

**Testimony of William J. Cox  
President & CEO, The Alliance of Catholic Health Care**

**Before the Energy & Commerce Committee's Subcommittee on Health  
*“Do New Health Law Mandates Threaten Conscience Rights and Access to Care?”***

**Wednesday, November 2, 2011  
2123 Rayburn House Office Building**

Good morning. Mr. Chairman, thank you for convening a hearing on this critically important topic, and for your longstanding leadership defending the right to life and protecting the conscience rights of health care providers. The title of this hearing asks if new health law mandates threaten conscience rights and access to care. The answer to this question is an unequivocal yes; and, if left unaddressed, these mandates will force providers and others of conscience to choose between violating their consciences or no longer providing or paying for health care and other services, and curtailing access to care, particularly for some of the most vulnerable among us.

My name is Bill Cox. For the past 12 years, I've had the privilege of serving as President and CEO of the Alliance of Catholic Health Care. Based in Sacramento, the Alliance represents four hospital systems that operate 54 hospitals and more than 40 nursing homes, hospices, assisted living and other facilities and services throughout the state of California. Catholic providers account for about 16 percent of all California hospitals and provide three quarters of a billion dollars annually in charity care and community benefits.

This proud Catholic legacy of providing health care to California's most vulnerable extends nearly 160 years to the 1854 arrival of eight Sisters of Mercy in San Francisco, who created a safe haven for abandoned women, prostitutes and young girls and provided care to the city's elderly and ill residents. When a cholera epidemic struck San Francisco the following year, the Sisters of Mercy went to work in the county hospital. According to San Francisco's *The San Francisco Daily News* of that time, "The Sisters of Mercy ...did not stop to inquire whether the poor sufferers were Protestant or Catholic, Americans or foreigners, but with the noblest

devotion applied themselves to their relief.”<sup>1</sup> The San Francisco board of supervisors subsequently petitioned the Sisters to operate the first county hospital.<sup>2</sup> Two years later, the Sisters of Mercy founded St. Mary's Hospital. Communities of Catholic sisters have repeated this type of selfless commitment to serve all in need countless times throughout our nation's history and today more than 600 Catholic hospitals serve patients, families and communities across the United States.

## **Health Care Provider Conscience Rights Under Attack**

Recently, the United States Department of Health and Human Services (HHS) turned its back on the contributions of Catholic health care and undid centuries of religious tolerance by adopting an Interim Final Rule on Preventive Health Services, which includes an exceedingly narrow definition of religious employer.

My testimony focuses on the definition of religious employer in HHS's interim final rule. This definition tracks identical language first enacted in a California statute, and was deliberately designed to contravene the religious conduct of religious organizations, such as Catholic hospitals, universities and social services. Specifically, both the California statute and HHS's interim final rule exempt a religious employer only if the employer meets all of the following criteria:

- 1) Its purpose is the inculcation of religious values;
- 2) It primarily hires people who share its religious tenets;
- 3) It primarily serves persons who share its religious tenets; and
- 4) It is a non-profit organization under Internal Revenue Code section 6033(a)(3)(A)(i) or (iii), (i.e., it is a “church” or “integrated auxiliary of a church”).<sup>3</sup>

---

<sup>1</sup> Fialka, John J. *Sisters Catholic Nuns and the Making of America*. Page 85

<sup>2</sup> [http://www.stmarysmedicalcenter.org/Who\\_We\\_Are/History/index.htm](http://www.stmarysmedicalcenter.org/Who_We_Are/History/index.htm)

<sup>3</sup> The legislative record from the California General Assembly clearly establishes that the authors and sponsors of the California religious employer exemption specifically designed it to exclude Catholic religious institutions, especially Catholic hospitals, universities and social service agencies. (*Catholic Charities of Sacramento Inc. v Superior Court* 32 Cal. 4th 527, 541-47 (2004).)

The first thing to be noted about this definition is that had it been operative in 1854 it would not have recognized the health care ministry of the eight Sisters of Mercy in San Francisco as religious: the Sisters of Mercy neither proselytized the cholera victims they cared for, nor did they limit their care to Catholics only.

HHS's definition of religious employer raises a fundamental question: may the government determine what parts of a bona fide religious organization are religious and what parts are secular? And, in particular, may the government make such distinctions in order to infringe the religious freedom of that portion of the organization the government declares to be secular?

Neither the propriety, nor the wisdom of, nor the government's authority to impose a contraceptive mandate on U.S. employers is at issue here. "The question is a very narrow one. May the government impose a mandate on a religiously affiliated employer that requires the employer to pay for contraceptives – in violation of an acknowledged religious tenet – or to redefine what constitutes religious conduct?"<sup>4</sup>

As former California State Supreme Court justice Janice Brown aptly noted, "A strong argument can be made that it was the primacy of religious liberty in the early history of this country, with its acknowledgement of the separate spheres of church and state, that gave rise to our notions of limited government and equal protection – the constitutional precursors of our anti-discrimination laws. '[T]he division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas.'<sup>5</sup>

"Our ability to create a space for religious perspectives is both instrumental and regenerative for democracy. Religious institutions enhance individual autonomy 'by challenging the power of the

---

<sup>4</sup> Dissenting opinion, J. Brown, *Catholic Charities of Sacramento v California*.

<sup>5</sup> McConnell, *Why is Religious Liberty the "First Freedom?"* (2000).

liberal state’<sup>6</sup> and by articulating alternative visions – ‘counter-cultural visions that challenge and push the larger community in ... directions unimagined by prevailing beliefs.’<sup>7</sup> By protecting religious groups from gratuitous state interference, we convey broad benefits on individuals and society. By underestimating the transformative potential of religious organizations, we impoverish our political discourse and imperil the foundations of liberal democracy.”<sup>8</sup>

This is certainly true of Catholic hospitals, which fulfill their religious mission by providing valuable health services not always available in other hospitals. For instance, Catholic hospitals in California are leaders in the provision of palliative care programs that promote quality of life for patients living with serious, chronic or terminal illness – 86 percent of Catholic hospitals have palliative care programs compared to 43 percent of all California hospitals. Other services that are more often found in Catholic hospitals include neonatal intensive care units (NICU), pediatric care beds, maternity care and coronary care units. Furthermore, a recent independent national study by Thompson Reuters found that on eight key measures Catholic-owned systems are “significantly more likely to provide higher quality performance and efficiency to the communities served” than their nonprofit and investor-owned counterparts.<sup>9</sup>

### **HHS’s Definition of Religious Employer is Discriminatory**

The definition of religious employer created in California and now being utilized by HHS did not occur in a vacuum. As the legislative history of the California contraceptive mandate makes clear, the highly flawed definition of religious employer was painstakingly crafted by the American Civil Liberties Union (ACLU) to specifically exclude religious institutional missions like health care providers, universities and social service agencies. In fact, in testimony before a state Senate committee, the head of Planned Parenthood in California at the time went so far as to say that the wording was designed to close the “Catholic gap” when it comes to contraceptive coverage. And in a floor statement, the principal legislative author of the state senate definition of religious employer argued, “59 percent of all Catholic women of childbearing age practice

---

<sup>6</sup> Noonan, *The End of Free Exercise?* (1992) 42 *De Paul L.R.* 567, 579-580.

<sup>7</sup> Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and For* (2004) 49 *Vill. L.Rev.* 77, 156.

<sup>8</sup> J. Brown, Dissenting Opinion, *Catholic Charities of Sacramento v California*.

<sup>9</sup> *Differences in Health System Quality By Ownership Type*, Thomson Reuters, August 2010).

contraception [and] 88 percent of Catholics believe ... that someone who practices artificial birth control can still be a good Catholic, “ and then stated, “I agree with that. I think it’s time to do the *right thing*” (italics added).<sup>10</sup>

### **HHS’s Contraceptive Mandate Is More Radical than California’s**

As bad as the California contraceptive mandate is, it is less onerous than HHS’s mandate, as its reach is limited to employers that provide an outpatient prescription drug benefit, it does not cover sterilizations and it does not preclude a religious employer from opting out of the mandate by self-insuring under *ERISA*. By contrast, HHS is proposing a far more radical approach by requiring that all types of health plans include all FDA-approved contraceptive methods as well as sterilization procedures and related patient "education and counseling." In requiring the coverage of all FDA-approved contraceptive methods, the interim final rule mandates at least one drug that is analogous to RU-486 and can cause an abortion when taken to avoid pregnancy. This specific component of the mandate is in direct violation of longstanding federal conscience law, the Hyde-Weldon amendment, which protects health care providers from discrimination by government entities for refusing to perform, participate in, pay for or refer for abortions. Moreover, the HHS mandate precludes religious employers from opting out of its requirements by self-insuring as *ERISA* plans.

### **HHS’s Contraceptive Mandate is the Most Radical in the Nation**

The HHS proposed rule is not only more radical than California’s; it is the most radical of the 28 state contraceptive mandates.

- Not a single state requires that all plans cover contraceptives. Every state, rather, specifically exempts *ERISA* self-insured plans.
- Only two states require that contraceptives be covered in plans that do not provide prescription drug coverage.
- Only one state requires that sterilizations be covered.

---

<sup>10</sup> Remarks of Senator Speier, Sen. Floor Debate on Assem. Bill No 39 (1999-2000 Reg. Sess.) Sept. 7, 1999, p. 7.

When compared to these 28 state mandates, the facts are clear: The HHS contraceptive mandate is designed to institute the most stringent of mandates – including sterilization and plans that do not offer other prescription coverage –and the narrowest of conscience-rights exemptions. If not corrected, this will create a perfect storm that will violate the religious freedom and right to conscience of an untold number of employers – institutional and individual – and jeopardize access to vital health, education, and social services.

### **Disproportionate Impact on Catholic Institutions**

While many employers of conscience – both religious and others – will be negatively affected by the rule, Catholic institutional ministries, such as hospitals, universities and social services, will suffer disproportionately. These Catholic institutional ministries all share distinct characteristics that include:

- An unqualified commitment to Christian service not calculated to inculcate religious values;
- A commitment to invite all people of goodwill, regardless of their religious beliefs, to serve with them in the operation of these ministries; and
- A commitment to serve all people in need, regardless of race, creed, national origin, or economic status.

A fundamental principle of religious freedom is the right of religious institutions to autonomy in their self-definition and governance. Simply stated, churches and religious institutions have the right to define and govern themselves free from government interference and entanglement. The HHS exemption violates this right by redefining Catholic institutional ministries in a manner that excludes central elements of their faith. HHS simply lacks the constitutional capacity to establish a definition of religious ministry that runs counter to a religious organization’s understanding of it – absent a compelling governmental interest that warrants state interference in a manner narrowly tailored to avoid burdening the exercise of this right. The interim final rule has identified no such compelling interest.

The extremely narrow character of the HHS's definition of religious employer offers Catholic institutional ministries a Hobson's choice: cooperate under governmental compulsion with conduct that is inconsistent with their religious and moral beliefs, or cease functioning altogether. It is particularly ironic that HHS is substantially burdening Catholic institutional ministries because they respectfully avoid inculcating religious beliefs, and compassionately serve persons of all faith traditions and those having no faith tradition at all. It is the latter population that will be the co-victim, along with Catholic ministries, if this rule is left unchanged:

- The single mother seeking to better life for her family by pursuing a GED at Catholic Charities;
- The family who finds itself homeless because of the economic downturn and reliant upon Catholic social services for food and shelter;
- The young child living in a dangerous community who is able to free himself of the shackles of poverty by attending a Catholic school; and
- The poor woman in need of urgent and expensive health care services without ability to pay for them.

As I noted earlier, our members in California alone provided \$765 million – more than three quarters of a billion dollars – in charity and related unreimbursed health care alone in 2007. Each of us should seriously weigh the impact on society that would arise if all of these institutions were forced to abandon their religious missions.

### **Fixing the Problem**

HHS can solve this specific problem immediately by changing its rule to expand the definition of religious employer. I specifically suggest that HHS start by borrowing from the definition of religious employer included in Title 26, Section 414 of the Internal Revenue Code. Additionally, while such a change would address institutional employers, HHS should also amend the rule to ensure that individuals and non-religious employers are similarly protected. On that point, the

Illinois Health Care Right of Conscience Act would be a worthy model because of the broad-based level of conscience protection it provides.

Should HHS decline to make such substantive changes, it is incumbent upon Congress to take appropriate action including, if necessary, measures to prevent the Department from moving forward to implement its discriminatory mandate absent broad and effective conscience protections.

### **Conclusion**

Nearly 160 years ago, the Sisters of Mercy responded with compassion and care when government was unable to tend to the victims of the San Francisco cholera epidemic. Today, it is time for government to honor this noble legacy by strengthening once and for all federal conscience protections so all health care providers today, tomorrow and well into the future can carry out their vocations absent the threat of government discrimination.

Thank you for your time. I look forward to answering questions members of the Committee may have.