exempt eligible self-insured religious organizations from the mandate to provide contraceptive services.

Thank you for considering my comments.

Sincerely,

Scott E. Harrington

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Curriculum Vitae
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Academic Appointments: The Wharton School, University of Pennsylvania, Professor of Health Care Management and Insurance and Risk Management, 2004-present, Professor of Business and Public Policy, 2011-present, Associate Professor of Insurance (with tenure), 1985-1988, Assistant Professor of Insurance, 1979-1985, Lecturer in Insurance, 1978-1979; University of South Carolina, The Moore School of Business, Professor of Insurance and Finance, 1988-2004, W. Frank Hipp Professor of Insurance, 2002-2004, Francis M. Hipp Distinguished Foundation Fellow, 1990-2002.

Other Appointments and Affiliations: Academic Director, Wharton/Penn Risk and Insurance Program; Adjunct Scholar, American Enterprise Institute; Senior Fellow, Leonard David Institute for Health Economics; Research Fellow, Wharton Risk and Decision Processes Center

Research Interests: Health economics and insurance; corporate, health care, and insurance company finance; insurance economics and regulation; insurance contract design and interpretation

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Undergraduate: The U.S. Health Care System (Wharton), Risk Management (Wharton and South Carolina), Principles of Risk Management and Insurance (Wharton and South Carolina), Property-Liability Insurance and Insurer Management (Wharton and South Carolina), Life-Health Insurance and Insurer Management (Wharton), Introduction to Finance (South Carolina),

Masters: Financial Management of Health Care Institutions (Wharton), Risk Management (South Carolina), Money and Capital Markets (South Carolina), Risk and Insurance (Wharton)

Doctoral: Proseminar on Health Services Research (Wharton); Current Issues in Finance (South Carolina), Empirical Methods in Financial Research (South Carolina), Insurance Economics (Wharton; independent study at South Carolina); Moore School of Business Finance Doctoral Program Coordinator, 2001-2004

Executive: AXA (Wharton), Prudential Financial (Wharton), XL Capital / China Insurance Regulatory Commission (Wharton); KPMG Insurance (Wharton), Insurance Company Finance (South Carolina);

Honors and Awards

Member, Federal Advisory Committee on Insurance, 2011-present
National Association of Mutual Insurance Companies (NAMIC) Service Award, 2010.
Alan B. Miller Professor (endowed chair), 2005-present
W. Frank Hipp Professor of Insurance (endowed chair), 2002-2004
Francis M. Hipp Distinguished Foundation Fellow, University of South Carolina, 1990-2002
Shin Award for Research Excellence (paper award), International Insurance Society Meeting, 2001.
Spencer L. Kimball Award for article in *Journal of Insurance Regulation*, 1999

Moore School of Business Distinguished Researcher Award, 1998
Robert I. Mehr Award, 1998, from the American Risk and Insurance Association for *Journal of Risk and Insurance* article published in 1988 with the greatest ten-year impact in the field of risk and insurance
Alpha Kappa Psi - Spangler Award, 1996, from the American Risk and Insurance Association for *Journal of Risk and Insurance* article published in 1986 with the greatest ten-year impact (award shared with another article)
Robert C. Witt Research Award, 1996, for best article in the 1995 volume of the *Journal of Risk and Insurance*
Alpha Kappa Psi - Spangler Award, 1995, from the American Risk and Insurance Association for *Journal of Risk and Insurance* article published in 1985 with the greatest ten-year impact (award shared with another article)
President, Risk Theory Society, 1992
President, American Risk and Insurance Association, 1992
College of Business Administration Research Fellow, University of South Carolina, Fall 1992, Fall 1989
International Insurance Society Research Paper Award, 1992
Insurance Educator of the Year, 1990, Professional Insurance Agents Foundation
Ranked most productive scholar in risk management and insurance based on total pages published weighted by number of authors and journal impact (study appeared in *Journal of Risk and Insurance*, 1990)
Journal of Risk and Insurance Award for one of top three articles in 1986
Honorary Master of Arts, University of Pennsylvania, 1985
Journal of Risk and Insurance Award for one of top three articles in 1985
Second Prize, Actuarial Studies in Non-Life Insurance International Competition for Young Researchers, 1985
Journal of Risk and Insurance Award for one of top three articles in 1981
Paul Van Arsdell Award, Outstanding Undergrad. Teaching, Finance Department, University of Illinois, 1978
State Farm Companies Doctoral Dissertation Award, 1977
University of Illinois Bronze Tablet for academic excellence, Phi Beta Kappa, Phi Kappa Phi, 1974-1975
Valedictorian, Rock Falls High School, Rock Falls, Ill., 1971

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Kauffman Foundation Legal Seminar, Accountable Care Organizations, Laguna Niguel, Cal., July 8, 2011.

America's Health Insurance Plans Compliance Seminar, San Francisco, Cal., June 15, 2011.

Geneva Association 38th General Assembly, Systemic Risk in Insurance, Rio de Janeiro, Brazil, May 22, 2011.

Networks Financial Institute, 7th Annual Insurance Reform Summit, Insurance and the Dodd-Frank Act, Washington, D.C., March 15, 2011.

Health Management Academy Senior Executives Forum, Effects of Health Care Reform on Providers and Payers and , Washington, D.C., March 25, 2011.

Health Management Academy Government Relations Officer Forum, Effects of Health Care Reform on Providers and Payers, Washington, D.C., February 9, 2011.

National Association of Mutual Insurance Companies Policy Summit, The Future of Insurance Regulation and Health Care Reform, the Dodd-Frank Act and the 2010 Election, Washington, D.C., January 21, 2011.

American Enterprise Institute Conference, Beyond Repeal and Replace, presentation on health insurance regulation under health care reform, Washington, D.C., December 8, 2010.

Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics at Harvard Law School, conference Should Congress Repeal the McCarran-Ferguson Act, presentation on insurance antitrust exemption, November 12, 2010.

Brokers and Reinsurers Marketing Association, presentation on health care reform, New York, N.Y., November 30, 2010.

University of Pennsylvania Law Review Symposium on health care reform, presentation on minimum medical loss ratios and rate review; Philadelphia, October 28, 2010.

Free Market Forum, Hillsdale College, presentation on ways to drive down health care costs, October 1, 2010.

AMCOMP (American Society of Workers Comp Professionals) Seminar, presentation on health care reform, New York, N.Y., September 14, 2010.

Property Casualty Insurers of America Association Board of Governors Meeting, presentation on healthcare and financial reform, Williamsburg, Va., July 20, 2010.

Louisiana Workers Compensation Corporation Board of Directors, presentation on healthcare reform, San Francisco, Cal., July 13, 2010.

American Enterprise Institute and National Chamber Foundation, symposium on U.S. Regulatory Policy and Free Markets, presentation on healthcare reform and health insurance regulation, Washington, D.C., July 8, 2010.

American Society of Health Economists Meeting, "Stochastic Frontier Analysis of Hospital Mortality," paper presentation, Ithaca, N.Y., June 22, 2010.

International Insurance Society Meeting, plenary address on healthcare reform, Madrid, Spain, June 7, 2010.

National Council on Compensation Insurance Annual Issues Meeting, presentation on healthcare reform, Orlando, Florida, May 6, 2010.

National Council of Insurance Guaranty Funds, presentation on systemic risk and financial reform, San Francisco, Cal., April 29, 2010.

World Insurance Forum Meeting, panel on systemic risk and insurance regulation, Bermuda, March 16, 2010.

Property/Casualty Insurer Joint Industry Forum, panel on systemic risk and insurance regulation, New York, N.Y., January 12, 2010.

"Cost of Capital for Pharmaceutical, Biotechnology, and Medical Device Firms," conference for *The Handbook of the Economics of the Biopharmaceutical Industry*, Philadelphia, November 20, 2009.

"How Private Health Insurance Really Works," American Enterprise Institute, Conference on "Private Health Insurance Markets: Facts, Fables, and Fiction," Washington, D.C., October 21, 2009.

"The Financial Crisis, Systemic Risk, and the Future of Insurance Regulation," National Association of Mutual Insurance Companies Annual Meeting, Atlanta, Georgia, September 21, 2009.

"Remarks on Health Insurance Reform," Health Management Academy CEO Forum, Laguna Beach, Cal., August 6, 2009.

"Public Plan Option: Competitor or Predator," American Enterprise Institute, Conference on "The Five (not so) Easy Pieces of Health Care Reform," Washington, D.C., June 4, 2009.

Networks Financial Institute, 6th Annual Insurance Reform Summit, presentation on systemic risk in insurance, March 4, 2009.

Discussant of "The Effects of 'Consumer-Directed' Health Insurance on the Use of Medical Care Services and Cost of Care," Southeastern Health Economics Study Group, Birmingham, Al., October, 2008.

American Health Economic Association, Population Density and Racial Differences in the Performance of Emergency Medical Services, Durham, N.C., June 2008.

International Health Economists Association, paper presentation, Are there Racial Disparities in Emergency Medical Services? Evidence from Mississippi, and paper discussant, Copenhagen, Denmark, July 2007.

International Insurance Workshop, Hitotsubashi University, Non-Life Insurance Institute of Japan, and Research Institute of Nipon Life Insurance Company, presentations on insurance company solvency, capital regulation, and design of optimal capital standards, Tokyo, Japan, March 2007.

National Association of Mutual Insurance Companies Policy Summit, presentations on insurance regulatory reform and the insurance industry's antitrust exemption, New Orleans, February 2007.
Southeastern Health Economists workshop, paper presentation, Are there Racial Disparities in Emergency Medical Services: Evidence from Mississippi, Coral Gables, Fl., September 2006.
American Enterprise Institute Colloquium on regulatory reform, presentation on insurance rate deregulation, Washington, D.C., September 2006.
AEI-Brookings Institution Judicial Education Program, lectures on insurance markets and regulation, Washington, D.C., September 2006.
American Society of Health Economists, presentation on cost of capital and research and development intensity for biotechnology, pharmaceutical, and medical device firms, Madison, WI, June 2006.
Networks Financial Institute 3rd Annual Insurance Summit, presented paper on optional federal chartering of insurance, Washington, D.C., March 1, 2006.
Natural Disaster Insurance, panelist NBER Insurance Project meeting, February 10, 2006, Cambridge.
National Symposium on Risk and Disasters, sponsored by the University of Pennsylvania and the Communications Institute, panelist, December 1, 2005, Washington, D.C.
The 11th Annual Thomas W. Langfitt, Jr., Memorial Health Policy Symposium, Consumer-Directed Care: Where Will This Road Take Us? panelist, November 29, 2005.
National Symposium on Terrorism Risk Insurance, sponsored by Wharton, RAND, U.S. Department of Homeland Security, University of Southern California, and the Communications Institute, panelist, Washington, D.C., October 7, 2005.
World Congress on Risk and Insurance Economics meeting, presented paper Soft and Hard Markets in Medical Malpractice Insurance (co-authored with Patricia Danzon and Andrew Epstein), Salt Lake City, Utah, August 10, 2005.
South Carolina Property Insurance Forum, presentation on homeowner's insurance markets in catastrophe prone areas, Charleston, S.C., June 24, 2005.
National Symposium on the Future of Terrorism Risk Insurance, sponsored by Wharton, RAND, U.S. Department of Homeland Security, University of Southern California, and the Communications Institute, panelist, Los Angeles, June 20, 2005.
Reinsurance Association of America Current Issues Forum, panelist, Philadelphia, May 24, 2005.
Kaiser Foundation web-telecast on medical malpractice reform, panelist, Washington, D.C., February 5, 2005.
NAIC Symposium, State Insurance Regulation: Ensuring Solvency, Transparency, and Competitiveness in a Global Insurance Market, presentation on regulatory modernization, Washington, D.C., February 24, 2004.
National Bureau of Economic Research Insurance Project, discussant, Cambridge, Mass., February 7, 2004.
Brookings / Wharton Conference on Public Policy Issues Confronting the Insurance Industry, presented paper Tort Liability, Insurance Rates, and the Insurance Cycle, Washington, D.C., January 9, 2004.
Bank for International Settlements and Federal Reserve Bank of Chicago Conference on Market Discipline: The Evidence Across Countries and Industries, presented paper Market Discipline in Insurance and Reinsurance, Chicago, Ill., October 31, 2003.
Harvard / Swiss Re colloquium on risk-based capital and market discipline, Cambridge, Mass., June 10, 2003.
51st Annual Antitrust Section Spring Meeting, presentation on The Future of the McCarran-Ferguson Act and Federal Chartering for the Insurance Industry, Washington, D.C., April 4, 2003.
Forum for Corporate Conscience, Economics session facilitator, Charlotte, N.C., March 2003.
National Conference of Insurance Legislators, session on medical malpractice insurance crisis and tort reform, Savannah, Georgia, February 22, 2003.
National Association of Life-Health Insurer Guaranty Associations Annual Meeting, Optional Federal Chartering and Insurance Guaranty Funds, Washington, D.C., November 1, 2002.
Cato Institute Forum, Terrorism Insurance: Is There a Role for Government, Washington, D.C., September 21, 2002.
Swiss Re Risk Management Network Meeting, Zurich, September 2, 2002.

National Conference of State Legislators, Modernizing Automobile Insurance Regulation, Denver, July 26, 2002.
Harvard / Swiss Re Colloquium on risk-based capital, paper presentation, Cambridge, June 2002.
National Association of Independent Insurers Fall Legislative Conference, Chicago, October 2001.
NAIC Working Group on competition and regulation, August 2001.
International Insurance Society, paper presentation, Vienna, July 2001.
National Bureau of Economic Research Insurance Project, paper presentation, Cambridge, Mass., February 16, 2001.
AEI-Brookings Joint Center for Regulatory Studies Conference on Insurance Rate Regulation, paper presentation, Washington, D.C., January 18, 2001.
American Finance Association, paper presentation, New Orleans, La., January 2001.
American Enterprise Institute Symposium on National Chartering for Insurance Companies, discussant, Washington, D.C., December 14, 2000.
Prudential Securities Conference on "Riding Cycles," Washington, D.C., October 4, 2000.
Wharton/Aon Conference on Capitalization of the Property-Casualty Insurance Industry, paper presentation, Philadelphia, September 27, 2000.
American Risk and Insurance Association Annual Meeting, paper presentations, 1980-93, 1995-97, 2000.
AEI-Brookings Joint Center for Regulatory Studies Conference on Insurance Deregulation, paper presentation, Washington, D.C., February 17, 2000.
National Bureau of Economic Research Insurance Project (discussant), Cambridge, Mass., February, 2000.
American Enterprise Institute Conference on Optional Federal Chartering and the Regulation of Insurance, paper presentation, Washington, D.C., June 3, 1999.
Risk Theory Society, paper presentations, 1979, 1980, 1983 (by co-author), 1984, 1989, 1996, 2000 (by co-author), 2001
Fifth International Conference on Insurance Solvency and Finance, paper presentation, London, 1997.
Southern Risk and Insurance Association, paper presentations, 1988, 1990, 1995, 1996 (discussion panel)
Wharton Financial Institutions Center Conference on Risk Management in Insurance Firms, Philadelphia, 1996.
National Association of Independent Insurers Annual Meeting, 1996.
Competitive Enterprise Institute Conference on Issues in Insurance Regulation, Washington, D.C., 1996.
NBER Conference on Property/Casualty Insurance (discussant), Cambridge, Mass. 1995.
Thirteenth Annual Conference on Economic Issues in Workers Compensation, paper presentation, Philadelphia, Pa., 1994.
NAIC Conference on Issues in Insurance Regulation, Washington, D.C., 1994.
International Conference on Insurer Solvency, paper presentation, Wharton School, Philadelphia, 1994.
International Insurance Society (discussion group moderator, 1992-94, paper presentation, 1992)
Michigan Association of Insurance Companies, 1992.
Federal Reserve Bank of Chicago Conference on Bank Structure and Competition, paper presentation, 1992.
Eastern Finance Association, paper presentation, 1992.
American Law and Economics Association, paper presentation, 1991.
Third Annual International Conference on Insurer Solvency, paper presentation, Rotterdam, The Netherlands, 1991.
Federal Reserve Bank of Boston Conference, The Financial Condition and Regulation of Insurance Co., paper presentation, 1991.
American Bar Association, Tort and Insurance Practice Section, paper presentation, 1990.
Professional Insurance Agents Legislative Conference, 1990.
Western Risk and Insurance Association, paper presentation, 1989.
Financial Management Association, 1988 (discussant), 1990.
Reinsurance Association of America, Tucson, Arizona, paper presentation, 1988.
American Association of Insurance Services, Charleston, S.C., 1987.
Brookings Institution Conference on Legal Liability, paper presentation, Washington, D.C., 1987.

ASTIN Colloquium, paper presentation, Biarritz, France, 1985.
Fifth Annual Conference on Economic Issues in Workers' Compensation, paper presentation, New York, N.Y., 1985.
Conference on Strategic Planning for Insurance, paper presentation, sponsored by the Geneva Association and the S. S. Huebner Foundation, London, England, 1982.
Geneva Association and the Association of Property-Casualty Insurance Economists, discussant, Allied Social Science Meetings, New York, N.Y., 1982.

Research Grants and Funded Research

Spencer Foundation, Moore School of Business, risk management at United Grain Growers, 2000.
Center for Applied Real Estate Education and Research, Moore School of Business, Federal Taxes, Insurance Company Capital, and the Price of Catastrophe Insurance (with Greg Niehaus), 1999.
An Economic Analysis of Workers' Compensation in South Carolina (with Travis Pritchett, Greg Niehaus, and Helen Doerpinghaus), University of South Carolina, College of Business Administration Business Partnership Foundation, 1993-1994.
University of South Carolina, College of Business Administration, Economic Analysis of Insurance Company Insolvencies and Solvency Screening Systems, from the National Association of Insurance Commissioners, 1992-1993.
University of South Carolina, College of Business Administration, Economic Analysis of Liability Insurance Pricing, from the National Association of Insurance Commissioners, 1989-1990.
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Testimony at Government Hearings

Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, U.S. House of Representatives, presented written and oral testimony on "Implementing Title I of the Dodd-Frank Act: The New Regime for Regulating Systemically Important Nonbank Financial Institutions," May 16, 2012.
Subcommittee on Health, Committee on Energy and Commerce, U.S. House of Representatives, presented oral and written testimony on "PPACA's Effects on Maintaining Health Coverage and Jobs: A Review of the Health Care Law's Regulatory Burden," June 2, 2011.
Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives, presented oral and written testimony on "How Should the Federal Government Oversee Insurance?" May 14, 2009.
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Editorial Boards, Other Board Memberships, and Advisory Committees: Co-Editor, *Journal of Risk and Insurance*, 2006-present; Associate Editor, *Geneva Risk and Insurance* Review, 2009-present; Associate Editor, *Journal of Risk and Insurance*, 1985-2006; Associate Editor, *Journal of Financial Services Research*, 1994-99; Board of Advisors, *Regulation: Cato Review of Business and Government*, 1999-2009; Adjunct Scholar, American Enterprise Institute, 2009-present; Funded Consumer Liaison, National Association of Insurance Commissioners, 2004; Adjunct Scholar, the Cato Institute, 2002-2009; Shadow Insurance Regulation Committee, 1999-2000; Shadow Financial Regulatory Committee, 1998-2005; ABA Antitrust Section Insurance Committee, 2003; Working Group of the Griffith Foundation for Insurance Education, 1996-97; Advisory Committee to Insurance Guaranty Fund Task Force, National Association of Insurance Commissioners, 1992-93; Board of Directors, American Risk and Insurance Association, Inc., 1986-93; Staff Advisory Committee on the Reinsurance Industry, U.S. Senator Joseph Biden, 1989; Academic Advisory Board, Center for Research on Risk and Insurance, University of Pennsylvania, 1985-88; S. S. Huebner Foundation for Insurance Education, Administrative Board, 1985-1988; Corroon & Black National Risk Management Panel, 1986-1989

Academic Associations: American Risk and Insurance Association (Board Member, 1986-93; Chair, Journal Awards Committee, 1987; Vice President, 1990; Annual Meeting Program Chair, 1990; Chair, New Editor Search Committee, 1991; President-Elect, 1991; President, 1992; Chair, Nominations Committee, 1993; Immediate Past President, 1993), Risk Theory Society (Secretary, 1991; President, 1992; Past President, 1993)