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ONE HUNDRED THIRTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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July 12, 2013

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, DC 20530

Dear Attorney General Holder,

On June 28, 2013, the Department of Health and Human Services (HHS) issued a final rule that revises the religious employer exception to the preventative services coverage mandate under the Patient Protection and Affordable Care Act (PPACA).<sup>1</sup> Like the previous revisions HHS has attempted, the extremely narrow religious employer exemption contained in this final rule continues to violate the protections afforded religious believers under both the First Amendment and the Religious Freedom Restoration Act (RFRA).

In general, the First Amendment's religious clauses and RFRA prohibit the federal government from infringing upon Americans' sincerely held religious beliefs. Specifically, the Free Exercise Clause and RFRA proscribe federal government action that imposes a "substantial[] burden [on] a person's exercise of religion" unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>2</sup>

The HHS mandate substantially burdens the free exercise rights of religious believers by requiring them, on pain of substantial financial penalties, to provide and pay for employee health insurance plans that include coverage for contraception, sterilization, and related medical services in violation of their religion's tenants. This mandate fails to satisfy strict scrutiny because the government's interest in making contraception and sterilization available on a "cost-free" basis is not sufficiently strong to qualify as compelling. Indeed, under PPACA many health plans are either grandfathered or exempt from the mandate, evidencing the non-compelling nature of the requirement. Moreover, coercing religious objectors into providing this

<sup>1</sup> 78 Fed. Reg. 7348 (Feb. 1, 2013).

<sup>2</sup> 42 U.S.C. § 2000bb-1(a), (b); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same).

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coverage is not the least restrictive means of achieving the government's objective, as the government has other methods of furthering its interest in access to contraception that do not impose a substantial burden on religious liberty.

In order to comply with the requirements of the First Amendment and RFRA, it would seem that HHS has a clear choice: remove the religiously objectionable preventative services from the mandate or provide a religious employer exception that respects the sincerely held religious beliefs of religious employers. Thus far HHS has decided to avoid this choice and instead provide a false religious accommodation that violates the constitutionally and statutorily protected conscience rights of employers, provoking, as of the date of this letter, 61 legal challenges.<sup>3</sup>

The June 28, 2013, "accommodation" continues this pattern of unconstitutionality. Although many religious employers will no longer be required to pay directly for contraceptive coverage, they are forced to provide their employees with insurance that includes such coverage. As one commentator has pointed out, this is nothing more than "a shell game useful only for those who want to deceive themselves."<sup>4</sup> Religious believers are forced to pretend that they are not facilitating access to contraceptives in violation of their religious beliefs and that contraception is "free." Indeed, when the proposed accommodation was announced last year, the head of the Economics Department at Harvard University explained that the proposal was mere "semantics" and made no functional difference "other than using slightly different words to describe it."<sup>5</sup>

It is striking that while HHS has struggled for more than a year to develop a final rule for the preventative services mandate the Secretary of Health and Human Services has testified before two congressional committees that HHS never requested any analysis of the constitutional and statutory religious freedom issues from the Department of Justice.<sup>6</sup> The Justice Department's Office of Legal Counsel is specifically charged with providing legal advice to all the Executive Branch agencies, especially with regard to legal issues of such importance as the religious freedom the Constitution protects.

Given the significant constitutional and legal questions raised by the need for a religious employer exception, we write to inquire as to the role the Justice Department played in assessing

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<sup>3</sup> Indeed, in at least 20 of these legal challenges, the courts have already granted injunctive relief, meaning the courts have determined that the claims presented will likely succeed on the merits.

<sup>4</sup> Michael Gerson, *Obama's New Contraceptive Rules Try to Fool Catholics*, Wash. Post, Feb. 4, 2013.

<sup>5</sup> Greg Mankiw, *Semantics at the Highest Level*, Greg Mankiw's Blog (Feb. 11, 2012), <http://gregmankiw.blogspot.com/2012/02/semantics-at-highest-level.html>.

<sup>6</sup> *Reviewing the President's Fiscal Year 2013 Budget Proposal for the U.S. Department of Health and Human Services: Hearing Before the H. Comm. on Education and the Workforce*, 112th Cong. 45 (April 26, 2012); *The President's Budget for Fiscal Year 2013: Hearing Before the S. Comm. on Finance*, 112th Cong. (Feb. 15, 2012).

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the legal issues surrounding the latest version of the exception. Specifically, we ask that you respond to the following questions and produce the following materials no later than Friday, July 12, 2013:

1. Did the Department of Justice, including the Attorney General and the Office of Legal Counsel, provide any legal opinions, written or oral, with regard to the revised religious employer exception to the preventative services mandate reflected in the final rules issued on June 28, 2013?
2. Did the Department of Justice, including the Attorney General and the Office of Legal Counsel, provide any legal opinions, written or oral, with regard to the revisions or proposed revision of the religious employer exception to the preventative services mandate that occurred prior to June 28, 2013?
3. If the Department of Justice provided any such legal opinions, please provide:
  - any Office of Legal Counsel opinion, opinion of the Attorney General, or other Justice Department opinion on the religious employer exception or the religious liberty issues presented by the Patient Protection and Affordable Care Act; and
  - any Office of Legal Counsel opinion, opinion of the Attorney General, or other Justice Department opinion that was withdrawn or superseded as a result of advice given on the religious employer mandate.
4. Please provide a copy of any Office of Legal Counsel opinion or opinion of the Attorney General that addresses the application of RFRA to the federal government, including any such opinion relating to the need, or lack thereof, for a religious employer exception.

Sincerely,



Bob Goodlatte  
Chairman



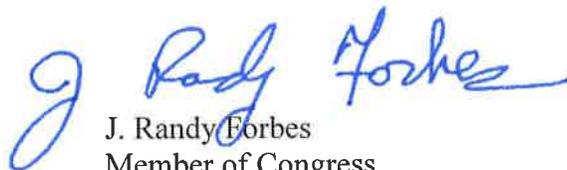
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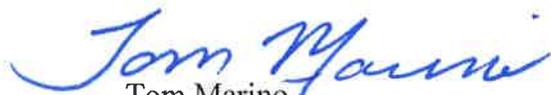
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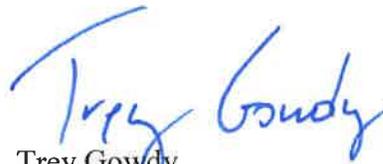
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