



November 24, 2017

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
Attention: RFI Regarding Faith-Based Organizations
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

[VIA EMAIL]

**RE: HHS-9928-RFI; Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding
82 FR 49300 (Oct. 25, 2017)**

Dear Sir or Madam:

The American Center for Law and Justice (“ACLJ”) submits the following comments in response to the Request for Information issued by the Department of Health and Human Services (“HHS” or “the Department”) on October 25, 2017 regarding the Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding as reported in 82 FR 493000.

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.¹ In addition, the ACLJ represented thirty-two individuals and for-profit corporations in seven legal actions against the

¹ 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 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).

federal government's contraceptive services mandate ("mandate").² The ACLJ has submitted amicus briefs with the U.S. 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).³

I. HHS HAS MADE STRIDES TOWARD INCLUSION OF FAITH-BASED GROUPS; THIS MUST CONTINUE IN ACTION

Over the past several years, HHS has implemented policies that have had a disproportionately negative impact on pro-life and faith-based organizations. These policies have often caused religious organizations to be forced to choose between continuing to offer their vital charitable and community services or holding to their sincerely held beliefs. The HHS contraceptive mandate is only the most recent and infamous example.

However, we are greatly encouraged by the strides made by HHS this past year. First, after half a decade of litigation, HHS has finally issued interim rules that secure not only the health and welfare of the American people, but also the constitutional rights and liberties of all Americans, including those with sincerely held religious beliefs. Second, for the first time in the history of the Department, HHS has released a Strategic Plan that recognizes the scientific fact that life begins at conception. We applaud this well overdue recognition and hope this new plan results in programmatic changes that fully considers the pre-born child and the pro-life organizations that provide services to that pre-born child.

It is our hope that these recent efforts are emblematic of a long-term commitment to righting the wrongs of the past. It is not enough to simply plan to include religious, pro-life, and faith-based organizations in the conversation. Rather, these terrific first steps must ultimately find root in programmatic implementation for grants and other participatory projects. The end result must be a Department that no longer excludes organizations from consideration for public funds and public programs because of their religious affiliation or other sincerely held beliefs. The ACLJ urges the Department to build on its recent efforts and make clear that neither faith beliefs nor a pro-life position can ever be grounds to exclude well-qualified organizations from consideration for public funds and programs.

II. ENDING THE CONTRACEPTIVE MANDATE'S BURDEN ON RELIGIOUS ORGANIZATIONS REMOVED A CRUCIAL BARRIER

The ObamaCare contraceptive mandate imposed on employers, under pain of ruinous financial penalties, a requirement to pay for and provide certain drugs and services, including abortion-inducing drugs known as abortifacients, through their health insurance plans. The original 2012 rule provided no exemptions or accommodations for sincerely objecting faith-

² *Gilardi v. United States HHS*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O'Brien v. U.S. HHS*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. HHS*, 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. HHS*, No. 4:13-cv-00462-AGF (E.D. Mo.); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253 (N.D. Ill.).

³ These comments are also being submitted on behalf of more than 61,000 individuals who signed the ACLJ's "Petition to Support HHS Pro-Life Policy Initiatives."

based organizations and businesses. Only religious houses of worship, strictly defined, were granted this basic constitutional right.

Only after the Supreme Court unequivocally declared the mandate overbroad and substantially burdensome in violation of the Religious Freedom Restoration Act (“RFRA”)⁴ did the Obama Administration and HHS make any effort to accommodate sincerely objecting organizations and businesses. However, while HHS created a waiver process, they refused to accommodate the specific yet very simple requests of sincere objectors, including those of Catholic priests and nuns. It took another Supreme Court case⁵ and a change of administration before HHS finally provided a full, constitutionally required, accommodation.

While we are disappointed it took five years of costly litigation and a change in administration before HHS stopped abrogating the constitutional rights of religious objectors, we are greatly encouraged by the Department’s October 2017 interim rules.⁶ These interim rules acknowledge what we have been arguing in court for half a decade: forcing the mandate on faith-based organizations “imposes a substantial burden on religious exercise under RFRA.”⁷

This decision by the Department represents the first step in restoring the long-broken trust between the government and faith-based organizations. Any efforts toward inclusion would not have been meaningful without first ending this onerous and unconstitutional burden on people of faith.

Unfortunately, however, it appears as though faith-based organizations like the Little Sisters of the Poor are once again besieged by State governments who refuse to comply with either the Court or the Department’s lawfully proposed rules.⁸ California and Pennsylvania seek to stop enforcement of these new provisions and to continue to unconstitutionally impose the contraceptive mandate on elderly nuns, celibate priests, and all people with a sincere religious objection to the use of contraceptives and abortifacients.⁹ Seeing as the “regulation leaves in place preventative services coverage guidelines where no religious or moral objection exists...”,¹⁰ their only aim can be to discriminate against people of faith.

Any claim that these rules violate so-called “reproductive rights” is simply false. Their proponents seek to obfuscate the issue, or they failed to read the rules. Either way, HHS should

⁴ See *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014).

⁵ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁶ Department of Health and Human Services, “Religious Exemptions and Accommodations for Certain Preventive Services Under the Affordable Care Act,” 82 *FR* 47792 (Oct. 6, 2017), <https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the>.

⁷ *Id.*

⁸ Robert King, “Little Sisters of the Poor Battles States in Court Over Birth Control Mandate,” *Washington Examiner*, Nov. 21, 2017, www.washingtonexaminer.com/little-sisters-of-the-poor-battles-states-in-court-over-birth-control-mandate/article/2641358.

⁹ *Id.*

¹⁰ HHS Press Office, “Trump Administration Issues Rules Protecting the Conscience Rights of All Americans,” *Department of Health and Human Services*, Oct. 6, 2017, <https://www.hhs.gov/about/news/2017/10/06/trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html>.

not be deterred in its efforts to restore the constitutional rights of sincerely objecting religious organizations.

The ACLJ urges HHS to continue to implement these interim rules and to defend them in court against the baseless claims of hostile and discriminatory actors. HHS must be committed to not only the health and welfare of the American people, but also to preserving their freedom of choice and constitutional rights in providing for their healthcare needs.

III. HHS'S HISTORIC STRATEGIC PLAN IS A MODEL FOR THE FUTURE

The Department's draft Strategic Plan begins with a Mission Statement that sets forth the Department's goal: "to enhance the health and well-being of Americans by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services."¹¹ The next section describes how the Department intends to accomplish its mission: "through programs that cover a wide spectrum of activities, serving and protecting Americans at every stage of life, beginning at conception."

Perhaps predictably, the inclusion here of the phrase "beginning at conception," and the use of the phrase "from conception to natural death" at several points later in the Plan (see Objective 2.4; Strategic Goal 3; Strategic Goal 4; and Objective 4.3), has aroused alarm and opposition from pro-abortion advocates and their allies.¹²

We applaud the Department's historic inclusion of the above-referenced language in the Department's Strategic Plan because, (a) it is strongly supported by any objective reading of the sciences of biology and embryology; (b) it reflects longstanding—and noncontroversial—government concern for pre-natal well-being as reflected in a myriad of existing statutes, regulations, and programs at both the federal and state levels; and, as such, is a reasonable and lawful exercise of the Department's overall mandate. Moreover, virtually identical concerns about similar language raised by abortion advocates in connection with Departmental rulemaking in 2002 were rejected by the Department and, in any case, have proven to be baseless.¹³

However, planning to treat the unborn with dignity and end the historic discrimination against pro-life organizations in receiving HHS funding and access to HHS programing is not enough. The Department must build on this plan and follow through with programmatic action.

¹¹ HHS Strategic Plan (2014-2018) Draft for Public and Congressional Consultation, 82 Fed. Reg. 45032, (Sept. 27, 2017), www.dtic.mil/doctrine/doctrine/interagency/hhs_sp_fy14-18_draft.pdf.

¹² See, e.g., In a radical departure, Trump health officials want to define life as starting at "conception" <https://www.vox.com/science-and-health/2017/10/13/16449724/trump-hhs-abortion-pro-life-conception> (Oct. 13, 2017); Health Department Draft Plan Declares Life begins at Conception, https://www.huffingtonpost.com/entry/health-human-services-draft-plan-life-begins-atconception_us_59de3434e4b01df09b77e67f (Oct. 11, 2017); The Trump Administration Just Officially Endorsed Anti-Contraception Junk Science, <http://www.motherjones.com/politics/2017/10/look-at-the-junk-science-aboutcontraception-in-the-health-departments-new-manifesto> (Oct. 11, 2017).

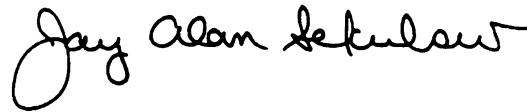
¹³ See the ACLJ's Comment on HHS Strategic Plan, FY 2018–2011 (82 FR 45032), submitted Oct. 26, 2017, http://media.aclj.org/pdf/ACLJ-Comments-82-FR-45032_Redacted.pdf.

By ending the unconstitutional enforcement of the contraceptive mandate against faith-based organizations, HHS has set an example for itself and others to follow.

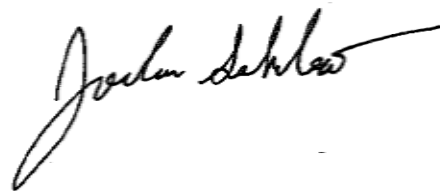
The ACLJ urges HHS to learn from its past mistakes and recent successes to turn its Strategic Plan into actionable policy. It is important that HHS implement policies that protect the rights of the unborn and include pro-life and faith-based organizations in its programs. A failure to provide faith-based organizations with fair and unbiased access to HHS programs and funding will continue to hamper the mission of HHS to better improve the health and welfare of the American people.

Thank you for the opportunity to provide comment on this critical matter, and we stand ready to assist you in implementing these recommendations.

Sincerely,

A handwritten signature in black ink that reads "Jay Alan Sekulow". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

Jay Alan Sekulow
Chief Counsel
AMERICAN CENTER FOR LAW & JUSTICE

A handwritten signature in black ink that reads "Jordan Sekulow". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

Jordan Sekulow
Executive Director
AMERICAN CENTER FOR LAW & JUSTICE