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September 16, 2016

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9931-NC, Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

[VIA OVERNIGHT DELIVERY]

RE: COVERAGE FOR CONTRACEPTIVE SERVICES
File Code CMS-9931-NC

Dear Sir or Madam:

The American Center for Law and Justice ("ACLJ") submits the following comments in response to the Request for Information ("RFI") issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department ("Departments") on July 22, 2016.

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 briefs with the U.S. Supreme Court in support of

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[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. 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.).

petitioners in both *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014), and *Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

I. INTRODUCTION

It is both wrong and illegal to force someone to be complicit in acts that violate their conscience. The ACLJ has therefore opposed the government's abortion/birth control/sterilization mandate since it was first imposed on the country by regulatory fiat in 2012. The ACLJ has consistently maintained that the mandate, including its numerous and faulty iterations purportedly attempting to accommodate the religious exercise of objecting organizations, violates federal constitutional and statutory laws, most notably, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. The mandate substantially burdens the religious exercise of objecting organizations because it requires them, under threat of ruinous penalties, to be complicit in the provision of objectionable services in violation of their religious and moral beliefs. In addition, the mandate is not the least restrictive means to achieve any compelling governmental purpose.

The lower courts in the *Zubik* litigation that held that the current "accommodation" scheme places only a minimal burden on the religious exercise of objecting organizations are not only wrong as a matter of law, those decisions have been vacated.[3] It is ironic indeed that while the Departments have vehemently argued in both the lower courts and the Supreme Court that the current "accommodation" is only a *de minimis* burden, if any, on religious exercise, the instant RFI states that "the accommodation generally *ensures that women* enrolled in the health plan established by the eligible organization, like women enrolled in health plans maintained by other employers, *receive contraceptive coverage* seamlessly—that is, *through the same issuers or third party administrators* that provide or administer the rest of their health coverage, and without financial, logistical, or administrative obstacles. *Minimizing such obstacles is essential to* . . . remov[ing] barriers . . . to *ensure that women receive* [the objectionable services]." 81 Fed. Reg. 47743 (emphasis added). What the Departments have identified in the RFI as critically important for the government is the very thing objecting organizations believe is critically important that they not do, *i.e*., facilitate or be complicit in wrongdoing. Unless and until the Departments can appreciate the root concern objecting organizations have with respect to their participation in wrongdoing, any further accommodations established and imposed by the Departments will be a fruitless exercise.

As the Supreme Court observed in *Hobby Lobby*, a religious claimant's decision about moral complicity "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778. The decision of what constitutes crossing a morally impermissible line is for the religious believer to decide, *not the government*. *Id*. at 2778; *cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 101 S. Ct. 1425 (1981). The Departments (or even the courts) have no authority to say that the religious beliefs of objecting organizations "are mistaken or unreasonable." *Hobby Lobby*, 134 S. Ct. at 2757.

[3] While the Supreme Court did not render a merits decision, those lower court decisions were vacated, rendering those opinions devoid of any precedential value.

Finally, while the ACLJ offers the following comments regarding how the religious beliefs of stakeholders might *truly* be accommodated consistent with RFRA and our country's longstanding tradition of respecting the rights of conscience, the ACLJ believes that the mandate itself should be withdrawn in its entirety. The specific mandate at issue was never debated and voted on by Congress, nor signed into law by the President. It was created by regulatory fiat based on the report and recommendation of the Institute of Medicine, which was substantially influenced by pro-abortion advocates.[4]

II. OBJECTING ORGANIZATIONS SHOULD BE WHOLLY EXEMPT FROM COMPLYING WITH THE MANDATE IN THE SAME MANNER THAT CHURCHES ARE EXEMPT.

If the government truly wishes to respect this country's "happy tradition of avoiding unnecessary clashes with the dictates of conscience," *Gillette v. United States*, 401 U.S. 437, 453 (1970), the most efficient means of doing so is to treat objecting organizations in the same way that churches and religious auxiliaries are treated, *i.e.*, with a complete and total exemption. *See* 78 Fed. Reg. 39874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i) or (iii)).

Not only would such an exemption respect the religious autonomy of objecting organizations (not to mention the important societal functions they perform), it would cure a serious constitutional deficiency that lies at the root of the Departments' efforts to divide religious organizations into different categories with different levels of free exercise protections. The religion clauses of the First Amendment prohibit the government from establishing a religious caste system whereby one association of religious believers is treated more favorably by the government than another association. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), for example, the Supreme Court reiterated the long-standing teaching that the Free Exercise Clause does not tolerate laws that "impose special disabilities on the basis of religious status," *id*. at 533 (citation omitted) and held that the "*minimum* requirement for neutrality is that a law not discriminate on its face." *Id*.[5]

Neither the ACA nor any other federal statute gives the government the authority to gerrymander religious groups in this fashion. In fact, RFRA prohibits it. What Justice Kennedy wrote in his concurrence in *Hobby Lobby* regarding the differential treatment of religious non-profit and for-profit groups applies with equal, if not greater force, with respect to differential treatment among religious groups: "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers— burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." 134 S. Ct. at 2786 (Kennedy, J., concurring)).

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[4] Arland K. Nichols, *Promised Objectivity: Americans Receive Planned Parenthood Ideology*, Public Discourse (Sept. 28, 2011), http://www.thepublicdiscourse.com/2011/09/4031.

[5] The differential treatment of religious entities (churches vs. non-church, non-profit religious groups) also raises concerns under the Fourteenth Amendment's guarantee of equal protection.

In addition, with respect to the mandate, there is no sound policy reason to treat religious non-profit organizations (like the Little Sisters of the Poor) in a manner different than churches. Why should a church that does not oppose abortion, contraception, and sterilization, be entitled to a full exemption (and thus not have to subsidize financially the costs of contraceptive services), while a congregation of Catholic nuns, for example, which is firmly and religiously opposed to these services, not be?

The government's ongoing justification for the differential treatment, *i.e.*, that employees of churches are more "likely" than the employees of non-churches to share their employers' beliefs against contraception, 78 Fed. Reg. 8461-62, is a paltry one indeed. The Departments have never offered any authority, beyond their say-so, to justify their view that non-church groups are less likely than churches to employ individuals who are morally opposed to contraception. The Departments' justification is nothing more than a hunch, and a hunch should not form the basis of a regulatory measure that implicates religious freedoms and the right of conscience.[6]

Moreover, religious groups like the Little Sisters of the Poor play a vital and important role in society by providing social services that the government cannot fully provide on its own. *See*, *e.g.*, *Zubik*, ACLJ Amicus Br. and United States Conference of Catholic Bishops Amicus Br. More importantly, as President Obama himself recognized, such groups provide these services in a more focused and efficient manner than governmental programs.[7] Religious groups that perform these important social services should be given breathing room to operate in a manner consistent with their religious beliefs — in the same fashion that houses of worship are allowed to do so.

In sum, objecting religious organizations should be afforded the same total exemption from complying with the mandate that other religious organizations, *i.e.*, churches and their integrated auxiliaries, enjoy. To do anything less is to confer on the Departments a position of authority that no federal law grants to them and that the Constitution and RFRA, in this context, prohibits.

III. ADEQUATE ACCOMMODATION SCHEMES

Should the government remain committed to advancing the mandate against organizations that have deep and sincere religious objections to participating in the provision of contraceptive services, there are a number of ways employees can access such services without forcing their religious employers to be complicit in their provision.

A. Access to Title X Family Planning Centers

First, as the Supreme Court recognized in *Hobby Lobby*, "[t]he most straight-

[6] The fact, too, that the health plan for the United States Military, which covers 9.5 million individuals, is not required to cover the drugs and services required by the mandate radically undermines the government's position that it is absolutely vital that employees of groups like the Little Sisters of the Poor have access to contraceptive services.

[7] President Barack Obama, *Remarks by the President on Preventive Care* (Feb. 10, 2012), https://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care.

forward way of [providing contraceptives] would be for the Government to assume the cost of providing" the items directly. 134 S. Ct. at 2780. The government already spends hundreds of millions per year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods . . . and services." 42 C.F.R. 59.5(a)(1). These methods and services are provided through nearly 4,200 family planning centers throughout the country that serve approximately 4.5 million clients a year.[8]

Importantly, Title X is not *wholly* limited to low-income individuals. The statute only establishes a "priority" for low-income families; it does not exclude all others. 42 U.S.C. § 300a-4(c)(1). There is no reason why HHS could not define "low income," 42 C.F.R. 59.5(a)(8), to include individuals whose employers will not or cannot provide contraceptive services to their employees.

Accommodating objecting organizations in this fashion would impose no great burden on employees who wish to avail themselves of contraceptive services. An employee can visit one of the thousands of family planning centers to access these services in the same way that employees must visit dentist offices, optometrists, and other providers to access specific health care services.

B. Access to Government Exchanges

Another means of accommodating objecting organizations would be to allow employees to enroll in separate, contraceptive-only health plans on the ACA exchanges. Under this arrangement, employees would simply sign up on healthcare.gov — which the government has regularly touted as involving a speedy and efficient enrollment process — for an insurance card that would allow them to access the contraceptive drugs and services not available in the health plan of the objecting organization.

This type of accommodation would not require the creation of a brand new governmental bureaucratic program, as this program is already in place. It would only require a modification of the current system (all accommodations require a modification of some sort), to cover the employees of the relatively small number of objecting organizations.

Not only would such an accommodation save objecting organizations from the dilemma they currently face (act in violation of their religious conscience or pay ruinous fines), it would respect the purposes of RFRA, *i.e.*, that the government must pursue the *least restrictive means* of advancing a compelling governmental purpose. As Judge Tjoflat observed, "Speaking bluntly, RFRA makes the Government put its money where its mouth is." *EWTN, v. Dep't of HHS*, 818 F.3d 1122, 1190 (11th Cir. 2016) (Tjoflat, J., dissenting).

C. Access to Separate Private Insurance Plans

Finally, it is entirely possible, as the Supreme Court suggested in its supplemental briefing order, that objecting petitioners could be accommodated by simply informing their insurance company, in the course of contracting for insurance coverage, that they "do not

[8] Title X Family Planning, U.S. Dept. of Health and Human Services, http://www.hhs.gov/ opa/title-x-family-planning.

want their health plan to include contraceptive coverage of the type to which they object on religious grounds." *Zubik*, S. Ct. Order (Mar. 29, 2016).

Once the objecting organization informs its insurance carrier of its wishes, the company would then reach out to the beneficiaries of the insurance plan advising them that "that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by the [objecting organization] and is not provided through [the organization's] health plan." *Id*.

Under this scheme, the objecting organization has no legal obligation to provide contraceptive coverage, does not pay for the coverage, and is not "required to submit any separate notice to their insurer, to the Federal Government, or to their employees." *Id*. In sum, the organization is totally removed from any process that implicates them in what they believe to be, on religious grounds, complicity in wrongdoing.

In order, however, for this removal to be more than a matter of semantics, the process by which the insurance company communicates with and provides contraceptive services to employees must be carried out in a way that the objecting organization is not complicit in the scheme:

1. Communications to employees must come directly from the insurance company to the employee, without the objecting organization having any role to play in that communication.

2. The insurance company's invitation to employees should be done through a separate and distinct contraceptive services enrollment. A separate enrollment will keep the line that the objecting organizations will not cross crystal clear. Many objecting organizations believe that avoiding scandal (the avoidance of any perception of wrongdoing) is a very real religious concern. *See*, *e.g.*, *Zubik*, 50 Catholic Theologians Amicus Br. at 24-25. A separate enrollment process will make it clear to employees that their religious employer wishes to play no part in the provision of drugs and services to which they religiously object.

3. Contraceptive services should be provided through a plan separate and distinct from the objecting organization's health plan. The Supreme Court's *Zubik* order suggests this proposal, where objecting organizations state to the insurance company that they "do not want their health plan to include contraceptive coverage." After all, the right of objecting organizations not to contract with an insurance company for a plan that covers drugs and services to which they religiously object lies at the heart of all litigation involving the mandate.

4. A separate contraceptive services plan would require a separate contraceptive services insurance card. This only makes sense: a separate card for a separate plan. Many, if not most, insured individuals carry a number of insurance cards for specific services: health services, eye care, dentistry, prescription drugs, and so forth. Requiring insurance carriers to issue separate contraceptive services cards would no cause no burden on the women who choose to avail themselves of that service — no more than a millimeter of space in a pocketbook or wallet. It would also help the insurance carrier in maintaining a division between the contraception-free insurance plan requested by the objecting employer

and the separate plan created by the insurance carrier to provide contraceptive services.

The foregoing process would effectuate what the government (incorrectly) believes to be a compelling governmental interest, *i.e.*, access to cost-free contraceptive services, and the process would impose no hardship on employees. They will be able to access contraceptive services, should they wish to, in a seamless and efficient fashion.

The Supreme Court in *Zubik* has suggested what it never dawned on the government to pursue in any real fashion: a resolution to this multiparty, multi-year litigation that furthers the interests of the government, while safeguarding the free exercise rights of objecting organizations.

It should be noted, however, that this third option is potentially the most problematic, as the objecting employer's statement that they do not want to have coverage of the objectionable items will itself trigger the communication from the insurer to employees about making these same items available without copays. If the government genuinely wishes to resolve this issue, therefore, it will have recourse to the first two options described above, namely, direct provision of the birth control items or direct provision, under the exchanges, of policies covering such items. These two approaches completely remove the employers from the equation, eliminating any and all moral complicity concerns.

IV. RELEVANCE OF THIRD PARTY INTERESTS

As a final matter, the ACLJ submits that the RFI's assertions regarding third party concerns must be placed in their proper context, namely, that *inconveniences to employees are often unavoidable in the employment context*. A dress code denies the freedom to dress as one chooses. *E.g.*, *Mt. Healthy Sch. Dist. Bd. of Educ.*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g.*, *Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shift). Office layouts deny employees the space and furniture arrangements they might prefer. *E.g.*, *Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). Finite salaries deny employees money beyond their pay. *E.g.*, *Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Employers may impose these various working conditions as a matter of financial planning, or personal taste, or corporate philosophy, to list just some possible motivations. That religious beliefs, personal moral values, or a sense of fairness might also motivate the determination of work conditions and compensation — for better or worse, from the employees' perspective — is not remarkable.

Moreover, under the government's approach, the federal government itself denies employees guaranteed coverage of preventive services not included in the mandate. *E.g.*, Michelle Diament, "Feds Omit ABA Therapy From New Insurance Requirements," disabilityscoop (Feb. 22, 2013) (autism therapy omitted despite heavy lobbying effort);[9] Jen

[9] *Feds Omit ABA Therapy From New Insurance Requirements*: http://www.disabilityscoop.com/2013/02/22/feds-aba-insurance/17346.

Wieczner, "Will Obamacare take bite out of dental coverage?," MarketWatch (July 24, 2013) (no adult dental coverage and gaps in coverage for children).[10] The federal government also denies, through the ACA's individual mandate, the freedom to choose to forego health insurance for the present in order to allocate those resources elsewhere. And, of course, the government is content to deny mandatory coverage to the class of employees whose employers are not bound by the mandate.

The mischaracterization of religious free exercise as denying or imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1963). The parent who removes his or her Amish child from formal high school education denies that child the instruction that would otherwise be given. *But see Wisconsin v.Yoder*, 406 U.S. 205 (1972). The owners of a kosher or halal deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham."); [11] Rory Mulholland, "Sell alcohol or pork or we will shut you down, French town tells halal supermarket," The Telegraph (Aug. 4, 2016) ("the mayor's chief of staff . . . [asserted that] the town's reaction would have been the same had a kosher shop opened on that spot").[12] And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014),[13] or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb),[14] each "impose" upon the would-be recipients of those procedures (or their parents).

Accommodating religious beliefs always entails some measure of sacrifice, and a respect for conscience should be viewed as a first principle of our civil society, not a negotiable perk. If what Thomas Jefferson wrote in 1809 is to remain true — that "no provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority"[15] — then the government must be willing to accept inconveniences to third parties in the name of respecting constitutional and statutory protections for religious freedom.

CONCLUSION

Now is the time for the government to put an end to years of needless litigation by doing what it should have done long ago: further the alleged government interests in a

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[10] *Will Obamacare take bite out of dental coverage?*: http://www.marketwatch.com/story/will-obamacare-take-bite-out-of-dental-coverage-2013-07-12.

[11] *Constitutional Dilemma on Birth Control*: http://forward.com/articles/152606/ constitutional-dilemma-on-birth-control.

[12] *Sell alcohol or pork or we will shut you down, French town tells halal supermarket*: http://www.telegraph.co.uk/news/2016/08/04/sell-alcohol-and-pork-or-we-will-shut-you-down-french-town-tells.

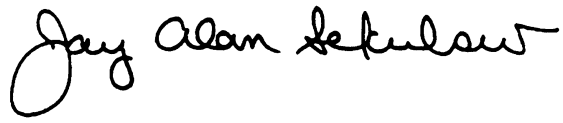
[13] *Female genital mutilation, Fact sheet No. 241*: http://www.who.int/mediacentre/ factsheets/fs241/en.

[14] *Apotemnophilia: a neurological disorder*: http://cbc.ucsd.edu/pdf/apotem.pdf.

[15] Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809)

manner that does not require religious groups to violate their religious beliefs. As the foregoing discussion suggests, there are numerous ways the Departments can do this. The ACLJ therefore respectfully submits these comments in an appeal to the government — at long last — to do the right thing.

Sincerely,



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