September 29, 2011

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

Dear Sir or Madam:

The following comments are submitted by the American Center for Law and Justice[1] on behalf of the Dominican Sisters of the Congregation of St. Cecilia of Nashville, Tennessee (hereafter, "the Congregation" or "the Nashville Dominicans"). The comments are directed to the Interim Final Rule on Preventive Services published by HHS on August 3, 2011, at 76 Fed. Reg. 46621, (hereafter, the "Interim Rule").

In their 151-year history, the Nashville Dominicans have, with the help of God, survived a Civil War on their doorstep, deadly epidemics, devastating floods, economic depression and tumultuous social upheaval. Today, however, they face a new, more insidious threat — their own government. As will be demonstrated herein, should HHS persist in implementing the Interim Rule and its contraceptive mandate without major modifications, the Congregation will be forced to curtail its mission. What war and disease could not do to the Congregation, the government of the United States will do. It will shut them down.[2]

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[1] The American Center for Law and Justice is a non-profit legal organization based in Washington, D.C. The ACLJ is dedicated to the concept that religious freedom is a God-given, inalienable right deserving of the highest protection. The ACLJ has presented arguments in the following First Amendment religious liberty/free speech cases, among others, at the U.S. Supreme Court: *Locke v. Davey*, 540 U.S. 712 (2004); *Hill v. Colorado*, 530 U.S. 703 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993).

[2] This is not hyperbole as a look at the almost certain penalties attendant upon an employer's violation of PPACA will demonstrate. See, *"Summary of Potential Employer Penalties Under the Patient Protection and Affordable Care Act (PPACA),"* Congressional Research Service, June 2, 2010.

I. OVERVIEW

The Congregation concurs fully with the arguments set forth in the comments submitted by the United States Conference of Catholic Bishops, Office of the General Counsel, dated August 31, 2011 (hereafter, "USCCB comments"). In order to avoid needless duplication, the Congregation's comments will not address several aspects of the issue covered in depth in the USCCB comments, *e.g.*, the Interim Rule's implied equation of pregnancy with disease, or the apparent conflicts with federal and state conscience laws and PPACA's own pre-emption provisions created by the inclusion within the mandate of "contraceptives" that are known to act in an abortifacient manner. [3] Rather, these comments will focus on the oppressive, undue burden to the Congregation of complying with the Rule's mandate, the constitutional and other defects of the mandate itself, and the gross inadequacies of the "religious employer" exemption contained in § 147.130 of the Interim Rule.

II. HISTORY AND MISSION

The Dominican Sisters of the Congregation of St. Cecilia were founded in 1860 when the Bishop of Nashville invited four Dominican sisters[4] from Somerset, Ohio to establish a boarding school for girls. From that founding, the Congregation has grown to number 275 sisters. The sisters are currently teaching in 35 schools in 28 cities across 14 states. They teach approximately 13,000 students from preschool through college level.

The Civil War Battle of Nashville raged on and around the Congregation's property in December 1864. Shortly after the war, in 1866, the sisters tended the victims of a cholera epidemic that devastated Nashville. One observer noted, "in every hut and cottage [of South Nashville] the white habit could be seen." In 1873, when 20,000 people fled a yellow fever outbreak in Memphis, of the 50 religious sisters who remained to care for the stricken, 30 died. Over the years, the sisters of the Congregation ran an orphanage and continued to expand their educational apostolate as noted above.

From the beginning, the Congregation's mission has been the education of youth. The sisters' description of their mission illustrates the indivisibility of the Nashville Dominicans' religious constitution and their educational work:

> In our Congregation's one hundred and fifty year history, we have lived the motto of the Order, 'to contemplate and to give to others the fruits of our contemplation,' by giving the fruits of our contemplation in the apostolate of Catholic education. With love for Truth and dedication to the Church, our sisters have brought generations of young people the message of Christ.[5]

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[3] To take just one example of such a conflict, the contraceptive mandate is in direct conflict with Tennessee law protecting from liability any "private institution . . . refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection." Tenn. Code Ann. § 68-34-104.

[4] "Dominican sisters" are affiliated with the Order of Preachers, a Catholic religious order founded by St. Dominic and approved by Pope Honorius III in 1216. The Order includes friars, nuns, congregations of active sisters (such as the Nashville Dominicans), and laypersons affiliated with the Order.

[5] http://nashvilledominican.org/Apostolate/Bringing_Christ_to_the_World.

As the word "others" indicates in this mission statement, the Congregation has *never* confined its efforts to those of the Catholic faith, particularly in terms of the faith of the students they educate or the individuals whom they employ in their educational or other efforts. The sisters adhere to a policy of non-discrimination in their hiring practices and have always respected the religious diversity of their employees. Of the 13,000 students currently enrolled in schools owned or staffed by the Congregation, 15% of the students are not Catholic.[6]

The Congregation owns and runs four schools[7]: St. Rose Academy in Birmingham, Alabama; Overbrook School, St. Cecilia Academy and Aquinas College in Nashville. The Congregation employs 293 full and part-time employees[8] at these four schools and at its Motherhouse in Nashville. Since Catholicism is most certainly a minority religion in Nashville (and most of the other areas served by the sisters), by necessity a large portion of the Congregation's employees and students are not Catholic. For example, at Aquinas College in Nashville, 59% of the faculty/staff and 67% of the students are not Catholic.

The mission of the Nashville Dominicans is succinctly summarized in the *Constitution of the Congregation* as follows:

> As daughters of the Church and in devotion to her, our intent is to be faithful to her teachings and to lead a life of zeal, engaging in apostolic activity penetrated by a religious spirit. We live for the Church, and by serving her we enter into the mystery of Christ.[9]

III. THE BURDEN IMPOSED BY THE INTERIM RULE'S CONTRACEPTIVE MANDATE

The Interim Rule, with its mandate that all health insurance plans cover prescription contraceptives, sterilization, and related patient education and counseling, imposes an insupportable and undue burden on the Congregation.

The Catholic Church's longstanding moral opposition to artificial contraception and sterilization is a given. Of critical importance to the issue at hand, however, is the fact that the Church's (and, thus, the Congregation's) position on these issues is not something that can be carved out from the institution's overall mission. As one writer has described it:

> . . . [T]he Church's position on birth control is not a stand-alone item. From the Church's standpoint, its position on birth control is part and parcel of its commitment to the sanctity of life . . . This need to defend the right to life from beginning to end manifests itself in a cohesive body of beliefs that starts with contraception and runs through abortion, the death penalty, and assisted suicide.

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[6] Nashville is the See city of the diocese and was established on July 28, 1837 by Pope Gregory XVI. The diocese includes 38 counties spread over 16,302 square miles in which Catholics serve as a distinct minority. According to data released in 2010 by the Diocese of Nashville, the Catholic population of the diocese is estimated at approximately 76,000 individuals registered in parishes, which represents about 3.4% of the overall population in Middle Tennessee. *See* http://dioceseofnashville.com/about2.htm.

[7] The remaining schools in which the Congregation's sisters currently serve are administered either by the local Catholic diocese or a lay board.

[8] This figure is in addition to the sisters themselves.

[9] http://nashvilledominican.org/Apostolate/Bringing_Christ_to_the_World.

> Thus, an attack on any part of that core set of beliefs strikes at the heart of what the Church deems sacred.

Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harvard J. L. & Pub. Pol'y 741 (2005).

For HHS to mandate that the Congregation provide insurance coverage for services that are contrary to its basic religious tenets demonstrates a basic contempt for what it means to be Catholic. According to the Congregation's Constitution, faithfulness to the teachings of the Church penetrates every aspect of the sisters' activity. Thus, the mandate imposed by the Interim Rule presents the sisters with a stark choice: obey Caesar, or obey Christ. That the burden of such a choice imposed by law is "undue" in the constitutional sense should go without saying.

IV. THE MANDATE VIOLATES THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE

The First Amendment protects the free exercise of religion. Laws designed to discriminate against individuals or groups because of their religious practices and beliefs are subject to strict scrutiny. The government must demonstrate that laws challenged under the Free Exercise Clause serve a compelling state interest and are narrowly tailored to advance that compelling interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). Because "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt . . . "[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (quotation and citation omitted).

At the same time, however, the Supreme Court has held that religiously neutral laws of general applicability are not subject to strict scrutiny even if they incidentally burden religious beliefs or practices. *Employment Div., Dept. Of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990*)*. But, because the Interim Rule's contraceptive mandate is neither neutral nor generally applicable, it will be subjected to "the most rigorous of scrutiny," a scrutiny it cannot survive. *Lukumi*, 508 U.S. at 520.

A. The Interim Rule Is Not Neutral.

While arguably neutral on its face, the mandate is clearly directed at one religious group — the Catholic Church and its affiliated institutions such as the Nashville Dominicans. The Catholic Church is for all intents and purposes the only institution in the country that teaches categorical opposition to artificial contraception and sterilization. The Church's opposition is frequently cited by proponents of universal access to free contraception as a roadblock to achieving their goal. In 2002, in its highly influential "Religious Refusals and Reproductive Rights," the ACLU's Reproductive Freedom Project decried the practices of "insular, sectarian institutions" standing in the way of universal contraceptive access and seeking to impose their

beliefs "in the public, secular world." The only "insular, sectarian institution" mentioned by name in the entire report is the Catholic Church.[10]

In *Lukumi,* the Court held that evidence of impermissible targeting of religious groups or beliefs in the enactment or operation of laws could be proved by direct or circumstantial evidence: "[R]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." 508 U.S. at 540. Given the history of efforts to impose universal, free access to contraception in this country culminating in the contraceptive mandate of the Interim Rule as part of PPACA, and the consistent singling out in all of those efforts of the Catholic Church as the major obstacle to achieving that goal, it will not be difficult to show that the mandate's target is the Catholic Church. As such, the mandate is not neutral under controlling Supreme Court case law and will be subjected to "the most rigorous of scrutiny."

B. The Interim Rule Is Not Generally Applicable.

The other qualification to the teaching of *Employment Div. v. Smith* is that, to avoid strict scrutiny, laws must be generally applicable. And *Smith* cautions that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Here, the Interim Rule on its face sets up a system of "individualized exemptions." True, the exemption purports to be available precisely for religious objectors, but only for those religious objectors determined to be sufficiently "religious" by officials of the U.S. Department of Health and Human Services. Even if such a procedure — government officials deciding which institutions meet the government's standards of religiousness (see argument below) — could somehow survive constitutional attack on its own merits, a partial religious exemption, one that exempts some religious objectors but not others at the sole discretion of government bureaucrats, defeats general applicability as readily as would a system of exemptions that exempts only non-religious objectors.

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[10] The ACLU substitutes the term "refusal clause" for exemption when referring to the religious based objection by Catholics to providing contraceptives. The clear focus of their argument for the elimination of these so-called refusal clauses in healthcare laws is the Catholic church:

> Moreover, significant consolidation within the Catholic system has given it dominance in certain geographic areas. For instance, by 1999, Catholic Healthcare West was the largest operator of hospitals in California, running forty-six hospitals, eighteen of which were formerly secular. And, in more and more communities, Catholic hospitals are the only ones in town. By 1998, ninety-one Catholic hospitals in twenty-seven states were operating as the only hospitals in their counties. (See inset.) This growth in the sectarian health system has given it more bargaining power to insist upon laws that permit religiously affiliated institutions to refuse to provide or cover health services – often reproductive health services – they believe to be sinful.

Weiss, Catherine, *Religious Refusals and Reproductive Rights, ACLU Reproductive Freedom Project* (2002).

V. THE MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT

In addition to the mandate's constitutional infirmity under the Free Exercise Clause, it also clearly violates the Congregation's rights as protected under the Religious Freedom Restoration Act ("RFRA"). RFRA, enacted largely in response to the Supreme Court's decision in *Smith*, requires that strict scrutiny be applied to any action of the federal government that substantially burdens the exercise of religion. 42 U.S.C. 2000bb-1(c).

The classic exposition of this approach is that of *Sherbert v. Verner,* 374 U.S. 398 (1963), in which the Supreme Court construed the Free Exercise Clause generally to forbid "substantial burdens" on religious exercise, unless they satisfy strict scrutiny. *Id.* at 403. A "substantial burden" is one which forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand." *Sherbert,* 374 U.S. at 404. The Nashville Dominicans would have little difficulty demonstrating "substantial burden" here. The Interim Rule compels them to act in violation of their core beliefs and practices or pay ruinous penalties.

Thus, the only way the Rule could survive strict scrutiny under RFRA would be upon a showing by the government that it is justified by a "compelling state interest" and is "narrowly tailored" to advance that interest. But even assuming that ensuring universal access to free birth control is a "compelling state interest," the means chosen by the government to advance that interest is hardly "narrowly tailored." Requiring employers to purchase health insurance policies that cover contraceptives pursuant to a Rule that, on its face, allows for some exemptions, as part of a general statutory scheme (PPACA) that itself allows for numerous exemptions can certainly not be viewed as a "narrowly tailored" means — or even a rational means — to advance the government's stated interest.

In short, whether the matter is analyzed under the Free Exercise Clause or RFRA, it is clear that strict scrutiny will be applied and that the Interim Rule will not survive that scrutiny.

VI. THE "RELIGIOUS EMPLOYER" EXEMPTION IS BOTH INADEQUATE AND DANGEROUS TO LIBERTY

A. The Exemption's Narrow Definition Excludes Clearly Religious Employers.

Under the Interim Rule, a "religious employer" is exempt from the mandate if it is an organization that meets all of the following criteria: (a) its purpose is the inculcation of religious values, (b) it primarily hires persons who share the organization's religious tenets, (c) it primarily serves person who share those tenets, and (d) it is a nonprofit as described in sections 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

This exemption was written by the ACLU as part of California's contraceptive mandate, the Women's Contraception Equity Act of 1999.[11] The language of the exemption reflects the

[11] 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

ACLU's view "[a]mong health care institutions, Christian Science sanatoria may exemplify those that should qualify for a religious exemption" from mandates like those at issue here, because they "are staffed by Christian Science healers, and they attend only to those seeking to be healed exclusively through prayer." Catherine Weiss, et al., ACLU Reproductive Freedom Project, Religious Refusals and Reproductive Rights 10 (2002). Indeed, it is difficult to imagine any religious institution other than the one described by the ACLU that would qualify for the exemption — certainly not the Catholic Church or Catholic organizations such as the Nashville Dominicans, organizations that have as part of their basic mission the mandate to reach out to and serve all people, not just those of the Catholic faith. As noted above, both in terms of those whom the Congregation serves in its schools and those it employs in carrying out its mission, the Nashville Dominicans do not confine themselves to those who share the organization's religious tenets. Thus, the Congregation would not qualify for the exemption.

While the ACLU-crafted "religious employer" exemption has survived court challenges in both California and New York[12], it has come under withering criticism from numerous quarters. California Supreme Court Justice Janice Rogers Brown, dissenting in *Catholic Charities of Sacramento,* wrote "[T]his is such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity." 85 P. 3d at 106. (Brown, J., dissenting). Several religious groups that do not share the Catholic Church's views about contraception, alarmed over the extraordinary overreach exemplified by the exemption language, joined in filing amicus briefs in both the California and New York cases.[13] One scholar observed that, under this exemption language, "Mother Teresa's Missionaries of Charity are 'secular' employers because they do not limit their care of AIDS victims to Catholics."[14]

B. The Exemption Is Inconsistent with Longstanding Congressional Protection of Conscience Rights.

Not only does application of the Rule's exemption yield absurd scenarios —neither Jesus nor Mother Teresa would be engaged in "religious" activity — it is inconsistent with existing federal conscience protecting measures. For example, Congress has for decades provided the broadest form of conscience protection in the following areas: 1) legislation prohibiting discrimination against foreign aid grant applicants who, based on their religious beliefs, offer only natural family planning;[15] 2) legislation exempting religious health plans from a contraceptive coverage mandate in the federal employees' health benefits program, and prohibiting other health plans in this program from discriminating against individual health

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exemption [at issue]....") (available at http://www.aclu.org/reproductive-freedom/aclu-applauds-ca-supreme-court-decision-promoting-womens-health-and-ending-gend).

[12] See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (2004); also, *Catholic Charities of Dioc. Of Albany v. Serio*, 859 N.E.2d 459 (2006).

[13] *See* Brief of Amicus Curiae of the Becket Fund for Religious Liberty, *Catholic Charities of the Dioc. of Albany v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003); Brief of Amicus Curiae of National Religious Organizations, *Catholic Charities of Sacramento, Inc. v. Super. Ct.,* 85 P.3d 67 (Cal. 2004), available at http://www.nccbuscc.org/ogc/amicuscuriae5.htm.

[14] Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 142-43 (2003).

[15] For the most recent enactment, *see* Consolidated Appropriations Act, 2010, Pub. L. No. 111- 117, Div. F, tit. III ("Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning").

professionals in the plan who object to prescribing or providing contraceptives on moral or religious grounds;[16] and 3) legislation affirming the intent of Congress that a conscience clause protecting religious beliefs and moral convictions be a part of any contraceptive mandate in the District of Columbia.[17]

In fact, Congressional concern for and protection of the rights of conscience in this area dates back to at least 1973 when Congress enacted the so-called "Church Amendment," named for Sen. Frank Church. The Church Amendment's conscience protections are not limited to abortion and contraceptives. The Church Amendment protects conscientious objection to sterilization (42 U.S.C. §§ 300a-7(b), 300a-7(c)(1), and 300a-7(e)) and, in programs funded or administered by HHS, to any health service to which there is a moral or religious objection (42 U.S.C. §§ 300a-7(c)(2) and 300a-7(d)). Given these repeated, undeniable expressions of Congressional intent to protect the conscience rights of individuals and organizations on the broadest possible basis, it would be highly inappropriate for HHS to adopt a regulation that severely cuts back on that protection across the board as the Interim Rule so clearly does.

C. The Exemption is Inconsistent With The First Amendment's Religion Clauses

The "religious employer" exemption puts into the hands of anonymous HHS officials the power to determine which activities of a church or religious group are truly "religious," and thus deserving of protection, and which are merely "secular," and thus subject to regulation. This is blatantly unconstitutional. *Larson v. Valente*, 456 U.S. 228 (1982) (state may not discriminate among religious organizations in imposing burdens).

It is likewise axiomatic in our legal system that the state has no authority to decide "what is or is not secular, what is or is not religious." *Lemon v. Kurtzman*, 403 U.S. 602, at 637(Douglas, J., concurring). Nor may the government "troll through a person's or institution's religious beliefs" to determine whether its purpose is to inculcate "religious values," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 at 1341-42 (D.C. Cir. 2002) and try to limit an exemption to religious institutions that engage in "hard-nosed proselytizing." *Id.* at 1346. Many religious organizations are not engaged in proselytizing when they deliver social, medical and educational services, yet the very provision of these services is itself a fulfillment of their religious mission; indeed, it is their *raison d'etre* and at its core lies a sincere, religious-based motivation.

The clear purpose and obvious effect of the exemption's second and third criteria of HHS-approved "religiousness" — employment and serving of co-religionists — is to give favored to treatment to some religious denominations — exemption from the Interim Rule —

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[16] For the most recent enactment, *see id*., Div. C, tit. VII, § 728 ("Nothing in this section shall apply to a contract with ... any existing or future plan, if the carrier for the plan objects to such coverage on the basis of religious beliefs... In implementing this section, any plan that enters into or renews a contract under this section may not subject any individual to discrimination on the basis that the individual refuses to prescribe or otherwise provide for contraceptives because such activities would be contrary to the individual's religious beliefs or moral convictions").

[17] For the most recent enactment, *see id*., Div. C, tit. VIII, § 811 ("Nothing in this Act may be construed to prevent the Council or Mayor of the District of Columbia from addressing the issue of the provision of contraceptive coverage by health insurance plans, but it is the intent of Congress that any legislation enacted on such issue should include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions").

while subjecting other denominations to the Rule's onerous and objectionable requirements. Thus, religious entities such as the Catholic Church with strong missionary and evangelizing charisms are subjected to the Rule, while religious entities that traditionally have refrained from such activity, *e.g.,* Orthodox Judaism, Old Order Amish, etc.,need not comply with the Rule at all. This is precisely the flaw identified in *Larson*.

Laying aside the catastrophic impact such a government policy of forced isolation of religious service providers from the public sector would have on our fragile economy, such a forced choice is offensive, discriminatory, and unconstitutional under the Religion Clauses. The second and third criteria are also problematic from a practical standpoint. These criteria would require religious organizations to make potentially intrusive inquiries into the religiosity of all their job applicants and clients, thereby placing employers in the untenable position of potentially violating Title VII's employment discrimination provisions and various public accommodations statutes in an attempt to ensure appropriate levels of "religiosity" to qualify for the HHS exemption.

D. Both The Mandate And Exemption Are Inconsistent With The Nation's Fundamental Policy Of Accommodation and Protection of Religious Liberty

This Nation has a long and proud tradition of accommodating the religious beliefs and practices of all its citizens, not dividing them into "approved" and "disapproved" camps at the discretion of government functionaries. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (government follows "the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs"). Evidence of the existence of that tradition dates back to the Founding Fathers themselves.

One particular example of that tradition of respect and accommodation for religious diversity has special application to the dilemma presented to the Nashville Dominicans by the Interim Rule. As at least one other commenter on the Interim Rule has pointed out,[18] both the spirit and the letter of this unfortunate regulation run afoul of President Thomas Jefferson's letter to the Ursuline Sisters of New Orleans assuring them of the "friendship," "respect," and — most importantly — the "protection" of the government of the United States. In 1804, shortly after the Louisiana Purchase, the Superior of this French religious congregation sought assurances from Jefferson that her congregation's rights and property would not be placed in jeopardy with Louisiana's shifting of political allegiance from Napoleonic France to the United States. In his letter replying to the sisters, "Monsieur le President" (as the Ursulines' Superior addressed Jefferson) commended the sisters for "the charitable objects of your institution . . . and its furtherance of the wholesome purposes of society, by training up its younger members in the way they should go,"[19] and assured the congregation of the "patronage" of his government and "all the protection which my office can give."

This exchange of letters between Jefferson and the New Orleans sisters has a special poignancy for the Nashville Dominicans because, since 2004, they have been administering and teaching at Cathedral Academy in New Orleans' French Quarter, working literally in the

[18] *See* comments submitted by Catholic Health Association at 2.

[19] *See* Letter of the Ursulines of New Orleans, March 21, 1804; *also*, Letter of Thomas Jefferson, May 15, 1804. Available at http://lsm.crt.state.la.us/1nation/1nation4b.htm (Louisiana State Museum). Jefferson here quotes from *Proverbs* 22:6.

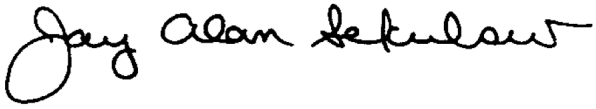
footsteps of the Ursuline Sisters who sought — and received — assurances of protection from Jefferson. The school is attended by inner-city children, many of whom are from poor and disadvantaged backgrounds. It is of no concern to the Congregation whether these students are Catholic or not. The mission of the sisters is to provide each student "with a solid liberal arts education, so that with a strong academic foundation and the development of their personal gifts, they might more freely respond to their God-given vocation."[20]

Should the HHS mandate remain unaltered, however, it is clear that the Congregation could be forced to curtail much, if not all, of its educational mission, including its mission in the footsteps of the New Orleans Ursulines. The respect, friendship, and protection promised at the very dawn of the Nation's history will have been removed as part of a misguided and unconstitutional effort to impose religious uniformity. "Monsieur le President Jefferson would be appalled at such an egregious departure from "the best of our traditions." *Zorach*, 343 U.S. at 313.

VII. CONCLUSION

For the foregoing reasons, the Department of Health and Human Services should not impose upon religious employers, institutions, or individuals a mandate to require coverage of contraception in group or individual health plans. Our commitment as a people to the preservation of religious liberties is enshrined as a part of the constitutional fabric of our nation. This ideal is too precious to be sacrificed on the altar of expediency in healthcare reform.

AMERICAN CENTER FOR LAW AND JUSTICE



Dr. Jay Alan Sekulow
Chief Counsel

[20] http://nashvilledominican.org/Apostolate/Bringing_Christ_to_the_World.