January 8, 2019

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9922-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: Proposed Rule: Patient Protection and Affordable Care Act; Exchange Program Integrity (CMS-9922-P)

Dear Sir or Madam:

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and nearly 300,000 of its members,[1] supporting the adoption of the proposed rule issued by the Department of Health and Human Services ("HHS" or "the Department") on November 9, 2018, regarding Patient Protection and Affordable Care Act; Exchange Program Integrity as reported in 83 FR 56015 of the Federal Register (hereafter, the "Rule").[2]

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.[3] In addition, the ACLJ represented thirty-two individuals and for-profit corporations in seven legal actions against the Federal Government's contraceptive services mandate.[4] The ACLJ submitted amicus briefs with the

[1] *Stop Giving Tax Dollars to the Abortion Industry*, AMERICAN CENTER FOR LAW AND JUSTICE, https://aclj.org/pro-life/stop-giving-tax-dollars-to-abortion-industry (last visited Nov. 18, 2018).
[2] Department of Health and Human Services; Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56015 (proposed Nov. 7, 2018) (to be codified at 45 C.F.R. 155, 156), *available at* https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24504.pdf.
[3] *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).
[4] *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 862 (8th Cir. 2014);

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).

The Rule should be adopted because: (1) it ensures that individuals who are enrolled in qualified health plans through individual market Exchanges do not receive reductions (or reimbursements) in the form of advance payments of the premium tax credit (APTC) and cost-sharing reductions (CSRs) for abortion coverage and/or any other services for which such payments are not available under section 1303 of the Patient Protection and Affordable Care Act ("PPACA") and the Hyde Amendment; (2) it requires greater oversight of and transparency from State Exchanges and requires them to meet the standards of federal law; and (3) it protects the interests of taxpayers and consumers by requiring issuers to clearly notify consumers of whether their plan covers abortion, allowing them to make more informed choices about the coverage they select, especially those consumers who desire to keep their funds from being used to pay for abortion services.

I. HHS HAS RECENTLY MADE STRIDES TO PROTECT THE SANCTITY OF LIFE AND IT SHOULD CONTINUE TO DO SO.

Abortion is a grave offense against justice because it entails the deliberate killing of an innocent member of the human race. It is indisputable that the unborn child is a distinct biological organism, is alive, and belongs to the species *homo sapiens*. A justification of abortion (aside from the life vs. life situations where a mother is at serious risk of dying from continuing the pregnancy) must therefore fundamentally rest on the proposition that some members of the human race do not have even the most basic of human rights, the right to live. That proposition is incompatible with the very notion of human rights, not to mention the recognition in the Declaration of Independence that "all men are created equal" and the constitutional principle of "equal protection of the laws." And while the U.S. Supreme Court in the tragic 1973 decision of *Roe v. Wade* prevented states from outlawing the grave injustice of abortion, even that Court has recognized that the citizens of this nation may rightly be protected against compulsory support for, or participation in, abortion. A pro-life policy, then, seeks to offer to unborn children what protective measures are possible, and to prevent the coerced complicity of the citizenry in the practice of abortion.

In prior administrations, HHS implemented policies that demonstrated a disregard for the sanctity of human life, agnosticism toward its duty to uphold the law, and hostility toward states that wished to act in the best interests of their citizens on the issue of life. Notwithstanding its past acts, however, the ACLJ is greatly encouraged by strides made by the Department over the past two years to change course and correct these past mistakes, preferring to recognize the humanity of the unborn, respect the freedom of conscience, and uphold the law rather than play politics with human life.

First, after half a decade of litigation, HHS finally adopted rules that end the contraceptive mandate for religious objectors, securing not only the health and welfare of the American people,

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Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., 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. Dep't of Health & Human Servs.*, No. 4:13-cv00462-AGF (E.D. Mo.); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill.).

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 released a Strategic Plan that recognizes the scientific fact that life begins at conception. Third, HHS has proposed vital safeguards and enforcement mechanisms that will help protect the right to conscience as required by federal law. Fourth, HHS has proposed rules that aim to end the discriminatory practices that exclude pro-life and faith-based organizations from federal funding, grants, and participatory projects. Now, HHS is proposing a rule that would require greater oversight to ensure transparency and compliance so that federal funds are not used to pay for abortion services.

It is our hope that these recent efforts are emblematic of a long-term commitment to righting the wrongs of the past. The ACLJ applauds the Department for building on these recent efforts, and encourages the Department to continue with these strides to make it clear that HHS will no longer shirk its responsibility to equitably, consistently, and transparently enforce federal law that prohibits federal taxpayer money from being used to pay for abortion services.

II. FEDERAL LAW PROHIBITS TAXPAYER FUNDING FOR ABORTION AND REGULATION OF THE PPACA SHOULD ENSURE COMPLIANCE WITH THE LAW

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. On January 24, 2017, the House passed H.R.7,[5] also known as the "No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017." That bill would codify the Hyde Amendment, so that it would no longer have to be adopted every year. The Trump Administration has stated that it strongly supports the legislation, and that President Trump would sign the bill into law.[6] While the Senate has yet to pass this bill, the longstanding history of bipartisan support for and the repeated passage of the Hyde Amendment underscores the desire of U.S. taxpayers to keep their tax money from being used to pay for abortion.

When the PPACA was passed in 2010, it included Section 1303, which places restrictions on, and requirements with respect to, insurance coverage of certain abortion services by qualified health plans ("QHPs") offered through individual market Exchanges. Further, Section 1303 explicitly prohibits the use of federal funds to pay for coverage by QHPs of abortions that are not permitted under the Hyde Amendment.[7] Thus, Section 1303 requires insurance companies to segregate abortion-related services from other healthcare funds. Funds for coverage of abortion-related services are to be collected via separate payments, kept in separate accounts, the segregation of such funds is to be strictly maintained, and only the funds separately collected are

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[5] No Taxpayer Funding for Abortion and Abortion Insurance Disclosure Act of 2017, H.R. 7, 115th Cong. (2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/7.

[6] Press Release, Statement of Administration Policy: H.R. 7 – No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, The White House (Jan. 24, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/sap-hr7-01242017.pdf.

[7] Section 1303(b)(2)(A) of PPACA, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 42 U.S.C. § 18023(b)(2)(A).

to be used to pay for abortions. This is to guarantee that taxpayer dollars in the form of subsidies and cost-sharing reduction payments are not comingled with funds used to pay for abortions. Moreover, Section 1303 requires issuers to notify consumers enrolling in coverage that they have selected a plan that covers abortion services. Such notification informs consumers, who might otherwise be unaware, that their funds are being used to cover abortions.

Unfortunately, compliance with and enforcement of Section 1303 has been inconsistent with, and contrary to, federal law. On August 6, 2018, 102 Members of Congress sent a letter to HHS Secretary Alex Azar, which requested that new regulations be implemented "to remedy the severe problems with the ACA in regard to abortion coverage."[8] Specifically, the letter requested new regulations to replace "[c]urrent regulations which define compliance with Section 1303 in a number of ways that negate the clear meaning of the statute's phrase, 'separate payment.'" As Section 1303 is currently regulated, issuers are allowed to send "notice at or soon after the time of enrollment that the monthly invoice or bill will include a separate charge for services," but "the rule explains that the issuer is not required to separately identify the abortion surcharge, and the surcharge can be collected in a single transaction rather than collected separately."[9] This clearly violates the requirement of Section 1303 that funds be collected and maintained separately to guarantee segregation of abortion funds from other healthcare funds. The congressional letter referenced a Government Accountability Office (GAO) report issued in 2014 that found that insurers were indeed violating the requirements of Section 1303.[10] In fact, GAO surveyed eighteen QHP issuers operating in 28 states, and "seventeen out of the eighteen QHP issuers surveyed failed to satisfy the requirement for collecting separate payments . . . ."[11]

It is clear that this Rule is needed to ensure compliance with federal law.

a. The Rule Promotes Transparency and Clarity for Taxpayer Consumers and Protects Rights of Conscience.

It is wrong to force someone to be complicit in acts that violate his or her conscience. Under current law, U.S. citizens are required to obtain a minimum level of insurance coverage. Thus, consumers are legally required to obtain insurance coverage. Yet, while consumers are complying with the current law, issuers providing coverage have not been doing likewise. As previously stated, QHP issuers are failing to follow the requirements of federal law and are not separately identifying abortion coverage surcharges for consumers. As such, "many [consumers] are unwittingly purchasing plans that include abortion coverage. No person should have to pay for abortion coverage that they don't want."[12]

As stated in HHS's Executive Summary, the Rule

[8] Letter from Chris Smith, Member of Congress, to Alex Azar, Secretary, U.S. Department of Health and Human Services (Aug. 6, 2018), *available at* https://chrissmith.house.gov/uploadedfiles/2018-08-06_-_smith_letter_on_section_1303_-_abortion_funding_transparency.pdf [hereinafter Smith Letter].
[9] *Id.*
[10] *Id.*
[11] U.S. Government Accountability Office, "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans," (Sept. 15, 2014), *available at* https://www.gao.gov/products/GAO-14-742R.
[12] Smith Letter, *supra* note 8.

> [a]lign[s] the regulatory requirements for issuer billing of the portion of the enrollee's premium attributable to certain abortion services with the separate payment requirement applicable to issuers offering coverage of these services, [by changing] the billing and payment collection requirements for QHP issuers in connection with their plans offered through an individual market Exchange that include coverage for abortion services for which federal funding is prohibited.[13]

As proposed, the Rule advances protection of taxpayer rights of conscience and prevents QHP issuers from hiding abortion coverage surcharges from consumers. This Rule is clearly necessary, as QHP issuers have failed to follow the statutory requirements of Section 1303 due to overly permissive and wrong guidance from the previous administration.

b. The Rule Merely Clarifies and Corrects Current Interpretations of Already Established Law.

As drafted, the Rule merely requires compliance with simple, straightforward statutory requirements. There is no reason to doubt that the Rule is as constitutional and statutorily authorized as the Hyde Amendment and Section 1303 of the PPACA. The Department should not allow threats of litigation by abortion advocates, should there be any, to derail the adoption and implementation of the Rule.

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.

When the Hyde Amendment was first passed, it was challenged in federal court in *Harris v. McRae*, 448 U.S. 997 (1980). Eventually, the case made its way to the Supreme Court, where the Court ultimately upheld the constitutionality of the amendment in 1980. The Court held:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.
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> . . . Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.

448 U.S. at 316-17 (footnote omitted).

[13] Department of Health and Human Services, Patient Protection and Affordable Care Act; Exchange Program Integrity, Proposed Rule, 45 CFR Parts 155 and 156, https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-24504.pdf.

A year before, in 1979, the Supreme Court held in *Maher v. Roe*, 432 U.S. 464 (1977), that *Roe v. Wade* does not establish a woman's right to a free abortion. The Court further held that *Roe v. Wade* "did not declare an unqualified 'constitutional right to an abortion'" and "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474.

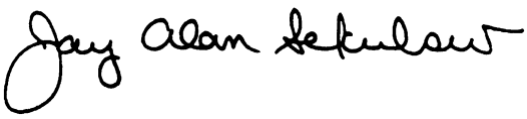
The constitutionality of the Hyde Amendment's prohibition on federal funds being used to pay for abortion services is well established. Section 1303 mirrors the Hyde Amendment, and the proposed Rule does likewise. No greater restrictions exist in the Rule and, thus, there is no question as to the constitutionality of its requirement that QHPs comply with federal law.

III. CONCLUSION

The ACLJ urges HHS to adopt the Rule in its entirety. Doing so will ensure that federal law is properly enforced. It does not create new law, but simply serves to provide oversight and require transparency to promote compliance with already established federal law. Such oversight and transparency will prevent federal funds from being used in violation of federal law to pay for abortion services. Further, it will protect the rights of conscience of U.S. taxpayers by preventing their funds from being used to pay for abortion services. The ACLJ commends HHS for acting in ways that recognize the humanity of the unborn, respect the freedom of conscience, and uphold the law. We also encourage HHS to remain ever vigilant, to continue to find new ways to protect the integrity of the law, and to protect the lives of the most vulnerable – unborn children.

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

Sincerely,



Jay Alan Sekulow
Chief Counsel
AMERICAN CENTER FOR LAW & JUSTICE

Jordan Sekulow
Executive Director
AMERICAN CENTER FOR LAW & JUSTICE