



February 19, 2019

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9926-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: Proposed Rule: Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020 (CMS-9926-P)

Dear Sir or Madam:

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and over 211,000 of its members,¹ supporting the adoption of the proposed rule issued by the Department of Health and Human Services (“HHS” or “the Department”) on January 24, 2019, regarding Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020 as reported in 84 FR 227 of the Federal Register (hereafter, the “Rule”).²

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.³ In

¹ *Stop Forcing Us to Pay for Abortion Insurance*, AMERICAN CENTER FOR LAW AND JUSTICE, <https://aclj.org/pro-life/stop-forcing-us-to-pay-for-abortion-insurance> (last visited Feb. 19, 2019).

² Department of Health and Human Services; Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020, 84 Fed. Reg. 227 (proposed Jan. 24, 2019) (to be codified at 45 C.F.R. 146, 147, 148, 153, 155, 156), *available at* <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-00077.pdf>.

³ *See, e.g., Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school’s campus did not violate the

addition, the ACLJ represented thirty-two individuals and for-profit corporations in seven legal actions against the Federal Government’s contraceptive services mandate.⁴ The ACLJ submitted amicus briefs with the Supreme Court in support of petitioners in both *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Rule should be adopted because it requires insurance companies that offer Qualified Health Plans (“QHPs”) under the Affordable Care Act (“ACA”), which provide plans that include abortion coverage for non-Hyde Amendment abortions, to also provide “otherwise identical” benefit coverage to consumers that omits coverage of those abortion services. This rule would ensure that consumers choosing a QHP under the ACA in all geographical regions (except the four states where abortion coverage is mandated) are able to select plans that do not include non-Hyde Amendment abortion coverage. Coupled with another recent HHS rule that requires issuers to clearly notify consumers of whether the plan they have selected includes abortion, this rule ensures that consumers are able to make informed decisions and are provided QHP options that are in line with their conscience by allowing them to keep their funds from being used to pay for abortion services.

I. HHS HAS RECENTLY MADE STRIDES TO PROTECT THE SANCTITY OF LIFE AND IT SHOULD CONTINUE TO DO SO.

Abortion is one of the gravest of all offenses against human life and against justice because it entails the deliberate killing of an innocent human being – a human being, as recently affirmed by President Trump, who is “made in the holy image of God.” It is an indisputable scientific fact that the unborn child is a distinct biological organism, is alive, and belongs to the species *homo sapiens*. Thus, any justification of abortion (aside from the extremely rare life vs. life situations where a mother is at serious risk of dying from continuing the pregnancy) fundamentally rests on the proposition that some members of the human race do not have even the most basic of human rights, the right to live. That proposition is incompatible with the very notion of human rights, not to mention the recognition in the Declaration of Independence that “all men are created equal” and the constitutional principle of the “equal protection of the laws.” And while the U.S. Supreme Court in the tragic 1973 decision of *Roe v. Wade* prevented states from completely outlawing the grave injustice of abortion, even that Court has recognized that the citizens of this nation may rightly be protected against compulsory support for, or

Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport’s ban on First Amendment activities).

⁴ *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. Dep’t of Health & Human Servs.*, No. 6:12-cv-03459-MDH (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 4:13-cv00462-AGF (E.D. Mo.); *Hartenbower v. U.S. Dep’t of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill.).

⁵ Non-Hyde Amendment abortions are any abortions other than those performed to protect the life or health of the mother, or in cases of rape or incest.

participation in, abortion. A pro-life policy, then, seeks to offer to unborn children what protective measures are possible, and to prevent the coerced complicity of the citizenry in the practice of abortion.

Thankfully, the HHS has taken steps to rectify the policies of prior administrations that demonstrated a disregard for the sanctity of human life, agnosticism toward its duty to uphold the law, and hostility toward states that wished to act in the best interests of their citizens on the issue of life, preferring instead to recognize the humanity of the unborn, respect the freedom of conscience, and uphold the law rather than play politics with human life.

On January 18, 2019, the HHS Press Office released a statement indicating the Trump Administration’s plan of action to protect life and conscience and listing some of the actions that have already been taken by HHS to protect life and conscience. For instance, in January 2019, the HHS Office for Civil Rights (OCR) “notified the State of California that its law requiring pro-life pregnancy resource centers to refer clients for abortions, by posting notices about free or low-cost family planning services and abortion, violated the Weldon and Coats-Snowe Amendments.”⁶ This is important, as it “is the first time that any state has been found in violation of these laws, [and reflects] HHS’s heightened commitment to enforcing conscience protection statutes.”⁷

Last fall, HHS proposed a rule that would require greater oversight to ensure transparency and compliance so that federal funds are not used to pay for abortion services.

The ACLJ is greatly encouraged by these efforts on the part of HHS to protect life and conscience, and it is our hope that these recent efforts are emblematic of a long-term commitment to righting the wrongs of the past. The ACLJ applauds the Department for building on these recent efforts, and encourages the Department to continue with these strides to make it clear that HHS will no longer shirk its responsibility to equitably, consistently, and transparently enforce federal law that protects the rights of conscience of U.S. taxpayers.

II. THE RULE PROTECTS RIGHTS OF CONSCIENCE

For over forty years, federal law has prohibited the use of any federal funds for abortion services, with only certain exceptions for pregnancies that are the result of rape or incest, or if the life of the mother is endangered. This law, also known as the Hyde Amendment, has been passed each year, through bipartisan support, as an addition to

⁶ Press Release, Health & Human Services, Trump Administration Actions to Protect Life and Conscience (Jan. 18, 2019), *available at* <https://www.hhs.gov/about/news/2019/01/18/trump-administration-actions-to-protect-life-and-conscience.html>.

⁷ *Id.*

congressional appropriations bills. On January 24, 2017, the House passed H.R.7,⁸ also known as the “No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017.” That bill would codify the Hyde Amendment, so that it would no longer have to be adopted every year. The Trump Administration has stated that it strongly supports the legislation, and that President Trump would sign the bill into law.⁹ While the Senate did not pass this bill, the longstanding history of bipartisan support for and the repeated passage of the Hyde Amendment underscores the desire of U.S. taxpayers to keep their tax money from being used to pay for abortion. As such, the Hyde Amendment is one way in which conscience protection is provided to U.S. taxpayers.

When the PPACA was passed in 2010 mandating insurance coverage for U.S. taxpayers, it included Section 1303, which places restrictions on, and requirements with respect to, insurance coverage of certain abortion services by QHPs offered through individual market Exchanges. Further, Section 1303 explicitly prohibits the use of federal funds to pay for coverage by QHPs of abortions that are not permitted under the Hyde Amendment.¹⁰ This means that all abortion coverage, other than instances where pregnancies threaten the life of the mother or result from rape or incest, is prohibited when taxpayer funds are at issue. In addition, federal law now provides conscience protections that prohibit QHPs from discriminating “against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.”¹¹

Both of these provisions are important in reinforcing conscience protections for U.S. taxpayers, but they are insufficient. Unfortunately, while organizations, health care providers and/or facilities are afforded some conscience protections via federal law, not all individual consumers of QHPs are afforded the same accommodation.

Currently, there are QHPs available to individual consumers that cover non-Hyde Amendment abortions, but many consumers are unable to purchase similar QHPs that do not include coverage of those same abortion services. Thus, many consumers are having to purchase plans that violate their conscience by funding abortion coverage because no plan in their geographic region that otherwise includes the type of coverage they need excludes abortion coverage.

It is wrong to force someone to be complicit in acts that violate his or her conscience. Under current law, U.S. citizens are required to obtain a minimum level of

⁸ No Taxpayer Funding for Abortion and Abortion Insurance Disclosure Act of 2017, H.R. 7, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/7>.

⁹ Press Release, Statement of Administration Policy: H.R. 7 – No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, The White House (Jan. 24, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/sap-hr7-01242017.pdf>.

¹⁰ Section 1303(b)(2)(A) of PPACA, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 42 U.S.C. § 18023(b)(2)(A).

¹¹ Section 1303(b)(4) of PPACA, Pub. L. 111-148 as amended by Pub. L. No. 111-152.

insurance coverage. Thus, consumers are legally required to obtain insurance coverage. Yet, while individual consumers are complying with the current law, many issuers are not providing coverage that is in line with the consciences of those consumers. While individual consumers may desire to obtain QHP coverage that does not provide non-Hyde Amendment abortion coverage, such a plan may not be available in their geographic region, thus preventing the consumer from being able to select a plan that both meets their individual needs and is in line with their conscience.

It is clear that this Rule is needed to protect the consciences of those consumers who believe that life is sacred, that abortion is wrong, and who desire to keep their funds from being used to pay for abortion coverage. Moreover, the Rule is not overly burdensome on insurance providers, as it only requires that “at least one ‘mirror QHP’ throughout each service area that the QHP issuer offers plans covering non-Hyde abortion coverage, even if the issuer has multiple plans that offer non-Hyde abortion services in a single service area.”¹²

III. THE RULE IS IN COMPLIANCE WITH FEDERAL LAW

Section 1303(b)(1)(A)(ii) of the ACA states: “subject to subsection (a), the issuer of a qualified health plan shall determine whether or not the plan provides coverage of services described in subparagraph (B)(i) or (B)(ii) as part of such benefits for the plan year.”¹³ Some will most likely seek to interpret this language as disqualifying of HHS’s proposed rule, arguing that under this section the insurance provider cannot be required to carry QHPs that do not provide non-Hyde Amendment abortion coverage.

However, it is important to note that § 1303(b)(1)(A)(ii) falls under the heading “Voluntary Choice of Coverage of Abortion Services,” and that § 1303(b)(1)(A)(i) states “nothing in this title (or any amendment made by this title), shall be construed to *require* a qualified health plan to *provide* coverage of services described in subparagraph (B)(i) or (B)(ii).”¹⁴ Subparagraph (B)(i) covers non-Hyde Amendment abortion services, and subparagraph (B)(ii) addresses Hyde Amendment abortions.¹⁵ Thus, § 1303(b)(1)(A)(ii) allows insurance providers to determine whether or not they *will* provide abortion coverage, and does not restrict the ability of HHS to require insurance providers to offer QHPs that *do not* cover non-Hyde Amendment abortions.

As such, this Rule is in compliance with § 1303(b)(1)(A)(ii).

¹² Department of Health and Human Services; Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020, 84 Fed. Reg. 227 (proposed Jan. 24, 2019) (to be codified at 45 C.F.R. 146, 147, 148, 153, 155, 156), *available at* <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-00077.pdf>.

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¹⁴ Section 1303(b)(1)(A)(ii) of PPACA, Pub. L. 111-148 (emphasis added).

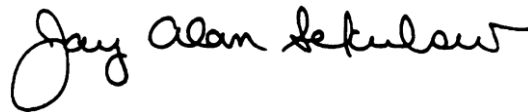
¹⁵ Section 1303(b)(1)(B)(i)-(ii) of PPACA, Pub. L. 111-148.

IV. CONCLUSION

The ACLJ urges HHS to adopt the Rule. Doing so will ensure the protection of rights of conscience of consumers by increasing QHP options for consumers who believe in the sanctity of life. It does not create new law, but simply serves to provide additional options for individual consumers who are legally required to obtain insurance coverage. The ACLJ commends HHS for acting in ways that recognize the humanity of the unborn, respect the freedom of conscience, and uphold the law. We also encourage HHS to go a step further and to offer similar protection to individual consumers who desire to purchase QHPs that do not contain abortion coverage in *any* form, and thus conform to their consciences, as a means through which HHS can remain ever vigilant, continue to find new ways to protect the integrity of the law, and to protect the lives of the most vulnerable – unborn children.

Thank you for the opportunity to provide comment on this critical matter.

Sincerely,

Handwritten signature of Jay Alan Sekulow in black ink.

Jay Alan Sekulow
Chief Counsel
AMERICAN CENTER FOR LAW &
JUSTICE

Handwritten signature of Jordan Sekulow in black ink.

Jordan Sekulow
Executive Director
AMERICAN CENTER FOR LAW & JUSTICE