ALLIANCE DEFENDING FREEDOM

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Testimony of Denise M. Burke
Senior Counsel, Alliance Defending Freedom
On Washington Senate Bill 6102
Before the House Committee on Judiciary
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My name is Denise M. Burke. I am Senior Counsel with Alliance Defending Freedom. I have been asked to testify today concerning the constitutional implications of Senate Bill (SB) 6102, requiring most health insurance plans offered in the State of Washington to cover life-ending drugs and devices and contraception in violation of the First Amendment freedom of conscience of many individuals, employers, and businesses.

In evaluating the practical and constitutional implications of this bill, it is important to remember that (1) while the U.S. Supreme Court has determined that an individual has a right to ***use*** contraception, there is no constitutional right to require others to pay for or facilitate access to that contraception; (2) many FDA-approved contraceptives have life-ending mechanisms of action that make them objectionable to many Americans; and (3) freedom of conscience is a fundamental right that has been respected and protected since the founding of our Nation

Right to Use Contraception Does Not Mandate that Others Pay for or Facilitate Access to It

In *Griswold v. Connecticut*,[1] the U.S. Supreme Court determined that an individual has the right to ***use*** contraception, striking down a Connecticut law that prohibited any person from using "any drug, medicinal article or instrument for the purpose of preventing conception."[2]

Importantly, there has been no Supreme Court or other case which has determined that there is a constitutionally protected right to have others pay for or facilitate an individual's use of or access to contraception; therefore, any purported right that SB

[1] 381 U.S. 470 (1965).
[2] *Id.*

6102 attempts to create is clearly subservient to the well-recognized First Amendment freedom of conscience.

Some FDA-Approved Methods of Contraception Have Life-Ending Mechanisms of Action

The FDA's definition of "contraception" is broad and includes drugs and devices with known post-fertilization (*i.e.*, life-ending) mechanisms of action.[3] As such, forcing employers to provide coverage of such life-ending drugs and devices violates the conscientious beliefs of Washington citizens and employers, as well as the businesses they have worked hard to establish and grow.

The scientific literature is overwhelmingly clear: a new, distinct human organism comes into existence during the process of fertilization.

- "The fusion of sperm and egg membranes ***initiates the life*** of a sexually reproducing organism."[4]

- The ***life cycle of mammals begins*** when a sperm enters an egg."[5]

- "Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce ***a genetically distinct individual***."[6]

- "Fertilization – ***the fusion of gametes to produce a new organism*** – is the culmination of a multitude of intricately regulated cellular processes."[7]

- Human development begins at fertilization when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to produce a single cell – a zygote. This highly specialized, totipotent cell marked ***the beginning of each of us as a unique individual***.[8]

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[3] *See* Food and Drug Administration, *Birth Control Guide* (Jan. 2018), *available at* https://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Feb. 21, 2018).
[4] Marsden et al., *Model systems for membrane fusion*, CHEM. SOC. REV. 40(3):1572 (Mar. 2011) (emphasis added).
[5] Okada et al., *A role for the elongator complex in zygotic paternal genome demethylation*, NATURE 463:554 (Jan. 28, 2010) (emphasis added).
[6] Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, CELL TISSUE RES. 349(3):765 (Mar. 20, 2012) (emphasis added).
[7] Marcello et al., *Fertilization*, ADV. EXP. BIOL. 757:321 (2013) (emphasis added).
[8] Moore & Persaud, THE DEVELOPING HUMAN 16 (7th ed. 2003) (emphasis added).

Life-ending mechanisms of action are included in the FDA definition of "contraception." Even though drugs and devices, such as "emergency contraception" and intrauterine devices (IUDs), may end a developing, distinct human being's life by preventing implantation, they are labeled by the FDA as "contraception."[9] However, referring to such drugs as "contraception" is deceiving in that the term implies only the ***prevention of fertilization***. Yet, the FDA-accepted scientific endpoint which defines a drug as a "contraceptive" is the ability to prevent a "pregnancy" – which means preventing detection of a positive pregnancy test at the end of a woman's cycle, nearly ten days to two weeks after embryo formation.[10]

Thus, because the FDA's criterion in categorizing a drug or device as "contraception" is whether a drug can work by preventing "***pregnancy***" – which the FDA defines as beginning at "implantation," not fertilization – drugs that interfere with implantation (which occurs days after fertilization and the creation of a new human organism) are categorized as "contraception."[11]

Clearly, under the mandates of SB 6102, individuals and employers are required to provide insurance coverage (*i.e.*, pay for) drugs and devices that can kill human embryos, contrary to their conscientious beliefs. If they refuse, they face adverse action by the state human rights commission or a civil lawsuit for discrimination. Clearly, under the auspices of SB 6102, individuals and employers will be forced to choose between either following their deeply held and conscientious beliefs or complying with the law. It is exactly this type of coercive dichotomy that violates the U.S. Constitution's guarantee of freedom of conscience.

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[9] For example, when promoting the contraceptive mandate in Obamacare, Kathleen Sebelius, then-Secretary of Health and Human Services (HHS), admitted that the FDA's definition of "contraception" extends to *blocking the implantation* of an already developing human embryo: "The Food and Drug Administration has a category [of drugs] that prevent fertilization *and implantation*. That's really the scientific definition." Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011) (emphasis added).

[10] *Id.*

[11] For an overview of how the definition of "pregnancy" has changed, *see* Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy*, 9 NAT'L CATHOLIC BIOETHICS QUARTERLY 542 (2009).

Freedom of Conscience is a Fundamental Right that has been Respected and Protected since the Founding of our Nation

The paramount importance of freedom of conscience has been affirmed by America's Founders, by the U.S. Supreme Court, and by federal and state governments. Our Nation's history, tradition, and jurisprudence confirm that an American cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs – including payment for such an act.

Freedom of Conscience is Affirmed by America's Founders

At the very root of the First Amendment's promise of the Free Exercise of Religion is the guarantee that the government cannot force a person to commit an act in violation of his or her religious faith or beliefs. The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience."

For example, Thomas Jefferson made it clear that freedom of conscience is not to be subordinate to the government: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."[12] Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority,"[13] and maintained that forcing a person to *contribute* to – much like forcing an individual or employer to pay for – a cause to which he or she abhorred was "tyrannical."[14]

Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He stated that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature ***an unalienable right***."[15] In fact, Madison described the conscience as "the most sacred of all property."[16]

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[12] Jefferson, *Notes on Virginia* (1785).
[13] Jefferson, Letter to New London Methodists (1809).
[14] Boyd, THE PAPERS OF THOMAS JEFFERSON 545 (1950).
[15] Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1785) (emphasis added).
[16] Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

Forcing individuals and employers to provide insurance coverage for (*i.e.*, to pay for) drugs and devices which have the effect of ending human life and to which they are conscientiously opposed eviscerates the very purpose for which this Nation was founded and formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. *We ought with one heart and one hand hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into . . . tyranny over religious faith. . . .*"[17]

Freedom of Conscience is Affirmed by the U.S. Supreme Court

The Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American. It has explicitly stated that "[f]reedom of conscience . . . cannot be restricted by law."[18] In fact, "freedom of conscience" is referenced explicitly throughout the Supreme Court's more than two centuries of jurisprudence.[19]

Further, the Supreme Court has held that laws cannot abridge expressions protected by the First Amendment simply because a business or corporation is the source of protected conduct.[20] Recently, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court ruled that the contraceptive coverage mandate in the Affordable Care Act, commonly known as the "HHS Mandate," violated the Religious Freedom Restoration Act of 1993 (RFRA)[21] which prohibits the federal government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.[22] The Court determined that the "HHS Mandate" burdened the constitutionally protected religious exercise rights of closely-held, for-profit corporations.

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[17] Jefferson, Letter to Edward Dowse, Esq. (Apr. 19, 1803) (emphasis added).
[18] *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added).
[19] *See, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (referencing "constitutionally protected freedom of conscience").
[20] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
[21] 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*
[22] *Id.*

Freedom of Conscience is Affirmed by Federal and State Laws

The federal government and the States have considered and passed numerous measures expressing their commitment to protecting the freedom of conscience.

Specifically, Congress has acted to provide specific conscience protections in the provision of contraceptives. For example, in 2000, Congress passed a law requiring the District of Columbia to include a conscience clause protecting religious beliefs and moral convictions in any contraceptive mandate.[23] Earlier, in 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives.[24] Similarly, as noted in the legislative findings of SB 6102, "in October 2017, the federal government issued interim final rules expanding the contraceptive coverage exemption [to the Affordable Care Act mandate] to include nearly any for-profit entity that has moral or religious objections to providing their employees with contraceptive services."[25]

Further, the laws of 12 states provide conscience protections for healthcare providers in the provision of contraception, specifically:

- Nine states allow individual healthcare providers to decline to provide services related to contraception: Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Maine, Mississippi, and Tennessee.
- Six states explicitly permit pharmacists to decline to dispense contraceptives: Arizona, Arkansas, Georgia, Idaho, Mississippi, and South Dakota. Broad conscience laws in Colorado, Florida, Illinois, Kansas, Maine, and Tennessee may also apply to pharmacists.
- Eight states allow healthcare institutions to decline to provide services related to contraception, while five states limit the exemption to private entities: Arizona, Arkansas (private), Colorado (private), Illinois, Maine (private), Massachusetts (private), Mississippi, and Tennessee (private).[26]

[23] *See* Pub. L. No. 108-7, 117 Stat. 11, 126-27 (2000).
[24] *See* Pub. L. No. 108-7, 117 Stat. 11, 472 (1999).
[25] Washington Senate Bill 6102 (2018), Sec. 2.
[26] *See* Guttmacher Institute State Policy Factsheet, "Refusing to Provide Health Services," (as of Feb. 1, 2018), *available at* https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services (last visited Feb. 21, 2018).

These laws and policies – and many others – highlight the commitment of the American people to protect individuals and employers from mandates or other requirements forcing them to violate their consciences and/or religious and moral beliefs, and demonstrate that SB 6102 ignores the longstanding national commitment to protect the freedom of conscience.