



Father Steven E. Boes
National Executive Director

September 28, 2011

Submitted Electronically

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

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

Dear Sir or Madam,

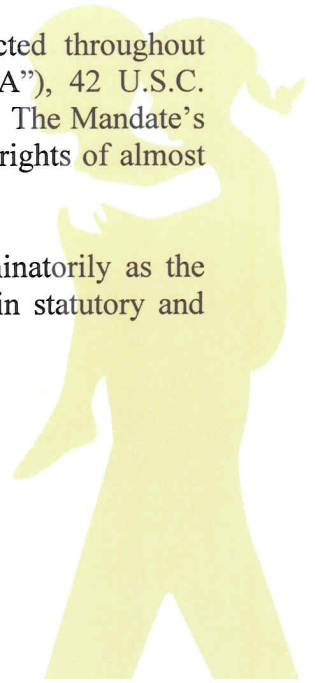
Father Flanagan's Boys' Home (commonly referred to as Boys Town) is gravely concerned about the illegal violations of religious and expressive freedoms that will be wrought by the interim final rule on preventive services, 76 Fed. Reg. 46621 (Aug. 3, 2011). That rule's mandate (hereinafter "the Mandate") that all health plans cover all FDA-approved "contraceptive methods" (including but not limited to drugs that can cause the demise of embryos both after and before uterine implantation), sterilization procedures, and associated patient education and counseling poses a direct violation of our rights and the rights of other entities and individuals not to participate in such activities to which they have a religious objection.

The Mandate blatantly violates the right to religious freedom protected throughout federal law, including under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb-1(c), and the First and Fourteenth Amendments to the U.S. Constitution. The Mandate's "religious exemption" is so narrow and limited that it leaves the constitutional rights of almost all religious groups unprotected.

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

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Saving Children, Healing Families®



Regardless of the exemption's exact scope, it would not save the Mandate from its illegal violation of the rights of any entity or individual that is not exempted.

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

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

Father Flanagan's Boys' Home has been a national leader in the care and treatment of children since its founding more than 90 years ago by Father Edward Flanagan.

As one of the largest nonprofit child and family care organizations in the country, Boys Town provides compassionate, research-proven treatment for behavioral, emotional, and physical problems. With sites in 11 states and the District of Columbia, Boys Town's services and programs touch the lives of 1.6 million people each year. That includes direct care to nearly 121,000 children and families from across the U.S.

Father Flanagan's Boys' Home is all about children.

We have been known for decades as the place that provides children with second chances in life and we just as firmly believe that every child deserves his or her first chance at life.

The work of our founder, Father Edward Flanagan – saving children and healing families – flourishes today because Boys Town and its hundreds of thousands of supporters around the world believe that every child, born and unborn, deserves to be valued and loved, and to experience a life of happiness and hope for a bright future.

Our primary purpose has been, and always will be, to keep children safe and free from all harm while helping them grow to be productive citizens. As an organization founded on Boys Town values that promote the sanctity of life, to be required or forced to do anything that hurts children would violate everything we stand for and the cause of the children we champion.

One way Father Flanagan’s Boys’ Home expresses its values is by the use of the following branding logo and motto:



The Mandate violates our free speech rights. We communicate on every letter we send, on our website, and on a myriad of books, documents, and other materials our motto, “*Saving Children, Healing Families.*” But, if this Mandate is enforced, we will be forced to provide drugs and education and training (speech) about drugs that *Kill Children and Wound Families.* That is a violation of our moral code, our conscience, and our constitutional rights. As such, enforcement of the Mandate against us and those like us is tyranny, not ordered liberty.

The Mandate Is Illegal

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

- *The Mandate Violates RFRA*

The Mandate is an unquestionable violation of the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb-1(c). That federal statute authorizes judicial relief against the federal government if it “substantially burden[s] a person’s exercise of religion,” unless “it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” To the extent that the Mandate imposes a burden on the religious or moral objections of *anyone*, it is illegal and enjoined under RFRA.

The Mandate, particularly in operation with PPACA, imposes burdens that violate RFRA upon large numbers of persons and entire categories of entities. Individuals are required to enroll in health insurance. Employers are required to provide or contribute to health insurance. Some state laws require entities to provide health insurance coverage even beyond employee situations, such as colleges providing coverage to their students, while some entities provide such coverage due to their own firmly held religious duty to do so. And religious insurance providers cannot operate without providing insurance. All such plans, under the Mandate, must include religiously and morally objectionable items that substantially burden the beliefs of providers, issuers, payers, and the insured.

The only exceptions to this requirement are plans “grandfathered” under PPACA, or employers who meet the Mandate’s emaciated “religious exemption.” But whether an

employer's plan is grandfathered is now out of the employer's hands. An entity whose employee plan is not presently grandfathered cannot now obtain that status. And PPACA lists a host of plan changes that trigger the loss of grandfathered status, and that will inevitably occur to nearly all plans. The lack of grandfathered status results in the full force of the Mandate's religious freedom violations.

Even if our health care plan manages to retain its grandfathered status, our constitutional rights will still be violated if we lose the right to switch to a different plan without forfeiting our right to refuse to engage in conduct and speech that violates our religious and expressive liberties guaranteed by the Constitution.

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

Second, because the exemption is merely permissive—providing that HRSA "may," *id.*, (or, one supposes, might not) exempt such entities—any religious entity's hope for an exemption appears to be subject to the whim of HRSA bureaucrats. This poses a serious threat to religious entities, since the interim final rule's summary indicates that it was rushed to finalization prior to the notice and comment period due precisely to HHS's belief that an urgent need exists to require entities to cover "contraception," abortifacients, sterilization, and information about the same. *Id.* at 46624. This inherently threatens the prospects of any entity that is subject to the discretion of HRSA in deciding whether or not HHS should to break the laws described below and mandate that entities cover practices to which they have a religious or moral objection. Moreover, the rule's summary also indicates that its religious "exemption" is intended to *merely* cover "the unique relationship between a house of worship and its employees in ministerial positions." *Id.* at 46623. This interpretation renders the already tiny "exemption" so microscopic as to impose the Mandate even on churches themselves, with regards to employees not deemed "ministerial."

Third, considering the heart of the Mandate's definition of a "religious employer," it is exceedingly narrow. It defines an entity as not "religious" if it does not (1) have as its purpose the inculcation of religious values; *or* (2) if it does not primarily hire persons who share the organization's religious tenets; *or* (3) if it does not primarily serve persons who share those tenets; *or* (4) it is not a nonprofit as described in sections 6033(a)(1) and section 6033(a)(3)(A)(i)

or (iii) of the Internal Revenue Code. *Id.* at 46626. Fail any one of these elements, and an entity fails the entire test. Taking the last requirement first, it appears to define as religious employers *only* those entities that are themselves “churches, their integrated auxiliaries, and conventions or associations of churches,” or “the exclusively religious activities of any religious order.” Many religious entities, not to mention vast other kinds of religious employers, are not themselves churches or religious orders, or the “exclusive” or “integrated” activities thereof, and so are categorically omitted from this exemption and subject to the full illegal force of the Mandate. Further, many religious entities do not limit the persons they serve or hire strictly to members of their own faith, even if service and hiring of such persons is an important focus of their work. The Mandate does not define “religious tenets” so as to specify to what extent persons served or hired must “share” them. The Mandate is unclear and, as a result, it is not clear how HRSA may interpret the statement that “the” purpose of a qualifying entity must be “the inculcation of religious values.” It is not clear how catechetical and heavy-handed the “inculcation” must be in the eyes of HRSA to qualify for the exception from the Mandate. Many religious entities follow their faith by serving others, whether or not the others are members of their same religion. Others promote their faith by their good example.

Thus the Mandate’s “religious exemption” does not apply to most if not all religious employers.

As a result of imposing its Mandate on so many entities and individuals, it violates RFRA. The Mandate cannot possibly satisfy the “strict scrutiny” test imposed by RFRA. The government has no compelling interest in the wholly unprecedented action of imposing a national mandate that all health plans cover abortifacients, contraception, sterilization, and information thereon. Congress did not even propose that such an interest exists, because it did not require HHS to mandate these contraception-related items—it allowed preventive care to be defined to omit them all. Nor is there any compelling interest in failing to exempt religious and moral objectors. Moreover, there is obviously a less restrictive alternative to burdening any objecting employer, insurer, entity, or individual’s religious objection to these practices: the federal government could, if the political will existed, simply provide women with these things itself, rather than forcing objecting entities and persons to do so.¹ Furthermore, the federal government cannot possibly show that the women who get health insurance from religious entities could not otherwise obtain contraception apart from the application of this Mandate to religious and moral objectors. As a result, the Mandate is blatantly illegal under federal statute and is subject to injunctive and other appropriate relief in federal court.

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

The Mandate is also a violation of a variety of protections guaranteed by the First and Fourteenth Amendments of the United States Constitution. Just a few of those ways are mentioned here. The Mandate engages in illegal religious discrimination in violation of the free exercise and establishment clauses of the First Amendment, because it is inherently targeted

¹ Of course, no such political will exists, which is why the Departments have attempted to impose this illegal Mandate by regulation rather than by statute. Since 1997, at least 21 bills have been introduced in Congress to mandate prescription contraceptive coverage in private health plans. No committee or subcommittee of Congress has ever reported out any of these bills.

against employers who do not offer such coverage on religious grounds. The Mandate's religious employer "exemption" was taken from the ACLU's draft of a similar provision in California that was intended to be so narrow as to not include organizations such as Catholic entities.² The Mandate's actual effect in overwhelmingly harming objecting entities betrays its discriminatory character. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532, 535 (1993).

As noted above, we are publically committed to "Saving Children," not killing them. Providing abortifacient drugs, contraceptives, sterilization procedures, and education and training on those subjects would violate our religious beliefs, our moral code, and our conscience. It would also violate our rights to free expression because we exist, in part, to instill our values in order to strengthen body, mind, and spirit. The Mandate demands conduct and speech that undermines our organization's Mission and Values and violates our constitutional rights.

Enforcement of the Mandate would lead an absurd and outrageous result: organizations like National Right to Life, Catholic Charities, religious colleges and universities, and religious insurance companies incorporated to insure churches and religious orders would be forced to violate their religious beliefs and free speech rights by, among other things, providing abortifacient drugs and related government mandated education and counseling.

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

HRSA's discretion over the exemptions for specific entities renders the Mandate unconstitutionally vague under the Fourteenth Amendment because it gives unfettered discretion to HRSA and thereby risks discriminatory enforcement. And by compelling the coverage of education, counseling, and information about and in favor of the Mandate's objectionable practices, the Mandate violates the freedom of speech, religion, and expressive association of objecting entities and individuals, as protected by the First Amendment.

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

² ACLU Press Release, "ACLU Applauds CA Supreme Court Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage" (Mar. 1, 2004) ("The ACLU crafted the statutory exemption [at issue]...")(available at <http://www.aclu.org/reproductivefreedom/aclu-applauds-ca-supreme-court-decision-promoting-womens-health-and-ending-gend>).

The Mandate also violates the Administrative Procedures Act. 5 U.S.C. § 706 authorizes a court to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” As described above, the Mandate is not in accordance with law. Furthermore, the Mandate violates the APA for giving the public no prior notice and opportunity to comment *before* its finalization, and for not—despite the Mandate’s claim—having a “public interest” basis for doing so. 76 Fed. Reg. at 46624.

In addition, because the Mandate includes drugs that cause early abortions, including after an embryo’s uterine implantation, it violates various federal laws against requiring the same. The Mandate includes whatever drug or device the FDA has chosen or will choose in the future to name as a “contraceptive,” regardless of whether it actually and merely prevents conception. Already the FDA has approved in this category an abortion drug, ulipristal (HRP 2000, or Ella), which can cause abortions after an embryo implants in the womb (and therefore is a first trimester abortion by any definition) and is a close analogue to the abortion drug RU-486 (mifepristone).³ Moreover, a variety of “contraceptives” function in part to prevent an already conceived embryo from implanting in the womb, including but not limited to IUDs. These abortifacient effects are not contraceptive at all, despite the attempt by pro-abortion-choice advocates to unscientifically change the definition of when a human life begins from conception-fertilization to implantation.

By compelling coverage of present and future abortion and abortifacient drugs, the Mandate violates: the Weldon Amendment prohibiting any federal program from requiring entities to provide coverage for abortion⁴; PPACA § 1303(b)(1)(A) prohibiting the preventive services Mandate from requiring coverage of abortion; PPACA § 1303(c)(1) providing that PPACA does not preempt state laws regarding abortion coverage, and several of which restrict abortion coverage in various health plans; and President Obama’s public assurances in conjunction with Executive Order 13535, 75 Fed. Reg. 15599, that PPACA would not be construed so as to require coverage of abortion.

Flying in the face of all these provisions, the Mandate has written the FDA a blank check to define any abortion drug as a “contraceptive,” such as it has already done with “Ella,” and thereby mandate its coverage in all health insurance plans.

- *The Mandate goes so far beyond what was intended by Congress and the President that it Violates PPACA and other Federal laws and breaks the promises made by Congress and the President*

Besides violating the constitutional rights of those with religious or moral objections, the Mandate represents an egregious overreach of the stated intent of the Congress and the President. The PPACA does not require private group health plans and health insurance issuers to cover elective abortions or abortifacients as part of “evidence” informed preventive care and

³ See A. Tarantal, et al., “Effects of Two Antiprogestins on Early Pregnancy in the Long-Tailed Macaque (*Macaca fascicularis*),” 54 *Contraception* 107-115 (1996), at 114 (“studies with mifepristone and HRP 2000 have shown both antiprogestins to have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation”); G. Bernagiano & H. von Hertzen, “Towards more effective emergency contraception?,” 375 *The Lancet* 527-28 (Feb. 13, 2010), at 527 (“Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion”).

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

screening.”³ In fact, when Section 2713(a)(4), which requires private insurance plans to cover certain preventive services for women, was added to the PPACA by amendment on December 3, 2009, Senator Barbara Mikulski, who offered the amendment, said during debate in the Senate, “This amendment does not cover abortion.... There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.”

The mandate would contradict the Administration’s pledge that under PPACA Americans who like their current coverage will be able to keep it because now all plans and insurers will be required to add the Mandate to their plans.

The Mandate reached for beyond the intent of Congress as expressed in the Church Amendment, which has been in force since 1973 and protects conscientious objection to abortion and sterilization where federal funds are involved.

Congress has required a meaningful “conscience clause” every year when mandating contraceptive coverage in the District of Columbia this way: “it is the intent of Congress that any legislation enacted on such issues should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.”

The Federal Employees Health Benefits Program is the only federal program in existances that requires a limited number of health plans to cover contraception. Every year since 1999, Congress has stipulated that it not apply to “any existing or future plan, if the carrier for the plan objects to such coverage on the basis of religious beliefs.”

President Obama promised before signing the PPACA that, once passed, “federal conscience laws will remain in place.”

President Obama’s Executive Order dated March 24, 2010 included this language: “Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. §300a-7, and the Weldon Amendment, Pub. L. No. 111-8, §508(d)(1) (2009)) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.”

The PPACA also explicitly prohibits elective abortion coverage as part of its “essential health benefits.”

A Mandate which defining “preventive care,” a group of services that must be covered by all group health plans and health insurance issuers, to include contraceptives, sterilizations, and drugs or devices that induce the expulsion of a human embryo before or after implantation go far beyond the letter of PPACA, violate other laws passed by Congress, and therefore is a dramatic overreach on the part of HHS that goes far beyond the boundaries set by Congress.

The intent of Congress and the President is clear: government must respect the rights of conscience of all citizens by allowing organizations and individuals to participate in our system of health care without violating their moral or religious convictions. No federal law has requires

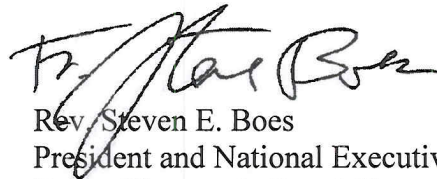
private health plans to provide coverage of contraception and sterilization. In fact, the Mandate violates a number of Federal laws and the promises to the American People by members of Congress and the President. HHS has gone too far with the Mandate.

The Final Rule Must Exempt All Religious or Moral Objectors of Any Status

As a result of the requirements of RFRA, the U.S. Constitution, and other laws discussed above, and the Mandate’s violations of the same, the Departments of HHS, Labor, and the Treasury should rescind the Mandate altogether. At the very least they are legally required to

- (1) omit all drugs that can cause the demise of conceived human embryos, including but not limited to “Ella,” from the scope of what the Mandate requires for anyone; and
- (2) provide a blanket, non-discretionary exemption from the Mandate for any employer, issuer, payer, individual, or entity who in his or its own determination has any religious or moral objection to providing, issuing, enrolling in, participating in, paying for, or otherwise facilitating or cooperating in coverage of any required practice or of any required provision of information.

Sincerely,



Rev. Steven E. Boes
President and National Executive Director
Father Flanagan’s Boys’ Home