

The U.S. House of Representatives
Committee on the Judiciary
“Executive Overreach: The HHS Mandate Versus Religious Liberty.”
February 28, 2012
Testimony of Jeanne Monahan, M.T.S.
Director of the Center for Human Dignity, Family Research Council

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Mr. Chairman and honorable members of the committee, thank you for the opportunity to testify before you today about the most critical issue of religious liberty facing our country.

My name is Jeanne Monahan. I work at the Family Research Council, a Christian public policy organization that since 1983 has promoted and defended human life and religious freedom in the United States. We represent more than 1.5 million people from Evangelical, Catholic, and other Christian denominations around the country. I speak today as a representative of Americans, particularly, American women, who are opposed to the President's contraceptive mandate and its profound discrimination against people of faith. Fundamentally, we believe that the contraceptive mandate violates religious freedom and undermines conscience rights protections that all Americans have enjoyed until now.

Background. In December 2009, Senator Barbara Mikulski's amendment on women's preventive services with no cost-sharing was adopted into the healthcare bill. The Affordable Care Act which became law in March 23, 2010, was followed in August 2010 by the Department of Health and Human Services (HHS) tasking to the Institute of Medicine (IOM) to study and make recommendations on specific women's preventive services to be included with no cost-sharing for patients. The IOM held three public meetings on November 16, 2010 and January 12, 2011 and March 9, 2011. The advising committee was composed of 17 members, most of whom had specialty backgrounds in the area of reproductive health. Invited presenters included representatives of the Planned Parenthood Federation of America, the Guttmacher Institute, the National Women's Law Center, National Women's Health Network, and others. No pro-life or religious liberty scholars, doctors, or public health experts were invited to make formal presentations.

Separate to the invited formal presentations during each meeting was opportunity for public comment. During the public comment period in each meeting the topic receiving the greatest attention was contraception coverage. I was among many pro-life attendees at each of the IOM committee meetings. Among my colleagues from the pro-life movement were medical doctors, lawyers, nurses, and health insurance providers, most of whom provided remarks during the public comment period. Most frequently opponents of a contraceptive mandate discussed the inclusion of abortion inducing drugs and devices.

In July 2011 the committee issued its report. It recommended coverage of the full range of FDA-approved contraceptives. The report did not include or reference any research related to abortion-inducing drugs presented in the public comment period, which, as noted above, were provided at each meeting by a variety of participants.

On August 1, 2011 HHS revised the general preventive services interim final rule, indicating that the Health Resources Services Administration (HRSA) could exempt a narrow group of

religious employers. The HRSA guidance, which is binding, included the full range of FDA-approved contraceptives as a mandatory preventative service for women in all health plans.

FRC is not opposed to many of the IOM recommended services, including domestic violence screenings, gestational diabetes and breast-cancer screenings. However, on behalf of millions of people of faith, FRC is strongly opposed to any person or institution being forced to provide coverage for FDA-approved contraceptives and sterilizations because some of these can function as abortifacients.

Based on the HHS rule issued August 1, 2011 the vast majority of faith-based organizations do not meet the narrow government criteria for a religious organization exemption, namely, employing only members of its religion, serving primarily its own members, and having as its primary purpose the “inculcation” of religious values. Schools, homeless shelters, hospitals, and other such faith-based organizations are not religious enough to be exempt. In the words of Rabbi Soloveichik, Director of the Straus Center for Torah and Western Thought Yeshiva University and Associate Rabbi for the Congregation Kehilath Jeshurun, “[T]he administration implicitly assumes that those who employ or help others of a different religion are no longer acting in a religious capacity, and as such are not entitled to the protection of the First Amendment.”¹

Following HHS’ announcement in August the Department received over 200,000² comments from the public on the contraceptive mandate. In a matter of days our own constituents filed over 15,000 comments and similarly the US Conference of Catholic Bishops (USCCB) reported that their constituents filed over 60,000 comments in protest.

Despite this groundswell of disagreement, on January 20, 2012 the Administration issued a press release announcing the government would grant a year’s delay so that religious organizations not exempted could determine how to violate their consciences. The understandable uproar across the country led to a February 10, 2012 announcement by President Obama of a promised “accommodation” requiring that religious employer’s health insurance companies cover the costs of contraceptives and abortifacients rather than the employers. However, no corresponding written changes were made by law or regulation.

On the same day the government issued the final regulation, again restating only the narrow religious exemption. It also re-issued binding guidance that reiterated the contraceptive mandate, with a promise of a future accounting procedure that would be issued with regard to the accommodation. However, should an accounting procedure be issued in future regulations, religious employers will still be forced to pay insurers who would in turn provide their employees the services to which they have religious objections. This is no accommodation. Religious employers would still under this scheme be violating their conscience by virtue of government fiat.

¹ House Oversight and Governance Committee Hearing, “Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?” (February 16, 2012) (http://oversight.house.gov/images/stories/Testimony/2-16-12_Full_HC_Mandate_Soloveichik.pdf, p. 3)

²Department of Health and Human Services, “Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act” (February 10, 2012) (http://cciio.cms.gov/resources/files/Files2/02102012/psrule_508.pdf, p. 6)

Response from religious people. What do religious people, those who will carry the burden, have to say about this mandate? As of today, most Catholic Bishops within the U.S. have stated that they will not comply. Yet this is not exclusively a Catholic issue. Recently 2,500 Evangelical church leaders signed FRC's letter in opposition sent to President Obama. The National Association of Evangelicals and the Southern Baptist Convention have also expressed their opposition.

Religious women are also speaking out. In a letter to the President and members of Congress recently signed by thousands of women of 18 different faiths and representing doctors, nurses, lawyers, teachers, mothers, community care workers, business owners, scholars and more women voiced their ardent opposition to the mandate.

The letter included these observations:

“We listened to prominent women purport to speak for us. We watched them duck the fundamental religious-liberty issues at stake. No one speaks for all women on these issues. Those who purport to do so are simply attempting to deflect attention from the serious religious liberty issues at stake. We call on President Obama, Health and Human Services Secretary Kathleen Sebelius, and our representatives in Congress to respect religious voices, to respect religious liberty, and to allow religious institutions and individuals to continue to provide witness to their faiths in all their fullness.”³

It is not acceptable for the government to force religious people to violate their beliefs by compelling their participation in insurance plans that provide services to which they fundamentally object. Many religious believers oppose this narrow exemption for religious churches as well. Not all oppose contraceptives, but many do. Most strongly oppose abortifacient drugs and devices, and there is a strong consensus objecting to the way this rule purports to redefine religion and religious belief.

Abortion-inducing drugs. Drugs and devices that destroy, rather than prevent life, are included in this mandate. For example, in the list of drugs to be provided with no cost-sharing are those categorized as emergency contraceptives (EC). The first of these drugs is Levonorgestral, or Plan B. Plan B possesses a number of mechanisms of action which can prevent a newly formed embryo from implanting in the uterine wall. One extensive review of the available medical literature on Levonorgestral revealed as many as seven mechanisms of action that potentially could prevent implantation of an embryo.⁴ In another literature review of the mechanisms of action of Levonorgestral, the authors concluded, “The evidence to date supports the contention that use of EC does not always inhibit ovulation even if used in the preovulatory phase, and that it may unfavorably alter the endometrial

³Helen Alvare and Kim Daniels, “Here We Are: Women Who Stand in Favor of Religious Liberty” National Review Online (February 21, 2012) (<http://www.nationalreview.com/articles/291590/here-we-are-helen-m-alvare>)

⁴ H. Croxatto, et al., “Mechanism of Action of Hormonal Preparations Used for Emergency Contraception: a Review of the Literature,” *Contraception* 63 (2001): 111.

lining regardless of when in the cycle it is used, with the effect persisting for days.”⁵ Plan B’s labeling information also admits this scientific reality. “[Plan B] may inhibit implantation (by altering the endometrium)”⁶.

The second problematic FDA-approved drug covered by the mandate is ulipristal acetate, marketed as Ella[®] by Watson Pharmaceuticals. Including Ella in the mandatory category of “preventive care service for women” means that HHS is requiring each health insurance plan to cover a drug which possesses the ability to kill an implanted embryo. The demise of an embryo post-implantation is widely agreed by all, even those who define pregnancy at implantation, to constitute an abortion. The FDA approved Ella under the label of an “emergency contraceptive,” but Ella is chemically and functionally similar to the FDA-approved abortifacient, RU-486.⁷ Even Ella’s label states that the drug is contra-indicated for pregnancy.⁸

A recent article published in *Annals of Pharmacotherapy* stated “[t]he mechanism of action of ulipristal in human ovarian and endometrial tissue is identical to that of its parent compound, mifepristone.”⁹ Numerous other research studies confirm ulipristal’s abortifacient mechanism of action.¹⁰ In one such study involving ulipristal’s action in macaques (monkeys), four out of five fetuses were aborted.¹¹

In paperwork filed for the approval of ulipristal in Europe, the European Medicines Agency noted that “Ulipristal, mifepristone and lilopristone were approximately equipotent at the

⁵ C. Kahlenborn, et al., “Postfertilization Effect of Hormonal Emergency Contraception,” *Annals of Pharmacotherapy* (2002): 468.

⁶ U.S. Department of Health and Human Services Food and Drug Administration, “Plan B One Step Labeling Information” (July 2009): p. 4 http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/0219981bl.pdf.

⁷ RU-486 (mifepristone; Mifeprex[®]) was approved in 2000 by the FDA as an “abortifacient.”

⁸ U.S. Department of Health and Human Services Food and Drug Administration, “Ella Labeling Information” (August 2010): p.1 (http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s0001bl.pdf).

⁹ D. Harrison and J. Mitroka, “Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health,” *Annals of Pharmacotherapy* 45 (Jan. 2011): 115-9.

¹⁰ Reel et al., “Antioviulatory and Postcoital Antifertility Activity of the Antiprogestin CDB-2914 When Administered as Single, Multiple, or Continuous Doses to Rats,” 58 *Contraception* (1998): 129-136, p. 129; VandeVoort et al., “Effects of Progesterone Receptor Blockers on Human Granulosa-Luteal Cell Culture Secretion of Progesterone, Estradiol, and Relaxin,” 62 *Biology of Reproduction* (2000): 200-205, 200. In this article, ulipristal is referred to as “HRP-2000,” Hild et al., “CDB-2914: Anti-progestational/antiglucocorticoid Profile and Post-coital Anti-fertility Activity in Rats and Rabbits,” 15 *Human Reproduction* (2000): 822-829, 824; G. Teutsch and D. Philibert, “History and Perspectives of Antiprogestins from the Chemist’s Point of View,” 9 *Human Reproduction* (1994)(suppl 1):12-31; B. Attardi, J. Burgenson, S. Hild, and J. Reel, “In vitro Antiprogestational/Antiglucocorticoid Activity and Progesterin and Glucocorticoid Receptor Binding of the Putative Metabolites and Synthetic Derivatives of CDB-2914, CDB-4124, and mifepristone,” *Journal of Steroid Biochemistry and Molecular Biology* 88 (2004): 277-88.

¹¹ A.F. Tarantal, A.G. Hendrickx, S.A. Matlin, et. al., “Effects of Two Antiprogestins on Early Pregnancy in the Long-tailed Macaque (*Macaca fascicularis*),” 54 *Contraception* 1996: 107-15; European Medicines Agency, “CHMP Assessment Report for EllaOne,” (Doc.Ref.: EMEA/261787/2009).

dose levels of 10 and 30 mg/day in terminating pregnancies in guinea-pigs...”¹² The authors of the *Annals* article noted: “[E]xisting studies in animals are instructive in terms of the potential abortive effects of the drug in humans.”¹³ Their analysis led them to conclude “it can be reasonably expected that the prescribed dose of 30 mg of ulipristal will have an abortive effect on early pregnancy in humans.”¹⁴ Thirty milligrams is the precise dose of ulipristal now provided in a single package of Ella when purchased as emergency contraceptive in the United States.

The IOM report ignored such scientific research and analysis. Yet many Americans are deeply troubled by the inclusion of these drugs on the mandatory coverage list. Those who oppose their inclusion on religious and moral grounds should not be forced to participate in and cooperate with their coverage in insurance plans. The government should not force people of faith to violate their religious beliefs concerning drugs they reasonably view as destroying human life.

Many Americans believe that drugs that destroy embryos are wrong regardless of FDA classification. It is a scientifically valid belief that conception occurs at fertilization and that pregnancy begins with fertilization and not with implantation. This analysis is supported by a recent survey of the four American medical dictionaries showing that three of the four back this position.¹⁵ Moreover, pregnancy is not a disease. While diseases or complications *related* to pregnancy should be treated, pregnancy itself is not a disease or illness. Yet even if there is disagreement with the beliefs of religious Americans who oppose drugs that can destroy embryos before or after implantation, it is not the proper role of the government to force them to violate their religious beliefs.

Conscience and religious protection violations. The HHS contraceptive mandate violates the spirit and, in one cases, the letter of long-standing federal conscience laws meant to protect people and groups from government discrimination in health care. In the past 35 years, Congress has passed a number of laws (notably, the Church Amendments¹⁶ and the Hyde-Weldon Amendment¹⁷) related to protecting the conscience rights of healthcare workers from government discrimination with regard to abortion or any service in a federally funded or administered program. These laws forbid discrimination in such programs. The HHS contraceptive mandate extends government discrimination beyond these laws’ protections by ordering insurance coverage in the private market in such a way as to violate the consciences of insurers, providers, and plan participants who have moral or religious objections. To the extent the HHS mandate includes Ella, we believe it violates the

¹² European Medicines Agency, “CHMP Assessment Report for EllaOne,” (Doc.Ref.: EMEA/261787/2009): p. 10.

¹³ Harrison and Mitroka, *supra*.

¹⁴ *Ibid*.

¹⁵ Christopher M. Gacek, “Conceiving ‘Pregnancy’: U.S. Medical Dictionaries and Their Definitions of ‘Conception’ and ‘Pregnancy,’” *National Catholic Bioethics Quarterly* (Autumn 2009): 542-557.

¹⁶ 42 U.S.C. § 300a-7.

¹⁷ Hyde-Weldon is currently contained in Section 508(d) of Division D of the Consolidated Appropriations Act, 2010 (P.L. 111-117), 123 Stat. 3280 (2009) which was renewed through the Department of Defense and Full Year Continuing Appropriations Act of 2011 (P.L. 112-10).

Hyde/Weldon ban on using federal funds to discriminate against health care entities that object to “abortion”.

The HHS contraceptive mandate also impinges upon a person’s exercise of his or her religion. In 1993, Congress enacted the Religious Freedom Restoration Act (“RFRA”)¹⁸ which holds a law or regulation that imposes a “substantial burden” on a person’s free exercise of religion to be allowed only when the government can demonstrate “that application of the burden” furthers “a compelling governmental interest.”¹⁹ In a related hearing on this mandate Bishop William Lori was asked if he believed that the government had a “compelling interest” sufficient to warrant a contraceptive mandate that will burden Catholic or others’ religious beliefs. Bishop Lori responded that if the government felt they had a “compelling interest” to burden religious liberty, it would not have provided for any kind of religious exemption. As Bishop Lori pointed out, the mandate and exemption each is arbitrary in that it is the government that decides who is and who is not religious.

As Rabbi Soloveichik testified on February 16th before Congress: “First: by carving out an exemption, however narrow, the administration implicitly acknowledges that forcing employers to purchase these insurance policies may involve a violation of religious freedom. Second, the administration implicitly assumes that those who employ or help others of a different religion are no longer acting in a religious capacity, and as such are not entitled to the protection of the First Amendment. This betrays a complete misunderstanding of the nature of religion.”

This is a religious liberty issue. The Administration’s imposition of its will on religious organizations is an act of gross discrimination against people of faith. Even those who are not opposed to contraceptives generally have spoken against the Government’s “accommodation”. Debra Saunders writes in the *San Francisco Chronicle*, “As a believer in birth control and family planning, I suppose I should be thrilled. Except that President Obama just trampled on the first part of the First Amendment, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’” She eloquently refutes the argument made by some that the HHS mandate guarantees “choice”. Ms. Saunders writes “But there is a ‘choice’ problem. In a raw exercise of power, the Obama administration has decreed that religious organizations must reject their deeply held beliefs and hand out FDA-approved contraceptives - including the morning-after pill...Now it turns out, Americans of all religious persuasions are free to choose, as long as they choose to agree with Obama.”²⁰

Conclusion. The contraceptive mandate is an unprecedented directive which deeply conflicts with religious and conscience freedom protections the American people currently receive. In our democratic society governed by the U.S. Constitution, it is not the role of this Administration to dictate what does or does not violate another person’s conscience on

¹⁸ 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq.*

¹⁹ 42 U.S.C. § 2000bb-1(b).

²⁰ Debra Saunders, “Obama imposes will in contraception compromise,” *San Francisco Chronicle* (February 15, 2012) (<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/14/ED6D1N70AQ.DTL>)

matters as critical as life and death. It is the job of the government to defend those rights, not trample them. This Administration's act of discrimination against people of faith, and women of faith, must be stopped. As CS Lewis said, you can be sincere, and sincerely wrong. We don't question the President's motives, but we think he is wrong. You may disagree with me, and think that I and the thousands of women like me are wrong. Fine, but do not discriminate against us and force us to violate our consciences. We urge you not to allow this President to discriminate against those with moral or religious objections to this mandate coverage of contraceptives, sterilization services, and abortifacients.