October 21, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Electronically Submitted

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653, U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Comments Regarding (1) Proposed Rules on Coverage of Certain Preventive Services under the Affordable Care Act, File Code No. CMS-9940-P, and (2) Interim Final Rules on Preventive Services

Dear Sir or Madam:

The following comments are in response to (1) proposed rules issued on August 27, 2014 (79 Fed. Reg. 51118) by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services regarding the expansion of the term "eligible organization" to include certain for-profit entities,[1] and (2) interim final rules issued on the same date by the same Departments (79 Fed. Reg. 51092) regarding an alternative "accommodation" process by which "eligible organizations" can comply with the government's contraception mandate.[2]

By way of introduction, the American Center for Law and Justice (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 religious liberties.[3] ACLJ attorneys have represented thirty-

[1] *See* 79 Fed. Reg. 51118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. subtitle A pt. 147).
[2] 79 Fed. Reg. 51092 (Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147).
[3] *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does

two individuals and corporations in seven actions against the government and its regulations that require employers to pay for and provide abortifacient drugs and devices, contraception, sterilization, and related patient education and counseling services in their health insurance plans.[4] The requirement to provide such coverage is referred to herein as "the Mandate."

Factual Background

The government proposes to expand "the definition of an eligible organization that can avail itself of an accommodation with respect to coverage of certain preventative services under section 2713 of the Public Health Service Act (PHS Act), added by the Patient Protection and Affordable Care Act, as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code."[5] The change was proposed in light of the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*[6]

The PHS Act requires coverage, without cost sharing, of women's preventative care as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).[7] These guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[8]

Some religious employers have been exempted from compliance with the Mandate.[9] Under federal regulations, "religious employer" is defined as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."[10]

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not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote 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) (unanimously striking down a public airport's ban on First Amendment activities).

[4] *O'Brien v. U.S. HHS*, No. 4:12-cv-00476-CEJ (E.D. Mo.); *Am. Pulverizer Co. v. U.S. HHS*, No. 6:12-cv-03459-MDH (W.D. Mo.); *Korte v. Sebelius*, No. 3:12-cv-01072-MJR-PMF (S.D. Ill.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Gilardi v. U.S. HHS*, No. 1:13-cv-104-EGS (D.D.C.); *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.).

[5] 79 Fed. Reg. 51118.

[6] *Id.*

[7] 42 U.S.C. § 300gg-13.

[8] U.S. Dep't of Health & Human Servs., *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Sept. 15, 2014).

[9] *See id.*; *see also* 45 C.F.R. § 147.131 (2014).

[10] 45 C.F.R. § 147.131 (2014).

Federal regulations provide a so-called "accommodation" for certain other organizations referred to as "eligible organizations."[11] An "eligible organization" is currently defined as:

> an organization that satisfies all of the following requirements: (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under §147.130(a)(1)(iv) on account of religious objections. (2) The organization is organized and operates as a nonprofit entity. (3) The organization holds itself out as a religious organization.[12]

The government now proposes to expand the definition of "eligible organization" so that it would also include "a closely-held for-profit entity that has a religious objection to providing coverage for some or all of the contraceptive services otherwise required to be covered."[13] In *Hobby Lobby*, the Supreme Court held that, as applied to closely-held corporations with religious objections, the Mandate violates the Religious Freedom Restoration Act of 1993 (RFRA).[14]

In addition, the Departments have published interim final regulations changing the process by which eligible organizations may seek an "accommodation."[15] When first introduced, the accommodation involved a process whereby the organization's health insurance issuer would provide contraception coverage to the plan's participants upon receipt of EBSA Form 700 from the objecting employer.[16] The August 27, 2014 interim final rules create an alternative process whereby the eligible organization notifies the Secretary of Health and Human Services who then notifies the health insurance issuer of the organization's religious objections to some or all of the drugs and services required by the Mandate.

The proposed change of expanding the definition of an "eligible organization" is inadequate. The new so-called "accommodation" process is also inadequate. It is the position of the undersigned that *both* for-profit *and* non-profit entities with sincerely-held religious objections to the Mandate should be given *complete* and *total* exemptions from having to comply.

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[11] *Id.*
[12] *Id.*
[13] 79 Fed. Reg. 51121.
[14] *Burwell v. Hobby Lobby Stores, Inc.*, 2014 U.S. LEXIS 4505, at *12–13 (June 30, 2014).
[15] 79 Fed. Reg. 51118.
[16] 78 Fed. Reg. 8456.

Legal Analysis

I. The August 27, 2014 proposed rules and interim final regulations fail to alleviate the substantial burden that the Mandate imposes upon religious exercise.

A large number of non-profit organizations are currently challenging the accommodation process for complying with the Mandate in courts across the country.[17] These non-profit organizations have contended that the accommodation violates RFRA and the First Amendment by forcing them to violate their sincerely held religious beliefs by involving them in the delivery of contraception to their employees.[18] The Supreme Court has twice granted preliminary relief to non-profit religious objectors.[19]

The new alternative "accommodation" process does not alleviate the substantial burden imposed on the religious exercise of eligible organizations. It requires them to "file a document causing their health plan, insurer, and/or [TPA] to be commandeered by the government and used as a mule to deliver certain objectionable items."[20] Provision of the contraception is "in connection with the plan."[21] This makes the eligible organizations a participant in the act of delivering the contraception to employees, something that objecting organizations cannot do according to their religious beliefs. No delivery of contraception to these employees would occur as a benefit of their employment had the eligible employers not already contracted with and paid an insurer or TPA (third party administrator).

Thus, the interim final rules do not fix the "accommodation" process; they merely offer "eligible organizations" an alternative way to violate their beliefs.[22] Even the government has acknowledged that whether an organization self-certifies in accordance

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[17] *See, e.g. Wheaton Coll. v. Burwell*, No. 13A1284, 2014 U.S. LEXIS 4679 (June 30, 2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691, 2014 U.S. LEXIS 791 (Jan. 24, 2014); *Brandt v. Burwell,* No. 14-cv-0681, 2014 U.S. Dist. LEXIS 116350 (W.D. Pa. Aug. 20, 2014); *La. Coll. v. Sebelius*, No. 12-0463, 2014 U.S. Dist. LEXIS 113083 (W.D. La. Aug. 13, 2014); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542 (BMC), 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 13, 2013); *Zubik v. Sebelius*, Nos. 13cv1459 & 13cv0303, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013); *Legatus v. Sebelius*, No. 2:12-cv-12061-RHC-MJH, 2013 U.S. Dist. LEXIS 178691 (E.D. Mich. Dec. 20, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-01092-D, 2013 U.S. Dist. LEXIS 178752 (W.D. Okla. Dec. 20, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207-JFC, 2013 U.S. Dist. LEXIS 179476 (W.D. Pa. Dec. 23, 2013); *S. Nazarene Univ. v. Sebelius*, No. 5:13-cv-01015-F, 2013 U.S. Dist. LEXIS 179569 (W.D. Okla. Dec. 23, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 U.S. Dist. LEXIS 179318 (N.D. Ind. Dec. 20, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 U.S. Dist. LEXIS 180364 (M.D. Tenn. Dec. 26, 2013).

[18] *See La. Coll.*, 2014 U.S. Dist. LEXIS 113083 at *25, *62.

[19] *Wheaton*, 2014 U.S. LEXIS 4679 at *1; *Little Sisters*, 2014 U.S. LEXIS 791 at *1.

[20] Appellees' Additional Supplemental Brief, at 3, *Southern Nazarene Univ. v. Burwell*, No. 14-6026 (10th Cir. Filed Sept. 8, 2014).

[21] 79 Fed. Reg. 51092, 51093.

[22] Appellees' Brief on the Interim Final Regulations at 5, *Burwell v. Reaching Souls, Inc.*, No. 14-6028 (10th Cir. Filed Sept. 8, 2014).

with the previous rules or sends a notification to the Secretary under the new interim final rules, the effect is the same: the insurers or TPAs of those organizations must pay for the contraception.[23] As such, the religious objection to the proposed accommodation does *not* stem from the act of notifying the government that the employer objects, but rather from the fact that (1) objectors must still submit a document that they believe facilitates the delivery of drugs and services in violation of their religious beliefs and (2) objectors must maintain a contractual relationship with third parties to deliver those drugs and services to which the objector is morally and religiously opposed. "Indeed, [the government] told the D.C. Circuit on the day that the interim final rules were released that the 'type of relief' reflected in their rules 'does not meet [the] concerns' of, among others, a Catholic church plan and its employers."[24]

The government cannot argue that a notification makes coverage of contraception separate from the eligible organizations' plans because, if it were, the Mandate would be illegal under the Administrative Procedure Act, which prohibits agencies from enacting regulations outside of statutory authority.[25] Rather than forcing insurance companies to offer contraception to everyone, the statutes under which these regulations are issued mandate coverage of contraception only through a "group health plan" or other employer-related coverage.[26] The government cannot deny that the Mandate is dependent on using the eligible organizations' own health plans or plan issuers to deliver the religiously objectionable drugs and services.

The government could have exempted *all* employers with religious objections by including them in the definition of "religious employer." Instead, the scope of the complete exemption is exceedingly narrow, only covering those non-profits "referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986."[27]

Broadening the definition of an eligible organization to protect the religious freedom of *all* objecting employers would be simple. In fact, many states with contraception mandates already extend exemptions to all religious objectors.[28] For example, Missouri law provides that

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[23] Center for Consumer Information & Insurance Oversight, *Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Sept. 19, 2014).

[24] Appellee's Brief on the Interim Final Regulations, *supra* note 22, at 10 (quoting Gov't Letter to the Clerk at 2, *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-5371 (D.C. Cir. Aug. 22, 2014)).

[25] *Id.*; *see* 5 U.S.C. §706(2).

[26] 42 U.S.C. § 300gg-13(a); Appellees' Additional Supplemental Brief, *supra* note 20, at 5.

[27] 45 CFR § 147.131 (2014).

[28] Daniel J. Rudary, *Note: Drafting a "Sensible" Conscience Clause: A Proposal for Meaningful Conscience Protections for Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives*, 23 HEALTH MATRIX 353, 389 (2013).

> any health carrier shall issue to any person or entity purchasing a health benefit plan, a . . . plan that excludes coverage for contraceptives if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity.[29]

This statute is now pre-empted by the Mandate.[30]

II. The alternative "accommodation" process for "eligible organizations" violates RFRA.

RFRA provides that

> [g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[31]

A. The Mandate forces "eligible organizations" to violate their sincerely held beliefs.

Many organizations have religious beliefs that forbid them from facilitating the use of either certain contraceptives that can cause abortion or all forms of artificial contraception.[32] Whether the eligible entity self-certifies in accordance with the July 2013 final rules or provides notice in accordance with the August 27, 2014 interim final rules, under the Mandate eligible organizations must facilitate the distribution of contraception in conjunction with their health plan.[33] In either instance, the plan's insurer or TPA receives notice that the plan must provide or arrange payments for contraceptive services.[34]

Like the plaintiffs in *Hobby Lobby* who had religious objections to the Mandate, the eligible organizations who cannot comply with the "accommodation" due to their religious beliefs will be required to pay out enormous sums of money.[35] The Supreme Court already ruled in *Hobby Lobby* that because of such fines, the Mandate "clearly imposes a substantial burden on those beliefs."[36] Although to some observers the notification to the Secretary of one's religious objections to the Mandate may seem like

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[29] Mo. Rev. Stat. § 376.1199 (2001).
[30] *Mo. Ins. Coalition v. Huff*, 947 F. Supp. 2d 1014 (E.D. Mo. 2013).
[31] 42 U.S.C. §2000bb-1(b).
[32] *See, e.g. id.* at *63; *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 237, 250–51 (E.D. NY 2013).
[33] Appellee's Brief on the Interim Final Regulations, *supra* note 22, at 5–6.
[34] 79 Fed. Reg. 51092.
[35] *Hobby Lobby*, 2014 U.S. LEXIS 4505, at *74.
[36] *Id.*

an insignificant act, the Supreme Court has continually held that compulsion to act contrary to one's religion tenets constitutes a significant burden.[37] Furthermore, the Court has repeated that the government does not have a right to argue the merit of anyone's religious beliefs.[38]

B. The Mandate does not further a compelling government interest, nor is it the least restrictive means of doing so.

The ACA itself undermines the contention that the Mandate furthers a compelling government interest because it provides exemptions from the Mandate for grandfathered plans and for employers with fewer than 50 employees.[39] The reason for one of the biggest exemptions, grandfathered plans, is merely avoiding the inconvenience of amending existing plans.[40] Whatever "interest" the government chooses to set forth as justifying the Mandate, surely it cannot be compelling when avoiding inconvenience is sufficient enough reason to outweigh it. Additionally, grandfathered plans are *not* exempt from certain other provisions of the ACA, a set of provisions the government has described as "particularly significant protections."[41]

Moreover, the least restrictive means test is "exceptionally demanding."[42] The government could easily avoid burdening religious beliefs by adopting the "most straightforward" path of paying for the objected-to contraception itself with respect to employees of objecting employers.[43] The government *already* spends substantial sums providing contraception itself, which shows that this is a viable alternative. By contrast, the government's current proposal violates the religious freedom of eligible organizations, as discussed previously.

Conclusion

The August 27, 2014 proposed rules and interim final rules fail to address the core moral problem that the Mandate poses for objecting for-profit and non-profit employers: under the new so-called "accommodation" process, they will still be forced to participate in the provision of drugs and services to which they strongly and religiously

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[37] *United States v. Lee*, 455 U.S. 252, 257 (1982) (payment of social security taxes); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (compulsory public school attendance).

[38] *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981) ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . ."); *Hobby Lobby*, U.S. LEXIS 4505 at *69–71 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. . . ."); *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim").

[39] *Hobby Lobby*, 2014 U.S. LEXIS 4505, at *75–76.

[40] *Id.* at *76.

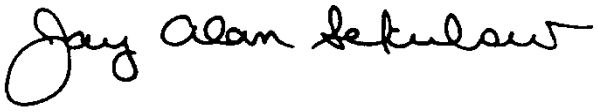
[41] *Id.*; 75 Fed. Reg. 34540 (2010).

[42] *Hobby Lobby*, 2014 U.S. LEXIS 4505, at *77.

[43] *Id.*

object. *Both* for-profit *and* non-profit entities that hold such religious objections should be given a *complete exemption*, as is currently the case with "religious employers," from having to comply with the Mandate.

Respectfully submitted,



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