



October 26, 2017

U.S. Department of Health and Human Services
Office of the Assistant Secretary for Planning and Evaluation
Attention: Strategic Plan Comments
200 Independence Avenue SW, Rm. 415F
Washington, DC 20201

[VIA FAX AND EMAIL]

RE: HHS Strategic Plan, FY 2018-2022
82 FR 45032 (Sept. 27, 2017)

Dear Sir or Madam:

The American Center for Law and Justice ("ACLJ") submits the following comments in response to the Request for Comments issued by the Department of Health and Human Services ("HHS" or "the Department") on September 20, 2017 regarding the Department's draft FY 2018-2022 Strategic Plan ("the Plan" or "Strategic Plan") as reported at 82 FR 45032.

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 federal government's contraceptive services mandate ("mandate").² The ACLJ also submitted amicus

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).

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.

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. INTRODUCTION

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.” 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. *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-at-conception_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-about-contraception-in-the-health-departments-new-manifesto> (Oct. 11, 2017).

The ACLJ supports the Department’s 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) 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.

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.”

II. THE DEPARTMENT'S ACKNOWLEDGMENT THAT LIFE BEGINS AT CONCEPTION IS GROUNDED ON INCONTROVERTIBLE SCIENTIFIC FACT.

The lives of each of the Americans whose health and well-being are the stated concerns of the Department began at conception.⁴ This is not religion, theology, or philosophy, but cold, hard scientific fact. To oppose the Department's acknowledgment of this simple fact requires one to ignore one of the most indisputable facts of life on planet Earth as even the most cursory review of scientific authorities will show. For example:

- “[The Zygote] results from the union of an oocyte and a sperm. A zygote is the beginning of a new human being. Human development begins at fertilization, the process during which a male gamete or sperm . . . unites with a female gamete or oocyte . . . to form a single cell called a zygote. This highly specialized, totipotent cell marks the beginning of each of us as a unique individual.” *The Developing Human: Clinically Oriented Embryology*, 6th ed. Keith L. Moore, Ph.D. & T.V.N. Persaud, Md. (Philadelphia: W.B. Saunders Company, 1998), pp. 2-18.
- “It is the penetration of the ovum by a spermatozoan and resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.” *Human Embryology*, 3rd ed. Bradley M. Patten (New York: McGraw Hill, 1968), p. 43.
- “Human embryos begin development following the fusion of definitive male and female gametes during fertilization. . . This moment of zygote formation may be taken as the beginning or zero time point of embryonic development.” *Essentials of Human Embryology*, William J. Larsen (New York: Churchill Livingstone, 1998), pp. 1, 14.
- “Almost all higher animals start their lives from a single cell, the fertilized ovum (zygote) . . . The time of fertilization represents the starting point in the life history, or ontogeny, of the individual.” *Patten's Foundations of Embryology* Bruce M. Carlson, 6th ed. (New York: McGraw-Hill, 1996), p. 3.
- “The zygote thus formed represents the beginning of a new life.” *Biological Principles and Modern Practice of Obstetrics* J.P. Greenhill and E.A. Friedman (Philadelphia: W.B. Saunders, 1974), p. 17.

In 1981, the Senate's Subcommittee on the Separation of Powers of the Committee on the Judiciary held extensive hearings during which it heard from some twenty-two “world-renowned geneticists, biologists, and practicing physicians” on the question of when human life begins. In the words of the Subcommittee's Final Report:

⁴ Also known as “fertilization” both in scientific literature and common parlance.

The testimony of these witnesses and the voluminous submissions received by the Subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete.

Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, Report, 97th Congress, 1st Session, 1981.

This basic scientific fact has been acknowledged even by those most closely associated with pro-abortion views and advocacy such as Planned Parenthood's former President, Dr. Alan Guttmacher:

A facet that makes the obstetrician's burden unique in the whole field of medicine is his double obligation; he simultaneously cares for two patients, the mother and the infant. . . The essential step in the initiation of life is by fertilization, the penetration of the ovum by a spermatozoan and the fusion of the two cells into a single cell.

Pregnancy and Birth: A Book for Expectant Parents, A. Guttmacher, New American Library; Revised Ed. (January 1, 1962)

Given the unanimity of scientific opinion on the question of when life begins—and the foregoing quotations barely scratch the surface of the available authorities that could be cited—the Department's use of the phrases “every stage of life, beginning at conception” and “from conception to natural death” in its Strategic Plan can hardly be viewed as even minimally controversial.⁵ On the contrary, had the Department avoided such objective factual terms out of concern for the ideological (and markedly unscientific) predilections of abortion proponents, it would have fallen short of that part of its stated mission to “foster[ing] sound, sustained advances in the sciences underlying medicine, public health, and social services.”

III. THE LANGUAGE IN QUESTION REFLECTS THE DEPARTMENT'S—AND THE NATION'S—LONGSTANDING CONCERN FOR PRENATAL HEALTH OF BOTH MOTHER AND CHILD.

The importance of prenatal medical care for both mother and unborn child can scarcely be overstated. *See, e.g.*, the Center for Disease Control's *Pregnancy and Prenatal Care*, <https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/PregnancyPrenatalCare.html> (“In order to have the best

⁵ It is well-settled, as a matter of constitutional law, that the government has “a legitimate and substantial interest in preserving and promoting fetal life,” as well as an “interest in promoting respect for human life at all stages in the pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007).

possible outcome for mother and child, early prenatal care is essential.”) As a component of HHS, CDC sees part of its role as being to “provide[s] scientific leadership in the promotion of women’s health and infant health before, during, and after pregnancy.” See <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/index.html>. This suggests, *inter alia*, that, not only do existing HHS subdivisions and agencies *already* concern themselves with health and well-being “beginning at conception,” the Department, in fact, sees its mission—for reasons of achieving maximum health outcomes—as extending to the time even *before* conception.

Another example of the Department’s longstanding commitment to programs and initiatives designed to serve and protect “Americans at every stage of life, beginning at conception,” is the NICHD, the Eunice Kennedy Shriver National Institute of Child and Human Development, an Institute within one of the Department’s Operating Divisions, the National Institutes of Health (“NIH”).

According to the Institute’s website, NICHD was established in 1962 by President John F. Kennedy to study the “complex process of human development from conception to old age.” Its programs incorporate, *inter alia*, the following concepts:

Events that happen prior to and throughout pregnancy, as well as during childhood, have a great impact on the health and well-being of children and adults. NICHD supports and conducts research to:

Advance knowledge of pregnancy, fetal development, and birth to inform development of strategies that prevent maternal, infant, and childhood mortality and morbidity.

About NICHD, <https://www.nichd.nih.gov/about/Pages/index.aspx>.

Moreover, during the Carter Administration, the Department issued a report on the Status of Children, Youth, and Families that observed that “life is a constantly evolving process that begins with conception and continues until death,” and noted that:

Life begins when a male sperm unites with a female egg. The new life created by this union starts as a single cell. . . . In relation to the total life span of the individual, the early developmental years are short and serve as the foundation for the remainder of one’s life span. The needs of a child in the support of this growth and development begin before birth and continue throughout the growth years until maturity is reached.

Office of Human Development Services, U.S. Department of Health and Human Services, *The Status of Children, Youth and Families 1979*, DHHS Publication No. (OHDS) 80-30274 (August 1980), pp. 29, 30 (citation omitted).

Aside from these examples of longstanding, general HHS acknowledgment of and commitment to prenatal health and well-being, a most compelling instance of the Department's commitment to health and well-being *beginning at conception* may be found in the "Definitions and use of terms" section of the regulations governing the State Children's Health Insurance Programs, or, SCHIPs.

The SCHIP program, which operates pursuant to rules promulgated by HHS, authorizes Federal grants to States for provision of child health assistance to uninsured, low-income children. 42 CFR 457.1 States may use their federal CHIP funds to finance coverage for children whose family incomes are too high to qualify for Medicaid under state rules. Roughly nine million children nationwide were covered by the program in FY 2016. See <https://www.medicaid.gov/chip/downloads/fy-2016-childrens-enrollment-report.pdf>

Under a 2002 amendment, the governing HHS regulations of the SCHIP program contain the following definition:

"Child means an individual under the age of 19 including the period from conception to birth."

42 CFR 457.10 ("Definitions and use of terms") (emphasis supplied).

In view of the foregoing, the Department's use in the draft Strategic Plan of language and concepts that have appeared with regularity in the Department's publications, mission statements, reports, and HHS-promulgated regulations for over fifty years, can hardly be viewed as alarming or even particularly noteworthy. Such language merely reflects the Nation's longstanding—and bipartisan—commitment to promoting the health and well-being of all Americans.

The ACLJ supports the Department in its efforts to continue to recognize and foster these important interests.

IV. ALARMIST CONCERNS REGARDING THE PLAN'S SUPPOSED IMPACT ON THE AVAILABILITY OF ABORTION SHOULD BE REJECTED.

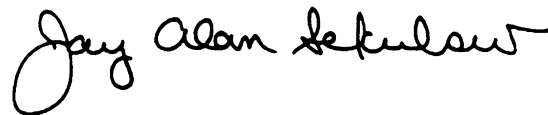
As noted at the outset, no sooner had the draft Strategic Plan been published in the Federal Register than pro-abortion partisan groups and their allies raised the alarm about how the Department's use of the language and concepts in question was designed to, and could lead to, the outlawing or sharp restriction of legal abortions. But this is the same Chicken Little argument that was raised against the 2002 amendment to the SCHIP regulations that defined "child" to include the period "from conception to birth." See, 67 Federal Register 191, 61955 - 61974 (Oct. 2, 2002), revising 42 C.F.R. § 457.10, summarizing comments. ("Many commenters

expressed opposing views on this issue, saying that this is an anti-choice proposal disguised as a health care proposal.” “They believe the proposed rule would undermine the foundation of the right to choose abortion and threatens a woman’s reproductive freedom.”)

The Department was right to reject this type of “the sky is falling” argument in 2002, and should do so again. Not only does abortion remain legal, but the expansion of health coverage allowed under the 2002 amended definition has proven to be of substantial benefit to the states in addressing the health needs of mothers and their unborn children. *See, e.g., Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults*, <https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip/#table2>. The Department must not be stymied in its mission to foster the widest, most inclusive, health measures in order to placate the baseless concerns of pro-abortion partisans.

The ACLJ urges the Department to resist attempts by alarmists to have it water down the scientifically sound language of the draft Strategic Plan and to narrow the scope of the Department’s vital mission.

Sincerely,



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