



March 8, 2024

Attn: Roselyn Tso
Director, Indian Health Service (IHS)
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: Proposed Rule: Removal of Outdated Regulations, RIN 0917-AA24

To Whom It May Concern,

The American Center for Law and Justice (“ACLJ”) submits the following comment on behalf of Lisa Johnson-Billy and Jon Echols. Lisa Johnson-Billy serves as a member of the Chickasaw Tribal Legislature. Her leadership and advocacy for Tribal Sovereignty and the wellbeing of Indian people is well known.¹ Jon Echols serves as Majority Floor Leader of the Oklahoma House of Representatives. We oppose the adoption of the Removal of Outdated Regulations (“Removal Rule”) issued by the Indian Health Service (“IHS”) on January 8, 2024. If the regulations are removed, the IHS will use its funds to expand access to abortion in contravention of Native American values and desires.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech, religion, and the right to life of preborn persons.² The ACLJ has also submitted formal comments through the rulemaking process in defense of preborn life.

¹ <https://legislative.chickasaw.net/Legislators/Pontotoc-District/Lisa-Billy.aspx>

² See, e.g., *Pleasant Grove City 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

An essential element of human flourishing is a recognition that all human beings have worth and dignity, and that they should not be deprived of life without due process. As both science and the law advance, they confirm the reality that life begins at conception.³ Any administrative-agency action that may deprive a preborn person of life risks violating the constitutional requirement that “[n]o person shall . . . be deprived of *life*, liberty, or property without due process of law.”⁴ The proposed Removal Rule makes it easier for the IHS to fund abortions in the event Congress ever fails to re-enact the Hyde Amendment.

The IHS should leave these rules in place because they provide important protections for preborn Native Americans and their families. Removing these rules would only further the tragic history that this population has already endured at the hands of the federal government by advancing the pro-abortion interests of the Biden Administration at their expense. Native American culture values the lives of children. In addition, the IHS’s claims of redundancy and inconsistency are invalid and do not justify the removal of these rules.

BACKGROUND

In *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court restored the State legislatures’ constitutional authority to restrict or prohibit abortion. In response, however, the Biden Administration has sought to expand abortion using any means available. This Removal Rule is just another means used by the administration to expand abortion. To that end, on January 8, 2024, the IHS submitted to the Federal Registrar the Removal Rule to remove current restrictions on government-funded abortions provided by the IHS.

A. The Tragic History of the Government’s Dealings with Native American Children

The United States Government has a rich history of violating the sanctity of life in Native American communities.⁵ In the late 1800s, the government developed nefarious goals aimed at “destroying tribal identity and assimilating Native Americans into broader society.”⁶ This began when the government used coercive tactics to force Native Americans into boarding schools.⁷ The

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).

³ *Hamilton v. Scott*, 97 So. 3d 728, 746 n.19 (Ala. 2011) (Parker, J., concurring specially) (citing a list of scientists who agree that life begins at conception in order to hold that a wrongful death statute applies to persons still in the womb).

⁴ U.S. CONST. amend. V, cl. 4 (emphasis added).

⁵ See generally *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring) (detailing the history of government abuses of power against Indian families).

⁶ *Id.* at 1642 (Gorsuch, J., concurring).

⁷ *Id.* (Gorsuch, J., concurring).

boarding schools sought to whitewash Native American culture and deprive Native American children of their heritage. As time progressed, things deteriorated. Schools frequently sent Native American children to live with white families in hopes of promoting more “assimilation.”⁸ Governments also used devious tactics to remove Native American children from reservations and force them into adoptions. Officials saw this as a tactic to destroy the Native American identity within one generation.⁹ And it was quite successful. Estimates show that roughly a third of Native American children were separated from their families, and nine in ten Native American children were adopted in homes of non-Native American couples.¹⁰ These collective issues gave rise to the Indian Child Welfare Act and provide a backdrop for the United States government’s abuse of the cultures and livelihoods of Native American families. Throughout history, abortion has been a consistent tool of eugenicists that destroy people’s culture through genocide.¹¹ The current restrictions grow and strengthen Native American families by preventing the government from funding and pushing abortion, a practice that kills future generations of Native Americans and harms Native American culture.

Mass sterilization is a “‘modern form’ of genocide,” and has, in the recent past, greatly harmed Native Americans.¹² “Over the six-year period that had followed the passage of the Family Planning Services and Population Research Act of 1970, physicians sterilized perhaps 25% of Native American women of childbearing age, and there is evidence suggesting that the numbers were actually even higher.”¹³ Tragically, “[s]ome of these procedures were performed under pressure or duress, or without the women’s knowledge or understanding.”¹⁴ The IHS was even used as a mechanism for these sterilizations.¹⁵ The Native American population already felt the impacts of forced placement on reservations and the resulting health effects which damaged its population numbers.¹⁶ Abortion should not be used as another method of harming the Native American population.

B. The Hyde Amendment’s Relation to the IHS

⁸ *Id.* at 1644 (Gorsuch, J., concurring).

⁹ *Id.* (Gorsuch, J., concurring).

¹⁰ *Id.* at 1644–45 (Gorsuch, J., concurring).

¹¹ *See, e.g.,* Ayse Wieting, *Uyghur Exiles Describe Forced Abortions, Torture in Xinjiang*, ASSOCIATED PRESS (June 3, 2021, 6:31 AM), <https://apnews.com/article/only-on-ap-middle-east-europe-government-and-politics-76acafd6547fb7cc9ef03c0dd0156eab>; *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, ASSOCIATED PRESS (June 29, 2020, 12:04 AM), <https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c>

¹² Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 27, 2019, 11:00 AM), <https://time.com/5737080/native-american-sterilization-history/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

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 Congressional appropriations bills. The Hyde Amendment was originally passed in 1976, three years after the Supreme Court legalized abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The amendment prohibits federal funding of abortions. While there have been various iterations of the amendment’s language during that span—and though the current version includes exceptions that allow Medicaid funds to be used for abortions in cases of rape, incest, or the health of the mother—all other federal taxpayer funding of abortion is banned.

“On January 27, 1982, IHS published regulations imposing restrictions on use of Federal funding for certain abortions, currently codified at 42 CFR 136.51–.57,” which “allowed the use of IHS funds for abortions only when a physician certified that ‘the life of the mother would be endangered if the fetus were carried to term.’”¹⁷ These regulations were consistent with the Hyde Amendment.¹⁸ Additionally, “[t]he purpose of these IHS regulations was specifically ‘to conform IHS practice to that of the rest of the Department [of Health and Human Services] in accordance with the applicable congressional guidelines.’”¹⁹

“In 1988, Congress enacted 25 U.S.C. 1676, explicitly extending any limitations on the use of funds included in HHS appropriations laws with respect to the performance of abortions to apply to funds appropriated to IHS. As such, IHS became subject to the Hyde Amendment as included in annual appropriations legislation.”²⁰ 25 U.S.C. § 1676 only addressed the limits on funding abortions that were being added. It did not address the IHS’s ability to add further limits on the funding of abortions. Nothing about the Hyde Amendment, applied to IHS via the Nickles Amendment, 25 U.S.C. § 1676, suggests that IHS cannot implement these provisions through regulations that may in some circumstances apply more prohibitively than the exceptions contained in Hyde. While Hyde permits funding of some exceptions, this does not mean IHS is required to fund these exceptions.

LEGAL ANALYSIS

A. Indian Health Service’s Misguided Justification for Removing These Regulations

1. The Value of the Regulations

¹⁷ Removal of Outdated Regulations, 89 Fed. Reg. 896, 897 (proposed Jan. 8, 2024) (to be codified at 42 C.F.R. pt. 136), <https://www.federalregister.gov/documents/2024/01/08/2023-28948/removal-of-outdated-regulations#citation-1-p897>.

¹⁸ *Id.*

¹⁹ *Id.* (citation omitted).

²⁰ *Id.*

The Removal Rule suggests that “[t]he current IHS regulation does not align with the current text of the Hyde Amendment or with 25 U.S.C. § 1676.”²¹ The Removal Rule purports a desire to “compl[y] with the statutory limitations” and “align[] IHS guidelines with the applicable Congressional guidelines governing HHS.”²² The Removal Rule suggests that 25 U.S.C. § 1676 is sufficient for these purposes without the regulations that it seeks to omit.²³ This is also why the Removal Rule proposes no new regulations with which to substitute the old regulations.²⁴

As discussed above, the Hyde Amendment’s exceptions for funding do not prevent the IHS from further restricting funding for abortion. The IHS regulations in place before this new rule were not “redundant” or “outdated.” They appropriately prohibited federal money from being used “to pay for or otherwise provide for abortions,” 42 CFR § 136.53, a limitation that is broader than the Hyde Amendment. Also, the current rules do not allow the exceptions for rape and incest as allowed by the Hyde Amendment. By removing these exceptions, preborn lives will be further threatened. Limiting the access to abortions via federal funds is especially important in this situation because of the tragic history and forced sterilizations. Abortion should not be allowed to further the harm that has been caused to these communities. Rather than being redundant, these rules expand protection for preborn lives, which the Hyde Amendment and 25 U.S.C. § 1676 does not prohibit them from doing.

The current rules serve to protect preborn lives. The proposed parts to be removed deal with “the use of Federal funds in providing health services to Native Americans.”²⁵ “Federal funds may not be used to pay for or otherwise provide for abortions in” those health services.²⁶ These rules give one exception for this prohibition. If the “[l]ife of the mother would be endangered” and “a physician has found so and certified in writing to the appropriate tribal or other contracting organization, or Service Unit or Area Director,” then “Federal funds are available for an abortion.”²⁷ The rules also allow “Federal funds . . . for drugs or devices to prevent implantation of the fertilized ovum.”²⁸ Other than by merely dismissing these rules as redundant, outdated, and inconsistent with the Hyde Amendment, the IHS has given no other justification for removing these rules from the regulations governing use of federal funds. Those reasons are flawed and not sufficient to justify removal of these rules.

In addition to the loss of protection for the lives of the preborn that will occur, the changes will also lessen accountability and confidentiality for abortions given through Indian Health Services by federal funds. The current rules require that records of the doctor’s certification required for

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 42 CFR § 136.51.

²⁶ 42 CFR § 136.53.

²⁷ 42 CFR § 136.54.

²⁸ 42 CFR § 136.55.

life-of-the-mother abortions be kept for three years.²⁹ Additionally, they require that “[i]nformation which is acquired in connection with the requirements of this subpart may not be disclosed in a form which permits the identification of an individual without the individual’s consent”³⁰ They do make an exception for “as may be necessary for the health of the individual or as may be necessary for the Secretary to monitor Indian Health Service program activities.”³¹ The Removal Rules propose to remove these protections for preborn lives while failing to explain their desired decrease in accountability and confidentiality.

2. The Inconsistency of This Regulation Removal with the Purpose of the IHS

The purpose of IHS is to provide funding “as the Congress shall from time to time appropriate . . . [f]or relief of distress and *conservation of health*.”³² Broadening abortion funding is fundamentally inconsistent with this purpose. Abortion is not healthcare, and it is harmful for women. Abortion is “the deliberate interruption of the natural, healthy physical process of pregnancy by use of metal instruments, poisonous drugs, and/or powerful suction machines.”³³ Abortion is claimed to be safer than childbirth but the statistics used to justify that claim are faulty because they include abortion mortality numbers in both abortion mortality counts and pregnancy mortality counts; they fail to include the pregnancies that end in losses or the gestational age in the pregnancy mortality evaluation; they also underreport abortion deaths; and they fail to include “delayed deaths that result from abortion.”³⁴ In addition to the flawed statistical analyses, peer reviewed medical research strongly indicates that in fact *abortion is more dangerous* than childbirth.³⁵ The physical health risks from abortions can include breast cancer, elevated risk of subsequent cardiovascular diseases, and other physical risks.³⁶ By enabling these dangers presented by abortion, the IHS is not serving its purpose of conserving the health of the Native American population.

²⁹ 42 CFR § 136.56.

³⁰ 42 CFR § 136.57.

³¹ *Id.*

³² 25 U.S.C. § 13 (emphasis added).

³³ Walter Weber, *5 Fast Facts: Medical Professionals Join ACLJ to Debunk Abortion Safety Myth at the Supreme Court*, ACLJ (Jan. 6, 2020), <https://aclj.org/pro-life/5-fast-facts-medical-professionals-join-aclj-to-debunk-abortion-safety-myth-at-the-supreme-court>.

³⁴ *Id.*

³⁵ See Amicus Brief of the Elliot Institute in Support of Petitioners at Section III, *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (No. 19-1392), <http://tinyurl.com/27u2tdh3>.

³⁶ See Sanne A. E. Peters et al., *Pregnancy, Pregnancy Loss, and the Risk of Cardiovascular Disease in Chinese Women: Findings from the China Kadoorie Biobank*, BMC MED., Aug. 2017; Maka Tsulukidze et al., *Elevated Cardiovascular Disease Risk in Low-Income Women with a History of Pregnancy Loss*, OPEN HEART, June 9, 2022; Harry Kyriacou et al., *The Risk of Cardiovascular Diseases After Miscarriage, Stillbirth, and Induced Abortion: A Systematic Review and Meta-Analysis*, EUROPEAN HEART J. OPEN, Oct. 5, 2022, at 1; Shuqing Zou et al., *Genetic and Lifestyle Factors for Breast Cancer Risk Assessment in Southeast China*, 12 CANCER MED. 15,504, 15, 507 (2023). For an annotated bibliography of peer reviewed studies identifying physical risks statistically associated with abortion, see *Physical Effects of Abortion*, ELLIOT INST., tinyurl.com/AbPhysical (last visited Feb. 27, 2024).

3. The “Trust Relationship” Between the Federal Government and the Native American People

The general “trust relationship” between the federal government and the Native American people does not create an independent legal obligation to provide federal funds for abortion services. Rather, the IHS is obligated to spend its funds to promote “Indian health,” a mandate that does not create an independent, legally enforceable right to compel the IHS to provide abortion services, destroying Native American children before they are born and injuring Indian women and families. In fact, this relationship indicates the opposite. If a trust relationship exists between the federal government and the Native American people, the federal government should not be using the Native American people to advance its interests. While the federal government may wish to expand abortion access, that expansion is contrary to the best interests of Native Americans. The government has a long history of advancing its interests at the expense of Native American people and culture. Enough harm has been done in the past, and the government should end its exploitation of Native Americans to advance its radical abortion agenda immediately. Restricting abortion, and thereby the harm that can come from it both for women and the preborn, is in the best interests of the Native American population.

B. Implications

1. The IHS Could Perform Abortions if the Hyde Amendment Is Not Passed

The Removal Rule shows its true intent when it states, “amending the regulations to reflect the current Hyde Amendment could cause additional confusion in the future if Congress changes the annual appropriations language, as it has in the past.”³⁷ If the Hyde Amendment was not included in the annual appropriations package, then the IHS and HHS would be able to expand access to abortion by expending funds for abortions given through Indian Health Services. By deleting all regulations on abortion, IHS would enable itself to automatically fund abortion, without any rulemaking whatsoever, if the Hyde Amendment should ever fail. This appears to be an attempt to set up a future end-run around the requisite rule-making process and public accountability necessary for rule changes. This intent is further evidenced by the lack of proposed regulations to take the place of those being removed. New IHS regulations could have instead aligned with the current Hyde standard, rather than eliminated any internal limitations on IHS’ performance of abortions. This approach suggests the real agenda is to promote and expand abortion and to specifically do so on Native American land – not to remove so-called “outdated regulations.”

³⁷ Removal of Outdated Regulations, 89 Fed. Reg. 896, 897 (proposed Jan. 8, 2024) (to be codified at 42 C.F.R. pt. 136), <https://www.federalregister.gov/documents/2024/01/08/2023-28948/removal-of-outdated-regulations#citation-1-p897>.

2. Tribal Sovereignty and Prerogatives Could Be Encroached Upon with Abortion Being Used as a Tool to Further Expand Governmental Interests to the Detriment of the Native American Population

The clichéd pro-abortion argument is that abortion is a *choice* made by women that brings freedom. However, many women, if not an overwhelming majority of women, “choose” abortion because they are pressured—or coerced—by others.³⁸ Often, that pressure to have an abortion comes from those who prioritize their own self-interest above the best interests and wishes of the pregnant woman: “once abortion becomes available, it becomes the most attractive option for everyone *around* the pregnant woman.”³⁹ Sixty-four percent of women report having been pressured into abortions by others.⁴⁰ The Native American population has faced forced sterilization in the past. The federal government’s attempt to remove these rules and widen access to abortion means these women now could be coerced into obtaining abortions.

Moreover, abortion can serve as a tool for furthering broader eugenic and racist goals.⁴¹ As Justice Thomas noted in his concurring opinion in *Box v. PPINK*,

the use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause.⁴²

It is well-known that Margaret Sanger, Planned Parenthood’s founder, embraced eugenics. Indeed, Planned Parenthood’s current CEO has now admitted as much.⁴³ Sanger even advocated for forced sterilization of those she deemed unfit in the past,⁴⁴ a harm well known to the Native American

³⁸ Vincent M. Rue, et al., *Induced Abortion and Traumatic Stress: a Preliminary Comparison of American and Russian Women*, 10 MED. SCI. MONITOR 9 (2004); Priscilla K. Coleman, Ph.D., *Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences*, 22 J. AMER. PHYSICIANS & SURGEONS 113, 115 (2017); Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 113 (2005).

³⁹ Frederica Mathewes-Green, *When Abortion Suddenly Stopped Making Sense*, NAT’L REV. (Jan. 22, 2016, 9:00 AM), <https://www.nationalreview.com/2016/01/abortion-roe-v-wade-unborn-children-women-feminism-march-life/>.

⁴⁰ David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women’s Emotional Responses and Mental Health*, CUREUS, Jan. 31, 2023, at 8.

⁴¹ *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 284-85 (5th Cir. 2019) (Ho, J., concurring in judgment), rev’d on other grounds, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782-93 (2019) (Thomas, J., concurring).

⁴² *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

⁴³ Alexis McGill Johnson, *I’m the Head of Planned Parenthood. We’re Done Making Excuses for Our Founder*, N.Y. TIMES (Apr. 17, 2021), <http://tinyurl.com/mut5xjs2>.

⁴⁴ Kay Coles James, *Even with Removing Margaret Sanger’s Name, Planned Parenthood Is Still Influenced by Racist Founder*, THE HERITAGE FOUNDATION (July 29, 2020), <https://www.heritage.org/life/commentary/even-removing-margaret-sangers-name-planned-parenthood-still-influenced-racist>.

population. “Planned Parenthood also still targets minority communities.”⁴⁵ The eugenic motivation behind abortion is shown by the public claim that abortion is protecting certain segments of the population, disproportionately racial minorities, from having more children than would supposedly be good for society.⁴⁶ Expanding access to abortion will further enable eugenicists to achieve their goal of decreasing minority populations.

Native American Elizabeth Terrill recognizes the harm that abortion poses to her people.⁴⁷ She emphasized that “[p]recisely because of [their] history of being discarded and disdained, [Native Americans] have an obligation to stand for those who are today being denied the rights that [they] have fought so hard to obtain.”⁴⁸ She states that “[m]any of the crimes against [their] people have involved the taking of [their] children.”⁴⁹ She also recognized that “[t]oday, unborn Native Americans are the most vulnerable among [Native Americans] and they are under assault from many sides.”⁵⁰ Further, she testified that

*Abortion is not a solution for Native women. It is part of the problem. It is another one of the lies that is told to keep our people traumatized and beaten down. I have worked with many women who have had abortions and that trauma only further injures their mental and physical health.*⁵¹

Terrill also highlighted that, to her tribe, the value of children is expressly acknowledged in the lives of both the born and preborn.⁵² Specifically, “[a]ll are sacred. At all points in time and at all points in human development, from conception to natural death.”⁵³ This respect for the lives of the preborn should be preserved instead of being threatened by expansion of abortion to serve governmental interests which are not found in the heritage of the Native American people.

⁴⁵ *Id.*

⁴⁶ See, e.g., Jacqueline Mitchell, *Abortion Restrictions May Be Linked to Rise in Children Entering Foster Care*, HARVARD MEDICAL SCHOOL NEWS & RESEARCH (Nov. 16, 2023), <https://tinyurl.com/3n5h3f9b> (“Policies that restrict abortion may contribute to the overrepresentation of racial and ethnic minority children in the foster care system, perpetuating inequities and further straining vulnerable populations”) (quoting study author Ashley O’Donoghue).

⁴⁷ Elizabeth Terrill, *Abortion Is Not a Solution for Native Women*, NAVAJO TIMES (Mar. 5, 2024), <https://navajotimes.com/opinion/essay/abortion-is-not-a-solution-for-native-women/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis added).

⁵² *Id.*

⁵³ *Id.*

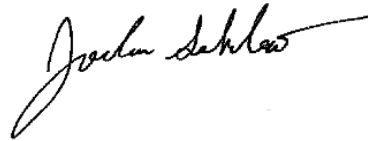
CONCLUSION

Pro-abortion motivations are driving the IHS to remove these rules, which were created to protect women and preborn lives. Without these rules in place, the Native American population could be further harmed by the federal government.

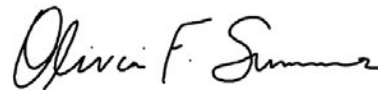
On behalf of Lisa Johnson-Billy and Jon Echols the ACLJ opposes the proposed Rule and urges IHS to leave the rules in place. The current rules are necessary and consistent with 25 U.S.C. § 1676 and the Hyde Amendment.

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

Very truly yours,



Jordan Sekulow
Executive Director



Olivia F. Summers*
Senior Litigation Counsel
**Admitted in VA & DC*

AMERICAN CENTER FOR
LAW & JUSTICE

