
RELIGIOUS LIBERTIES

WHICH RELIGIOUS ORGANIZATIONS COUNT AS RELIGIOUS? THE RELIGIOUS EMPLOYER EXEMPTION OF THE HEALTH INSURANCE LAW'S CONTRACEPTIVES MANDATE

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On August 1, 2011, the Health Resources and Service Administration issued guidelines specifying that, among the preventive health services that, under the Affordable Care Act, must be covered, without cost sharing, by group and individual health insurance plans, are “all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”¹ The requirement applies to plans or plan years that begin on August 1, 2012, or later.² The Catholic Church opposes birth control drugs and sterilization; the Church and others regard some of the FDA-approved contraceptives—Plan B (*levonorgestrel*), the so-called “morning after pill,” and *ella* (*ulipristal acetate*), the “week-after pill”—to be abortifacients. On that same August day, the Department of Health and Human Services (“HHS”) announced an amendment to its July 19, 2010, interim final regulations, the regulations governing the requirement that health plans must cover preventive health services.³ The amendment provided an exemption from the coverage requirement (hereinafter, “contraceptives mandate”) for “religious employers.”⁴ The Administration noted that some commenters on the interim final regulations had “asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom.”⁵ The religious employer exemption responded to this conscience or religious freedom concern.

However, the religious employer exemption met immediate and growing criticism from religious organizations and religious communities. During the comment period it drew more than 200,000 responses; while many supported the exemption as announced or sought a narrowing of the definition or elimination of the exemption, other commenters protested the narrowness of the definition and thus the limited scope of the exemption.⁶ Representatives of various religious organizations noted that their own institutions did not fit within the boundaries of the definition; in effect, they were defined as not being religious organizations whose conscience claims needed to be respected by the government and by insurers. The Catholic Health Association, for example, commented:

The religious and moral objections of the Catholic Church and others to contraception and sterilization are well known. The Interim Final Rule (IFR) acknowledges these objections and attempts to accommodate them by creating a religious employer exemption to the mandated coverage for contraceptive services. While we appreciate the recognition

of the need for such an exemption, the proposed definition of religious employer is wholly inadequate to protect the conscience rights of Catholic hospitals and health care organizations in their role as employers. It is imperative that the definition of religious employer in the regulation be broadened to provide sufficient conscience protections to religious institutional employers.⁷

Criticism that the exemption was so narrow that many religious organizations with religious objections to some or all of the contraceptive services would nonetheless be required to include them in their employee plans only grew during the next months, sparking an outpouring of public commentary, petitions and letters to the administration, lawsuits against the federal government, and an unsuccessful effort in the Senate to broaden the exemption to a much wider set of organizations (and to certain individuals).⁸

The “religious employer” definition and the exemption were nevertheless finalized on February 10, 2012.⁹ However, on the same day, the President and the Administration announced further action: additional measures to respond to the conscience claims of religious organizations not deemed to be “religious employers” by the now-finalized definition and thus not exempt from the contraceptives mandate. The President announced that an “accommodation” would be developed to deal with the conscience concerns of such organizations.¹⁰ And, to protect them while the new accommodation is being developed, the Administration announced a “temporary enforcement safe harbor,” a promise by federal agencies that certain non-exempt organizations would be free from prosecution for a year despite not including the mandated contraceptives coverage in their plans.¹¹ On March 21, 2012, an Advance Notice of Proposed Rulemaking (“ANPRM”) was published, setting out ideas for such an accommodation and requesting comments.¹²

The focus of this article is the August 1, 2011, definition of “religious employer,” which is now incorporated into the Code of Federal Regulations.¹³ Some attention is given to the related, but alternative, definitions used in the temporary enforcement safe harbor and in the ANPRM.¹⁴ It is worth stressing that concern about the “religious employer” definition is not limited to religious organizations and religious communities that object to the contraceptive services as such. The definition circumscribes the organizations that are regarded by the Administration to be authentically religious such that they have a valid claim to religious freedom protections. Its narrowness thus not only has the consequence that some significant number of religious organizations that object to providing the mandated contraceptive services are not exempted from the requirement (although the Administration has promised

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While our institutions do infuse their religious values into every aspect of what they do . . . as [they] are also fully accredited, degree granting, institutions of higher learning, we are concerned whether the government agent tasked with determining whether a group meets the four requirements . . . would indeed find that our institutions meet the first requirement.²⁶

The definition, in short, seems to take as a necessary characteristic a religious purpose or activity—the “inculcation of religious values”—that is not the obvious or main religious purpose or activity of many faith-based service organizations. At best, this criterion requires government officials unconstitutionally to troll through the inner lives of religious organizations in an attempt to discern whether their “purpose” is religious, or religious in the intended way.²⁷ As the University of Notre Dame said in its lawsuit against the contraceptives mandate, “It is unclear how the Government defines or will interpret religious ‘purpose.’”²⁸

A third, cumulative, requirement of the definition is that, to be considered an exempt “religious employer,” an organization must “primarily employ[] persons who share the religious tenets of the organization.” So-called religious or co-religionists hiring by religious organizations, although controversial to some, does not constitute illegal discrimination under Title VII, the employment title of the 1964 Civil Rights Act, as amended in 1972. The practice was upheld unanimously by the U.S. Supreme Court in *Corporation of the Presiding Bishop v. Amos* in 1987.²⁹ There appears to be only limited research on the religious hiring practices of religious organizations;³⁰ however, it is clear from anecdotal evidence that the religious hiring practices of organizations that hold themselves out to the public as religious are varied.

Some primarily or only employ persons who agree with the organization’s statement of faith and abide by its faith-based code of conduct.³¹ On the other hand, the Catholic Health Association says, “Men and women of any or no faith who are willing to serve with us in a manner faithful to the teachings of the Catholic Church are welcomed to join us as colleagues and employees.”³² (This raises the question: for the purposes of the definition, is being “faithful to” an organization’s religious teachings equivalent to “shar[ing] the organization’s religious tenets?”)³³ In yet another variation, the Council for Christian Colleges and Universities notes that, as a condition of membership, its member institutions must have a policy of employing only “professing and practicing Christians” for administrative and full-time teaching positions, and yet those member institutions maintain varied policies with respect to the religious standards applied to support staff and adjunct faculty. However, the Council avers that even the variations from the Christian-only standards for these other employees “reflect [the institutions’] respective understanding of how best to accomplish their mission in light of their theological traditions.”³⁴

The fourth characteristic that must also be present for an organization to be regarded as a “religious employer” is that it be categorized as “a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal

Revenue Code of 1986, as amended.” The *Federal Register* notice of the finalized definition notes that “Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.”³⁵ Critics have pointed out that these Code sections are not intended to *define* religious organizations in federal law but rather simply to govern the disclosure of information to the government by different categories of “exempt organizations.”³⁶ The types of organizations referred to in the definition are not required to file the annual return that most nonprofit organizations must file, presumably to honor the First Amendment requirement that the government must respect the autonomy of churches. However, even in the Code it is not necessary for an organization to fall into the ranks of churches and religious orders to be classified as a “religious organization”: the very same section of the Code sets out different reporting requirements for “a *religious organization* described in section 501(c)(3)” that in a taxable year does or does not have gross receipts of \$5,000 or more.³⁷

Taken together, it is clear that the four-part definition of “religious employer” does not encompass all religious organizations as recognized under federal law but only a subset of such organizations. In general terms, that subset comprises those religious organizations referred to in the fourth criterion: churches and religious orders—inward-looking and worship-oriented. Faith-based service organizations, such as religious colleges, charities, and hospitals do not, or at least do not unambiguously, fit the definition. Churches fit the definition and are exempt from the contraceptives mandate; “parachurch organizations,” or faith-based service organizations, do not fit the definition and thus are not exempt.³⁸

“Religious Employer” Under Title VII

The narrowness of the “religious employer” definition is evident as well when considered in light of the 2011 decision of the Ninth Circuit in *Spencer v. World Vision*. World Vision describes itself as a “Christian humanitarian organization dedicated to working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice.”³⁹ After World Vision fired three employees for no longer holding to the organization’s religious beliefs, they sued. And they alleged that the firings constituted illegal religious employment discrimination because World Vision is not a religious organization—a religious employer—and thus not covered by the religious exemption of Title VII of the 1964 Civil Rights Act of 1964, as amended.⁴⁰

Among other arguments, the plaintiffs alleged that, although World Vision claimed a religious purpose for its humanitarian work, the fact that it did not limit its services to coreligionists showed that it acted inconsistently with its purported religious mission. The court, however, rejected the view that serving persons without regard to their beliefs demonstrates that an organization is not a religious entity.⁴¹ The court similarly rejected the assertion that an organization must be a church or be church-like to be a religious employer eligible for the Title VII exemption.⁴² Against the challenge the court upheld World Vision as a religious employer, though its purpose is humanitarian, its services are not restricted to coreligionists,

and it is a 501(c)(3) nonprofit and not a church, an integrated auxiliary of a church, nor a religious order. For employment-law purposes, World Vision clearly is a religious employer, and yet it seems that it does not count as a “religious employer” according to the contraceptive mandate regulations.

Temporarily Excused Nonprofit Organizations and Accommodated “Religious Organizations”

Various religious organizations have criticized the contraceptive mandate’s “religious employer” definition in this way: our organization is a religious organization and yet it fails to match one or more of the four required criteria and thus, wrongly, it will be required to offer morally objectionable insurance coverage. For example, Dr. Samuel W. “Dub” Oliver, President of East Texas Baptist University, said this to a congressional hearing on the mandate: “East Texas Baptist University is a Christ-centered university that was founded in 1912. . . . Because East Texas Baptist University teaches and serves non-Christians (we accept students of all faiths and students of no faith), we do not qualify for the very narrow religious exemption offered by the Administration.” And, not being exempt, “under the Administration’s mandate, East Texas Baptist University will be required to buy insurance so that our employees can get abortion causing drugs for free, as if they are no different than penicillin. We believe that is wrong.”⁴³

In effect, the federal government has conceded the critics’ argument. Although it has written the narrow definition of exempt “religious employers” into the Code of Federal Regulations, the Administration has promised a religious “accommodation” to (certain) non-exempt religious organizations and sanctuary against prosecution for a year while the accommodation is put into place. However, it has defined in more than one way the non-exempt religious entities whose religious freedom claims it has decided to acknowledge in some way.

In a February 10, 2012, guidance document, the Administration promised not to enforce the contraceptives mandate for a year in the cases of certain organizations that object to including the mandated coverage in their health plans. Organizations eligible for this “temporary enforcement safe harbor,” however, are not every religious organization other than those exempted from the mandate because they fit the “religious employer” definition. Rather, to be eligible, an organization must meet all four of the following criteria: (1) it is organized and operates as a “non-profit entity”; (2) it has maintained a health plan that from February 10, 2012, and onward has not provided contraceptive coverage “because of the religious beliefs of the organization”; (3) it will ensure that its employees receive specific notice that the health plan, because of the temporary enforcement safe harbor, does not cover contraceptive services; and (4) it completes a self-certification form and makes that form available to its employees.⁴⁴

At least two elements of this definition are particularly notable. First, *non-religious* organizations can fall within it, if they are organized as nonprofits and have “religious objections to contraceptive coverage.”⁴⁵ Second, and by contrast, some *religious* organizations with a religious objection to contraceptive coverage are not included: an organization otherwise eligible

whose insurance plan on February 10, 2012—when the temporary enforcement safe harbor was announced—or later did include coverage of contraceptives, or whose plan excluded contraceptive coverage but for a reason other than a religious objection, is not eligible for the protection from enforcement if the insurance it offers once the mandate comes into effect does not include all of the FDA-approved contraceptive services.

The ANPRM proposed yet another definition of religious organizations that have religious freedom or conscience claims that might be honored with respect to mandatory coverage of contraceptives. Most important and most striking is the creation by the government of a second major category of religious organizations, in order to deal with additional religious freedom issues raised by the contraceptives mandate. The ANPRM commits the Administration to an “accommodation” for “non-exempt, non-profit religious organizations with religious objections to contraceptive coverage.”⁴⁶ These accommodated organizations are termed “religious organizations” to distinguish them from “religious employers”—religious entities that are exempt from the mandate.⁴⁷

“Who qualifies for the accommodation?” the ANPRM asks,⁴⁸ albeit without giving a definitive answer. Instead, comments are solicited. In general, it appears that the Administration intends to include in this category of accommodated organizations the faith-based service organizations that do not fit its definition of “religious employer.” Yet, not all such organizations may be accommodated, while unexpected other organizations may receive an accommodation: the ANPRM states that the accommodation will apply “to some or all organizations that qualify for the temporary enforcement safe harbor, and possibly to additional organizations.”⁴⁹

Organizations eligible for the safe harbor that might not qualify as “religious organizations” presumably will include non-religious organizations that have a religious objection to contraceptives. Such an organization might be a pro-life group whose opposition to abortion (and thus to abortifacient drugs) is expressed in religious as well as moral terms and yet the entity is not organized as a religious organization. On the other hand, religious entities that are ineligible for the safe harbor but that might fit the new “religious organization” category might include faith-based service organizations that object to covering the mandated contraceptive services but that, due to inattention, resistance by their insurers, or a state contraceptives mandate, on February 10, 2012, or later, did cover the contraceptives in their insurance plans. The ANPRM does not indicate what the government will do about such religious entities; however, it does seek comment “on whether the definition of religious organization should include religious organizations that provide coverage for some, but not all, FDA-approved contraceptives consistent with their religious beliefs.”⁵⁰ Thus non-exempt religious organizations ineligible for the safe harbor because their insurance on Feb. 10, 2012, included some contraceptives but not others (e.g., abortifacients) might be included in the definition of accommodated “religious organizations.”

Interestingly, in seeking comment “on which religious organizations should be eligible for the accommodation,” the ANPRM asks “whether, as some religious stakeholders have suggested, for-profit religious employers with such

objections should be considered as well.⁵¹ The ANPRM also asks “whether an exemption or accommodation should be made for certain religious health insurance issuers or third-party [insurance] administrators with respect to contraceptive coverage.”⁵² Assuming that some of these issuers or third-party administrators are commercial entities, it is possible that the eventual “religious organization” definition might drop “organized as a non-profit” as one criterion, and even that certain religious commercial entities involved with insurance might be swept into the “religious employer” category and be exempted from the mandate entirely.

The ANPRM, without committing the government, does suggest two possible sources for the eventual definition of a “religious organization”: state or federal law. As to the former, “the definition used in one or more State laws to afford a religious exemption from a contraceptive coverage requirement” might be chosen.⁵³ No specific example is listed; presumably the definition would not be the one already selected for the category “religious employer.”

As to federal law, the Administration suggests as a possibility “section 414(e) [of] the Code and section 3(33) of ERISA, which set forth definitions for purposes of ‘church plan.’”⁵⁴ Basing a definition on these existing provisions “may include organizations such as hospitals, universities and charities that are exempt from taxation under section 501 of the Code and that are controlled by or associated with a church or a convention or association of churches.” The church connection is a positive element for a definition, the Administration says, because “we are cognizant of the important role of ministries of churches and, as such, seek to accommodate their religious objections to contraceptive coverage.”⁵⁵ However, including a requirement of a church connection as part of the definition of an accommodated “religious organization” would only reproduce the problem of the under-inclusiveness of the church-centric definition of exempt “religious employers.” That is because some proportion of faith-based service organizations are not controlled by nor tied to a church or denomination but are rather religious entities in themselves⁵⁶ or have a multi-denominational or inter-faith character and set of connections.

Two Classes of Religious Organizations

The ANPRM is just that, an “advanced notice of proposed rulemaking”; although it proposes the distinct new category of “religious organizations” that are promised an “accommodation” for their conscience concerns, neither the precise boundaries of the category nor the precise features of the accommodation are specified in the document. Nonetheless, in proposing the new category of “religious organization” to parallel the now-finalized category of “religious employer,” the federal government has chosen to create a two-class scheme of religious organizations, at least for the purposes of the contraceptives mandate. If the ideas in the ANPRM are finalized, some religious organizations will be categorized as “religious organizations” that receive only an “accommodation” of their conscience concerns—a work-around—while other religious organizations will be classed as “religious employers” that are wholly exempted from the contraceptives mandate.

Leaders of a range of faith-based service organizations have written to HHS Secretary Kathleen Sebelius to protest this two-class system. “Our organizations, as we ourselves, do not all share the same view of the moral acceptability of the contraceptive drugs and services that comprise the contraceptives/abortifacient mandate,” the letter says. The signers hold different views about the acceptability of the Administration’s designs for an “accommodation” for non-exempted religious organizations, they belong to different faiths, and their organizations operate in different areas of service. But there is one firm point of unity, the letter stresses:

[W]e are united in opposition to the creation in federal law of two classes of religious organizations: churches—considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations—outwardly oriented and given a lesser degree of protection. It is this two-class system that the administration has embedded in federal law via the February 15, 2012, publication of the final rules providing for an exemption from the mandate for a narrowly defined set of “religious employers” and the related administration publications and statements about a different “accommodation” for non-exempt religious organizations.

And yet both worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that “pure religion” is “to look after orphans and widows in their distress” (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes true religion and authentic ministry.⁵⁷

The definitions of religious organizations that the federal government is deploying in the context of the mandate, which requires health plans to cover a wide range of contraceptive services, have great religious-freedom significance not only because they will determine which religious freedom and conscience claims will be honored, and to what degree, but because they embody a governmental conception of what is authentic religion. That evident conception has proven to be greatly troubling to many religious organizations, both houses of worship and faith-based service organizations.

Endnotes

- 1 The history and quotation are drawn from Certain Preventive Services Under the Affordable Care Act, Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012) [hereinafter ANPRM].
- 2 Grandfathered plans that did not include contraceptives coverage as of July 19, 2010, are not subject to the contraceptives mandate as long as they retain their grandfathered status.
- 3 Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).
- 4 Press Release, U.S. Dep’t of Health & Human Servs., Affordable Care Act

Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), available at <http://www.hhs.gov/news/press/2011pres/08/20110801b.html>. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Interim Final Rules, 76 Fed. Reg. 46,621 (Aug. 3, 2011) [hereinafter Interim Final Rules]

5 *Id.* at 46,623.

6 For a summary of the responses, see Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Final Rules, 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012) [hereinafter Final Rules]

7 Catholic Health Ass'n, Comments on Religious Employer Exceptions to Preventive Services (Sept. 22, 2011), link available at http://www.chausa.org/Pages/Advocacy/Issues/Faith-based_and_Ethical_Concerns/ [hereinafter CHA Comments]

8 Respect for Rights of Conscience Act of 2011, S. 1467, 112th Cong. (2011) (introduced by Sen. Roy Blunt of Missouri). The House of Representatives companion bill, H.R. 1179, was introduced by Rep. Jeff Fortenberry of Nebraska.

9 Press Release, The White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012) [hereinafter White House Fact Sheet]. The regulation was published in the Federal Register on Feb. 13, 2012 (Final Rules, *supra* note 6).

10 Press Release, The White House, Office of the Press Secretary, Remarks by the President (Feb. 10, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>; White House Fact Sheet, *supra* note 9.

11 DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING UNDER SECTION 2713 OF THE PUBLIC HEALTH SERVICE ACT, SECTION 715(A)(1) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND SECTION 9815(A)(1) OF THE INTERNAL REVENUE CODE (Feb. 10, 2012), available at <http://ccio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf> [hereinafter SAFE HARBOR GUIDANCE]

12 ANPRM, *supra* note 1. The ANPRM was first released as a Word document on Feb. 10, 2012.

13 45 C.F.R. §147.130(a)(1)(iv)(B).

14 Thus, although the various definitions of religious organizations are bound up with issues of conscience and religious freedom, this article does not touch on the many other conscience and religious freedom issues connected with the health reform law, such as abortion, the individual mandate, and the requirement that employers above a certain size must provide employee health insurance or else pay a penalty, and, for that matter, the public value of expanding access to contraceptives via employee health insurance and the public good of expanding access to health insurance as such.

15 Letter from Leith Anderson, President, National Association of Evangelicals, et al., to Joshua DuBois, Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships (Aug. 26, 2011) [hereinafter Letter to DuBois]. (The letter was organized by the Institutional Religious Freedom Alliance. Signers included orthodox Jewish, Protestant, and Catholic leaders.)

16 *See, e.g.*, Final Rules, *supra* note 6, at 8728; ANPRM, *supra* note 1, at 16,502.

17 *E.g.*, according to Interim Final Rules, *supra* note 4, at 46,623. The definition seems to be identical to that in California's Women's Contraceptives Equity Act, adopted in 1999 and upheld by the California Supreme Court in March 2004. Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 85 P.3d 67 (Cal. 2004), available at <http://caselaw.findlaw.com/ca-supreme-court/1240089.html>. For discussions of state exemptions, including the associated definitions of exempt religious organizations, see, e.g., CYNTHIA BROUGH, CONG. RESEARCH SERV., PREVENTIVE HEALTH SERVICES REGULATIONS: RELIGIOUS INSTITUTIONS' OBJECTIONS TO CONTRACEPTIVE COVERAGE (Feb. 22, 2012); Office of the General Counsel, U.S. Conference of Catholic Bishops, Comment on the

Interim Final Rules on Preventive Services (Aug. 31, 2011), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf>.

18 45 C.F.R. §147.130(a)(1)(iv)(B).

19 Jesus Won't Pass Muster at HHS, Posting of Sr. Mary Ann Walsh to USCCBlog, <http://usccbmedia.blogspot.com/2011/09/jesus-wont-pass-muster-at-hhs.html> (Sept. 12, 2011). The parable of the Good Samaritan is recorded in Luke 10:25-37.

20 Of course, some religious service organizations may be designed to serve those of a particular faith, such as a Jewish day school.

21 *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?: Hearing on the Respect for Rights of Conscience Act of 2011 Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 112th Cong. (2011) (statement of Jane G. Belford, Chancellor of the Roman Catholic Diocese of Washington) (quoting Caryle Murphy, *A Steadfast Servant of D.C. Area's Needy*, WASH. POST, Oct. 25, 2004), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Health/110211/Belford.pdf>.

22 The point is made in Letter to DuBois, *supra* note 15. The requirement that organizations directly funded by federal money—i.e., not via a scholarship or voucher or other “indirect” means—not discriminate against service recipients or potential service recipients is part of the several “Charitable Choice” provisions enacted into law during the Clinton Administration. This requirement was applied to other federal funding through George W. Bush's Executive Order 13,279, entitled “Equal Protection of the Laws for Faith-Based and Community Organizations” (Dec. 12, 2002), and confirmed through President Barack Obama's Executive Order 13,559, “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations” (Nov. 17, 2010). For a discussion of the principle in relation to the Bush Administration, see, e.g., IRA C. LUPU & ROBERT W. TUTTLE, *THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, THE STATE OF THE LAW—2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS* 45f (2008).

23 Office of the General Counsel, U.S. Conference of Catholic Bishops, Comment on the Interim Final Rules on Preventive Services 19 (Aug. 31, 2011), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf>.

24 CHA Comments, *supra* note 7, at 3..

25 *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight & Gov. Reform*, 112th Cong. (2012) [hereinafter *Lines Crossed*] (statement of Rabbi Meir Soloveichik, Director of the Straus Center for Torah and Western Thought, Yeshiva University).

26 Council for Christian Colleges & Univs., Comment on the Interim Final Rules on Preventive Services 2-3 (Sept. 30, 2011) [hereinafter CCCU Comment].

27 The charge that the definition requires an unconstitutional examination and assessment by government is made by, among others, the Council for Christian Colleges and Universities. *See id.*

28 Complaint and Demand for Jury Trial, *Univ. of Notre Dame v. Sebelius*, No: 3:2012cv00253, at 33 (N.D. Ind. May 21, 2012), available at http://opac.nd.edu/assets/69013/hhs_complaint.pdf.

29 483 U.S. 327 (1987). On religious hiring, see Carl H. Esbeck, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (2004).

30 *But see, e.g.*, STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* (1996); STEPHEN V. MONSMA, *PUTTING FAITH IN PARTNERSHIPS: WELFARE-TO-WORK IN FOUR CITIES* (2004).

31 One example is World Vision, Inc., which successfully defended itself against a lawsuit charging it with illegal employment discrimination for discharging several employees who no longer agreed with the organization's faith statement. On World Vision's hiring practices, see the Ninth Circuit's decision in *Spencer v. World Vision*, 633 F.3d 723, 739-740 (9th Cir. 2011)

