

Testimony of

Rev. Barry W. Lynn

**Executive Director of
Americans United For Separation of Church and State**

Submitted to

**U.S. House of Representatives Committee on
Oversight and Government Reform**

***Written Testimony* for the Hearing Record on**

**"Lines Crossed: Separation of Church and State. Has
the Obama Administration Trampled on Freedom of
Religion and Freedom of Conscience?"**

February 16, 2012

I am submitting testimony on behalf of Americans United for Separation of Church and State (Americans United) for the hearing on "Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?"

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

It is my understanding that today's hearing will focus on the regulatory provisions governing the "Affordable Care Act" that will require employers to provide insurance coverage for contraceptives, without a co-pay or deductible. The rule issued in January by the Department of Health and Human Services (HHS) provides a sufficient exemption for churches, other houses of worship, and similar organizations that object, on religious grounds, to providing coverage for contraceptives.¹

Then, on February 10, the Obama Administration announced it will issue an additional rule that will expand the religious exemption even further. It will require insurance companies—not religious organizations—to provide coverage for contraception if the religious organization objects to such coverage. The religious organization will not have to pay for the coverage or refer employees to organizations that provide coverage. And, women will still be provided coverage for contraceptives with no charge. Groups ranging from Planned Parenthood to the Catholic Health Association welcomed the compromise.

Unfortunately, the compromise has not quelled the rhetoric from the far right or efforts to further erode women's access to birth control—some are actually even trying to expand the religious exemption to individual business owners, making the coverage mandate meaningless.

Contrary to the sentiments expressed by the title of the hearing, *expansion* of the exemption—not keeping the exemption as-is—is what risks violating the separation of church and state. The separation of church and state means that the government will not force one religious view or doctrine upon the people. Expansion of the Obama compromise, however, would allow one particular religious doctrine to govern our public health policies at the expense of the health, safety, and religious conscience rights of the women they employ.

If the expansion for contraceptives is further expanded, it will not be long before people in other faiths demand the "right" to refuse coverage of other procedures, prescriptions, or medical specialties they find inconsistent with their theological tenets. This would be

¹ United States. Dept. of Health and Human Services. Final Rules, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act." 77 CFR 8725. Feb. 15, 2012. Print.

not only a nightmare as a practical matter. It would turn the right of “conscience” into a sword to be used to fight off any and all regulation that a business owner chose not to implement. This turns genuine conscience claims on their heads in pursuit of an incredibly broad and utterly unconstitutional false declaration of a right surely not contemplated by the Framers of the Constitution itself.

Religious Liberty Requires Protecting the Employee’s Right of Conscience

I testify in opposition to an expansion of the religious exemption as a member of the clergy committed to religious freedom. I was ordained in the ministry of the United Church of Christ in 1973. My faith has been a stalwart guide for my life. It has also guided my reflection on how public policies have an impact on Americans of faith and those who reject religious traditions. And, it has led me to be a strong advocate for the preservation of the right of “conscience.” Indeed, my commitment to religious freedom and the right of conscience was recently acknowledged both by the Franklin and Eleanor Roosevelt Institute in Hyde Park, which honored me with the distinguished Medal of Freedom for my work to preserve the “freedom to worship,” and the Boston University School of Theology, which granted me a “distinguished alumnus” award.

The Constitution clearly protects the rights of conscience. One early draft of what became the First Amendment actually stated: “Congress shall not make any law infringing the right of conscience or establishing any religious sect or society”. Ultimately, that language was changed, but it would be a misnomer to believe that claims of conscience were not envisioned as a protected by the final language of the Constitution.

In the continuing battle over the HHS regulations regarding insurance program coverage of contraception, there are actually two claims of “conscience.” One, asserted by the Conference of Catholic Bishops and some Protestant evangelical groups, would establish a right of religious institutions to exercise a “corporate conscience” and implement only those federal policies they deem consistent with their theological understanding. The second is a “conscience” claim by individual employees who seek the right to make moral judgments about contraceptive use upon consultation with both medical and spiritual advisors of their choosing.

In my view, it is the individual who has the stronger claim. Women—not their employers—should be allowed to make decisions about their healthcare and their religious beliefs. A woman may not share the religious beliefs of their employer or practice religion in exactly the same way her employer does. It is the woman’s right to exercise her religion freely and make her own decisions about reproductive health, even if she is employed by an organization that holds a different position on these matters. But, for many women, the right to purchase birth control is often meaningless without the insurance coverage to do so. If the government allowed religious interests to overcome a woman’s health interest, church-state separation would be threatened.

The original HHS regulation protected the individual woman’s conscience right by requiring large entities like religiously-affiliated hospitals and universities to provide contraceptive coverage, but exempted churches, seminaries, and similar institutions. To me, that arrangement was the correct balance of equities. Unlike churches, these larger religious organizations act like large corporations: (1) they employ many persons who do not share the religious affiliation of the parent group; (2) they receive large amounts of financial support from taxpayers of all religious and philosophical viewpoints; and (3) they hold themselves out as providing a public function. In addition, the actual impact the insurance mandate would have on the “corporate conscience” of these institutions would be minimal: It is the individual employee—not the religious institution—who will make the independent private choice whether to avail herself of prescription contraception as one of the many services under the group insurance plan. And, under the regulation, an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the employees themselves.

The religious convictions of the individual employee should certainly supersede the “corporate conscience” of these quasi-public institutions.

Under the new regulations issued on Friday, the corporate “conscience” is even more tenuously implicated: coverage becomes an issue largely between an employee and a private insurance company with no connection to any religious institution. Religious organizations will not have to cover or refer women to providers of contraceptives. Religious organization will have no connection whatsoever to a woman’s use of contraceptive coverage. It is difficult to understand how allowing a woman—without financial support, approval, or assistance from her employer—to access coverage on her own would violate the conscience of her religious employer.

No one would argue that a religious employer could legally object to an employee using money from her paycheck to pay for contraceptives. Why then should the religious employer have the right to object to a woman obtaining contraceptives from an insurance company when the employer has no connection to that coverage?

The Obama Compromise Protects Women’s Health and Reproductive Autonomy.

Access to birth control is not just a matter of respecting a woman’s right of religious conscience. First, the use of birth control is necessary for women implementing fundamental childbearing decisions. At the core of every woman’s right to privacy is whether and when to become a parent.

In addition, birth control affects the health of women and their children. Access to birth control leads to fewer unintended pregnancies and improves a woman’s ability to space pregnancies. Because “unintended pregnancies are by definition unplanned, . . . women may be entering pregnancy with behavioral risks, genetic risks, and unmanaged chronic

conditions that affect their health and the health of their babies.”² And, according to the U.S. Agency for International Development (USAID), “short birth-to-pregnancy intervals are associated with significant increased risk of neonatal, infant, child and under-5 mortality; low birthweight and preterm births; infant/child malnutrition in some populations; and stillbirths, miscarriages, and maternal morbidity.”³ Women also use birth control pills for reasons other than birth control. For example, women who suffer from endometriosis often use the pill for relief.

Further Expansion of the Religious Exemption Should Be Rejected Because it is the Real Threat to Church-State Separation.

The religious exemption many on the panel seek is incredibly expansive: they want to exempt *any* individual employer who has an objection to providing coverage of contraceptives from the mandate.

Last week, according to *USA Today*, Anthony Picarello, general counsel for the U.S. Conference of Catholic Bishops, argued against the compromise, saying his goal is to get the contraceptive mandate removed from the healthcare law altogether.⁴ He explained that no mandate should apply to “good Catholic business people who can’t in good conscience cooperate with this.”⁵ And he complained that “If I quit this job and opened a Taco Bell, I’d be covered by the mandate,”⁶ Indeed, the Catholic Bishops are arguing that even owners of a Taco Bell should be able to act upon a “corporate conscience” and deny women coverage of birth control based on a religious objection.

Similarly, in a Congressional hearing in November, witnesses from the Christian Medical Association and the Alliance for Catholic Health Care also argued that the religious exemption should include individual employers.⁷

If Congress were to expand the exemption to individuals, the exemption could easily end up swallowing the rule. Employees would have no real protections, as anyone could simply refuse to provide insurance coverage for contraceptives. Employees would not necessarily even know before they accept a job whether or not they would be granted coverage for preventative care services offered to other Americans.

² North Carolina Department of Health and Human Services, “Unintended Pregnancies: 2004-2006 N.C. Pregnancy Risk Assessment Monitoring System,” *North Carolina Prams Fact Sheet*, March 2009. Retrieved Feb. 15, 2012, from <<http://www.schs.state.nc.us/SCHS/pdf/UnintendedPregnancies.pdf>>.

³ U.S. Agency for International Development, “Birth Spacing,” *USAID Website*, 2009. Retrieved Feb. 15, 2012, from <http://www.usaid.gov/our_work/global_health/pop/techareas/birthspacing/index.html>.

⁴ Richard Wolf and Cathy Lynn Grossman, “Obama mandate on birth control coverage stirs controversy,” *USA Today*, Feb. 9, 2012. Retrieved Feb. 14, 2012, from <<http://www.usatoday.com/news/washington/story/2012-02-08/catholics-contraceptive-mandate/53014864/1>>.

⁵ *Id.*

⁶ *Id.*

⁷ David Stevens, CEO of the Christian Medical Association, argued against the proposed regulation on the grounds that it “provides no protection to conscientiously objecting individuals,” and William J. Cox, President and CEO of the Alliance of Catholic Health Care, stated, “HHS should also amend the rule to ensure that individuals... are similarly protected.” U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Health. *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?*. 112th Cong, 1st sess. 2011.

In fact, the logical conclusion of those urging a more expansive exemption is that *any* employer—whether an individual or corporation—could refuse to cover *any* procedure to which they objected on religious grounds.⁸ Such an astonishing broad and far sweeping exemption would endanger patient health and threaten to overturn the important medical decisions of employees. Its reach would extend beyond reproductive healthcare, such as sterilization and abortion, to areas such as coverage of end-of-life directives, services for patients with HIV, and patients in need of psychiatric medicines and services. Allowing employers a blanket exemption from providing insurance coverage for *any* service or item—with no consideration of the effect such exemption would have on the patients—creates a serious threat to public health.

For example, an employer who works for an individual who believes the Bible proscribes blood transfusions could be denied coverage for that life saving procedure or services related to the procedure. An employee who, in this tough job market, takes a job with an individual who opposes traditional medicine for religious reasons could be denied insurance that covers any service or item beyond prayer therapy. And, an employee who works for an adherent of Scientology could be denied most psychiatric services.

Furthermore, expanding the exemption risks violating the Establishment Clause. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,⁹ its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”¹⁰ For example, in *Texas Monthly, Inc. v. Bullock*,¹¹ the Supreme Court explained that legislative exemptions for religious organizations that exceed Free Exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.”

In *Cutter v. Wilkinson*,¹² the Supreme Court held that, to meet the confines of the Establishment Clause, “an accommodation must be measured so that it does not override other significant interests.” The Court upheld the law in that case because the government could deny the exemption if “religious accommodations become excessive” or would “impose unjustified burdens on other[s].”¹³ Indeed, in *Estate of Thornton v. Caldor, Inc.*,¹⁴ the Supreme Court struck down a blanket exemption for Sabbatarians because it “unyielding[ly] weight[ed]” the religious interest “over all other interests,” including the interests of co-workers.

It is clear that the more expansive the exemption and the greater the burden it places on others, the more likely the exemption will violate the Establishment Clause. Here, critics want to expand the exemption, burdening more women by denying them insurance

⁸ Indeed, H.R. 1197 would impose this very exemption into the “Affordable Care Act.”

⁹ Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

¹⁰ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

¹¹ 480 U.S. 1, 18 n. 8 (1989).

¹² 544 U.S. 709 (2005).

¹³ *Id.* at 726.

¹⁴ 472 U.S. 703, 704f (1985).

coverage. This risks becoming an “excessive” accommodation that imposes an “unjustified burden” on women seeking contraceptives.

Conclusion

The separation of church and state means that the government will not force one religious view or doctrine upon the people. The religious exemption compromise attempts to strike a balance and not promote the private interests of one religion over the conscience of employees. This rule allows women—not their employers—to make decisions about their healthcare and their religious beliefs. Women may not share the religious beliefs of their employer or practice religion in the exact way their employer does. It is the woman’s right to exercise her religion freely and make her own decisions about reproductive health, even if she is employed by an organization that holds a different position on these matters. But, for many women, the right to purchase birth control is often meaningless without the insurance coverage to do so. If the government, however, allowed the “corporate conscience” or a religious institution to override the conscience and health interests of its employees, church-state separation would be compromised.