(I will address the letters individually)

September 26, 2011

The Honorable John Thune
United States Senate
511 Dirksen Senate Office Building
Washington, D.C. 20510-4104

The Honorable Tim Johnson
136 Hart Senate Office Building,
Washington, DC 20510

The Honorable Kristi Noem
226 Cannon HOB
Washington, DC 20515

Dear,

I write to express concern about the August 3, 2011 amendment to the regulations entitled Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act (File Code CMS-9992-IFC2). Specifically, I have two concerns: 1) that the exemption created in this amendment for religious employers is not adequate to exempt our school and 2) that even if the exemption were expanded to exempt our school, as written, it would only exempt the health care plans that our schools offer to their employees, but would not exempt the health plans that our school offers to its students, and that in both circumstances, being compelled to fulfill this mandate would be a violation of the conscience rights of our institution as well as their First Amendment rights of free speech and expressive association.

The mission of the University of Sioux Falls (USF) is that we "seek to foster academic excellence and the development of mature Christian persons for service to God and Humankind in the world." As expressed in this mission, our school incorporates Christian faith into every facet of student development. Yet, in spite of the deeply held religious convictions of our institution and the religious mission that guides our institution, per the definition outlined in these regulations it is uncertain that we would be considered a religious employer.

First, before I address our specific concerns with the exemption and the fact that even if expanded it would still leave our student plan subject to the mandate, allow me to explain why it is so important to USF, both philosophically, theologically, and legally, that USF be exempted from the contraceptive mandate. First, USF is commitment to being recognized as a religious entity and being afforded its constitutional protections as such.

Implicit in these regulations is the notion that there are tiers of religious organizations, some which are religious enough to be afforded their religious freedoms and others which are not, essentially disregarding the religious character of non-church or non-church related institutions. I think this notion is troubling for a number of reasons. First, it violates the principle that "the government may not pick and choose among different religious organizations when it imposes some burden." *Larson v. Valente,* 456 U.S. 228 (1982). Second, it places the government as the arbiter of such decisions and creates the exact interference with church by state that the constitution protects against as "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions". *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 at 502 (1979).

Further, I am fundamentally opposed to the idea that the government can mandate something so at odds with the religious beliefs of many without granting adequate religious and conscience protections. The Supreme Court has held time and time again that without a compelling reason, the government must respect the religious beliefs and practices of religious organizations without judging the merits of those religious beliefs and practices. It is for such reason that Congress passed the Religious Freedom Restoration Act of 1993 (RFRA). This legislation excuses federally funded faith-based organizations from having to incur a substantial religious burden when burden is imposed by a generally applicable law. Being mandated to provide and pay for a service that is so in opposition to the conscience of the organization is most certainly a burden and such application would most certainly violate RFRA.

Furthermore, to mandate that a religious institution adopt a practice to which it has a conscientious objection is a violation of that groups First Amendment freedom of speech, (S*ee e.g., Keller v. State Bar of California,* 496 U.S. 1 (1990) (holding that state bar members could not be compelled to finance political and ideological activities with which they disagree) and Freedom of Expression (*See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that compelling an organization to do something that they had a conscientious objection to would violate their freedom of expressive association by forcing them to send a message to the world that they legitimize something they actually object to).

As you know, the exemption to the contraceptive mandate carved out for religious employers states:

> "For the purposes of this subsection, a 'religious employer' is an organization that meets all of the following criteria:
>
> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 603 3(a)(1) and section 603 3(a)(3)(A)(i) or (iii) of the Internal Revenue Code of

> 1986, as amended" that refer to "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.

Regarding the first factor, I object to the subjective inquiry that both is unrelated to whether an organization is truly religious and also invites an unconstitutional inquiry into whether religious organizations are religious enough. While USF infuses religious values into every aspect of what we do, and though the United States Supreme Court has identified that "'the raison d'être of parochial schools is the propagation of a religious faith,'" NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 503 (1979), as these are also fully accredited, degree granting, institutions of higher learning I am concerned whether the government agent tasked with determining whether a group meets the four requirements listed above would indeed find that our institution meets the first requirement. This concern was affirmed by the Supreme Court when it said that ""[t]he line" between secular and religious activities "is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 13 327, 336 (1987).

Further, is the consideration as to who will be tasked with making the final determination as to whether the "inculcation of religious vales is the purpose of the organization." The Department of Health and Human Services hardly seems like the appropriate place for such a determination to be made. In fact, the subjectivity of the factor itself seems to invite an unconstitutional inquiry into the religiosity of the organization that has been rejected by the Supreme Court. In *Mitchell v. Helms* the 530 U.S. 793, 828 (2000), the Court explained in its plurality decision "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." Yet, with these regulations, HHS has set itself up to do exactly that; an inquiry that our institutions deeply object to.

In addition, I am concerned about the factors deeming as a "religious employer" only organizations that both serve and employ primarily co-religionists. While USF hires only co-religionists for all administrative and full-time faculty positions, we have implemented different policies for hiring support staff and adjunct faculty that reflect their understanding of how best to accomplish their mission in light of their theological traditions. USF also is a policy regarding enrolling Christian and non-Christian students alike. The decisions made by USF reflect our interpretations of the Christian faith, Christian gospel, and mission of the school. These regulations, however, lead to the absurd results that institutions whose theological interpretations happen to align with HHS's wishes could be considered religious organizations while those that have a different theological understanding and mission could not. We are confident that this is not the outcome the Department intended when these regulations were created, and reflect another way the current religious exemption is flawed. Finally, these differences, of whether to hire and serve primarily co-religionists cannot simply be dismissed as neutral factors when there are legitimate religious principles that guide these decisions and "the prospect of church and state litigating in court about what does or does not have

religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

Finally, the fourth requirement, that the organization meet specific IRS 990 categorizations, is merely a formal categorization that governs disclosures, and bears no actual relationship to the religiosity of an organization, yet would probably disqualify USF from being considered as "religious employers". While many institutions similar to USF are affiliated with larger church organizational or denominational structures, many are not, and instead are independent organizations, a factor that this requirement disregards. Again, this requirement serves to distinguish between the constitutional rights of churches and other religious organizations, a distinction the Supreme Court has repeatedly rejected.

Our second overarching concern stems from the fact that even if the exemption were to be expanded to be more inclusive of religious employers, I am concerned that the regulations as written will violate the conscience of our institution as it relates to the health care plan that we offer to our students – the exemption is for employer plans, as written it does not appear to also include the student plans. Not only would this force our institution to violate our religious convictions by offering emergency contraceptives to our students, it would put us in the awkward position of offering a health care plan to our employees that is consistent with their religious convictions while offering another to our students that violates their religious convictions. Further such an offering would most certainly violate the conscience of many of the students that participate in the health plan.

In light of these considerations I ask the department to eliminate the mandate altogether. But if the Department chooses to keep the mandate in place, I ask the department to expand the scope of the exemption to include both a wider scope of religious employers and also health care plans offered by religious organizations, whether they are an employer or not so that the conscience of all religious organizations is protected, regardless of their relationship with the insured.

I appreciate your attention to this crucially important matter and am happy to speak with you or your department's representatives if that would be helpful.

Sincerely,

Mark Benedetto
President