CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

October 21, 2014

Submitted Electronically

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

Re: Notice of Proposed Rulemaking on Coverage of Certain Preventive Services under the Affordable Care Act,
File Code No. CMS-9940-P

Dear Sir or Madam:

The Christian Legal Society submits the following comments on the Notice of Proposed Rulemaking (NPRM) on Coverage of Certain Preventive Services under the Affordable Care Act, 79 Fed. Reg. 51118 (August 27, 2014).[1] The NPRM invites comments on a proposed "accommodation" that would require for-profit employers, despite their religious objections, to provide insurance coverage for certain contraceptives, including Plan B and *ella*, which many consider to be life-destroying drugs. This would be done despite the United States Supreme Court's recent decision in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (June 30, 2014), that protected for-profit employers.

The HHS Mandate is an extreme departure from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of

[1] On June 19, 2012, Christian Legal Society filed comments on the Advance Notice of Proposed Rulemaking on Preventive Services (Feb. 15 , 2012), CMS-9968-ANPRM, *available at* http://www.clsnet.org/document.doc?id=368&erid=249607&trid=4c956211-0ee9-487b-a655-bcf66c40b5ae (last visited April 5, 2013). On April 8, 2013, Christian Legal Society filed comments on the Advanced Notice of Proposed Rulemaking on Preventive Services, 78 Fed. Reg. 8456 (Feb. 6, 2013), available at http://www.clsnet.org/document.doc?id=476 (last visited October 20, 2014).

religious conscience rights in the context of participation in, or funding of, abortion. The Christian Legal Society joins other commenters in calling upon the Administration to rescind the Mandate. The Administration has at its disposal several less restrictive means to achieve its interests than requiring employers to provide insurance coverage for drugs to which they have religious objections.

A. Protections for religious conscience, including protections of for-profit entities, have been a bipartisan tradition in the health care context for four decades.

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[2]

Before the ink had dried on *Roe v. Wade*, 410 U.S. 113 (1973), a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect from discrimination doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.[3]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[4] In upholding its constitutionality, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful

[2] *See* Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records*, April 30, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5306 (last visited Feb. 18, 2013).

[3] Nearly all states have enacted conscience clauses, specifically 47 states as of 2007. James T. Sonne, *Firing Thoreau: Conscience and At-will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007).

[4] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976).

termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).[5] Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded coverage of abortion or other services. Hospitals, doctors and other health care workers who refused to participate in the performance of any health care service on the basis of religious belief or moral conviction were protected. Commercial insurance companies and self-insurers likewise were protected.[6]

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[7] While the Church, Hyde, and Weldon Amendments are the preeminent conscience

[5] In the companion case to *Roe*, the Supreme Court noted with approval that Georgia law protected hospitals and physicians from participating in abortion. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("[T]he hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.")

[6] Doerflinger, *supra*, n. 2. *See* 103rd Congress, Health Security Act (S. 2351), introduced Aug. 2, 1994 at pp. 174-75 (text at www.gpo.gov/fdsys/pkg/BILLS-103s2351pcs/pdf/BILLS-103s2351pcs.pdf); Sen. Finance Comm. Rep. No. 103-323, available at www.finance.senate.gov/library/reports/committee/index.cfm?PageNum_rs=9 (last visited Feb. 18, 2013).

[7] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011).

protections, numerous other federal statutes protect religious conscience in the health care context.[8]

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." *Id.* § 18023(b)(1)(A)(i). "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii).

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that "longstanding Federal Laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide, pay for, provide coverage of,* or refer for abortions." 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added). Former Representative Bart Stupak (D-Mich.) and several other pro-life Democrats voted for ACA based on their belief that Executive Order 13535 would protect conscience rights as to ACA's implementation. Former Representative Stupak has stated that the Mandate

[8] *See, e.g.*, 20 U.S.C. § 1688 (federal sex discrimination law cannot be interpreted to force anyone to participate in an abortion); 18 U.S.C. § 3597 (protecting persons who object for moral or religious reasons to participating in federal executions or prosecutions); 42 U.S.C. § 1396w-22(j)(3)(B) (protecting Medicare managed care plans from forced provision of counseling or referral if they have religious or moral objections); Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 (since 1999, protects religious health plans in federal employees' health benefits program from forced provision of contraceptives coverage, and protects individual religious objectors from discrimination); Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act, Pub. L. No. 112-74, Div. I, Title III (since 1986, prohibits discrimination in the provision of family planning funds against applicants who offer only natural family planning for religious or conscience reasons).

"clearly violates Executive Order 13535."[9] Indeed, former Representative Stupak filed a brief in *Hobby Lobby*, explaining why the Mandate violates the ACA and Hyde-Weldon Amendments.[10]

The federal conscience protections cover both non-profit and for-profit entities and individuals engaged in for-profit commerce. Under these federal laws, hospitals, nurses, and doctors do not forfeit their conscience rights because they are paid for their services. The Hyde-Weldon Amendment and the ACA both protect health insurance plans, contrary to the Mandate's requirements, as well as hospitals, HMOs, and provider-sponsored entities. Nor does RFRA distinguish between for-profit and non-profit institutions in its protection. 42 U.S.C. § 2000bb. *See* Part B, *infra.* The First Amendment further protects the religious conscience rights of for-profit businesses. *See, e.g., Stormans, Inc. v. Selecky,* 2012 WL 566775 (W.D. Wash. 2012); *Morr-Fitz, Inc. v. Quinn,* 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (state conscience law protects individual pharmacists and corporate owners of pharmacies from state regulation requiring pharmacists to fill prescriptions for emergency contraceptives despite their religious objections).

If the government may force religious employers to pay for contraceptives and abortifacients, nothing prevents the government from ordering them to pay for all abortions. This concern is real. California just adopted such a requirement in its own contraceptives mandate. The Washington State Legislature almost enacted a similar requirement earlier this year. Indeed, the Institute of Medicine report that recommended coerced coverage of contraceptives and abortifacients suggests that coverage of "abortion services" was discussed, when it notes: "Finally, despite the potential health and well-being benefits to some women, abortion services were considered to be outside of the project's scope, given the restrictions contained in

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[9] Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at* http://www.democratsforlife.org/index.php?option=com_content&view=article&id=773:bart-stupak-on-contraception-mandate&catid=24&Itemid=205 (last visited Feb. 18, 2013).

[10] Brief *Amici Curiae* of Bart Stupak and Democrats for Life of America, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_dfla.authcheckdam.pdf (last visited October 21, 2014).

the ACA." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011) at 22.[11]

The Mandate is badly out of step with the tradition of bipartisan protection of religious conscience. Respect for this tradition of bipartisan protection of citizens' right not to participate in, or fund, abortion on religious or moral grounds requires rescinding the Mandate.

B. The Religious Freedom Restoration Act, not an administrative agency's regulation, determines the scope of a for-profit corporation's religious liberty, and such protection is not limited to closely held for-profit corporations.

The NPRM's working premise is that religious liberty protections may be limited to closely held for-profit corporations as defined by other federal laws or state laws. This premise is mistaken. The Religious Freedom Restoration Act -- not another federal or state law, and certainly not a federal regulation – determines whether a "person," including a for-profit corporation, may invoke RFRA's protection against application of the HHS Mandate.

As the Supreme Court reasoned in *Hobby Lobby*, "RFRA applies to 'a person's' exercise of religion,' 42 U.S.C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' 1 U.S.C. § 1." 134 S. Ct. at 2768. The Dictionary Act defines the word "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Ibid.* The Dictionary Act does not include the modifier "closely held" before the term "corporation." As the Supreme Court concluded, "No known understanding of the term 'person' includes *some* but not all corporations." *Id*. at 2769.

RFRA certainly does not contemplate either of the two "approaches" upon which the NPRM solicits comments. RFRA's protections are not limited to 1) "closely held for-profit entit[ies] . . . where none of the ownership interests in the entit[[ies] is publicly traded and where the entity has fewer than a specified number of shareholders or owners" or 2) "closely held for-profit entit[ies] in which the

[11] Presumably "the restrictions contained in the ACA" refers to the conscience provisions in the ACA.

ownership interests are not publicly traded, and in which a specified fraction of the ownership interest is concentrated in a limited and specified number of owners." 79 Fed. Reg. 51122.

In *Hobby Lobby,* the Court observed that it had "no occasion . . . to consider RFRA's applicability to such companies," referring to "large publicly traded corporations such as IBM or General Electric." 134 S. Ct. at 2774. The Court noted that there were "numerous practical restraints" on the ability of large publicly traded corporations to exercise religion; however, the Court did not foreclose the possibility that some corporations that are not closely held might qualify for RFRA's protections.

RFRA, not an administrative regulation, sets the parameters as to whose religious liberty is protected, and "RFRA was designed to provide very broad protection for religious liberty." By its own terms, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

As CLS demonstrated in its *amicus* brief in the Supreme Court in *Hobby Lobby,*[12] Congress understood that RFRA protected for-profit corporations and their owners. Congress repeatedly emphasized that RFRA would provide universal coverage, applying a single standard to all cases. RFRA's stated purpose is "to restore the compelling interest test . . . and to guarantee its application in *all* cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). Excluding corporate cases at the threshold, instead of evaluating them under RFRA's substantive standard of exercise of religion, substantial burden, compelling interest, and least-restrictive means, is inconsistent with this commitment to uniform coverage of all claims. RFRA's text and history show that all claims are covered, including claims by for-profit corporations. CLS Br. at 4-10.

The CLS brief also explained that protecting for-profit corporations is consistent with larger traditions of religious liberty. *Id.* at 35-43. As already discussed in Part A, *supra,* the tradition of protecting conscientious objectors is

[12] The CLS brief is *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Nos__13-354__13-356_bsac_Christian_Legal_Soc.pdf (last visited October 21, 2014),

especially broad and deep with respect to the taking of human life. The Court itself observed in *Hobby Lobby* that "some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, *e.g.*, 42 U.S.C. § 300a–7(b)(2); § 238n(a)." 134 S. Ct. at 2773 (original emphasis). The CLS brief further argued that if the government prevailed in *Hobby Lobby*, the government could require coverage for all abortions, by any method, in any trimester. It could require coverage for partial-birth abortions, or assisted suicides, or unconsented euthanasia. CLS Br. at 39.

Finally, the CLS brief reminded the Court that excluding religious minorities from businesses and professions is an historic means of persecution and, therefore, must be covered by RFRA. "Limiting the size of business that can be owned by religious minorities is an historic wrong." *Id.* at 42. The brief gave examples of eighteenth-century British laws that prohibited Catholics from having more than two apprentices in their businesses, or that required an anti-Catholic oath from persons seeking to hold government or other public jobs.

C. The Government has numerous less restrictive means available that do not require employers with religious objections to provide insurance coverage of drugs that violate their religious consciences.

RFRA requires that the government achieve a compelling interest by the least restrictive means available. 42 U.S.C. § 2000bb-1(b). Forcing religious employers to fund contraceptives and abortifacients is hardly the least restrictive means of achieving the government's purported interest of gender equality and childbirth avoidance. This is a solution in search of a problem. No one seriously disputes that contraceptives are widely available. As former HHS Secretary Sebelius explained, contraceptives are "the most commonly taken drug in America by young and middle-aged women," and "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[13] Contraceptives are available from online pharmacies and vending machines at modest cost.

[13] *See* News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013).

The government can ensure that employees have access to contraceptives without wading into the bureaucratic morass that the NPRM's proposed rules would create. The government has numerous highly conventional means of providing the coverage to any and all employees, including: 1) providing a tax credit to reimburse employees' purchase of contraceptives; 2) provide contraceptives directly through "community health centers, public clinics, and hospitals"; 3) provide direct insurance coverage through the state and federal health exchanges; 4) fund programs for willing private actors, *e.g.*, physicians, pharmaceutical companies, or interest groups, to deliver the drugs through their programs; and 5) public interest advertising to inform the public how to access these drugs that are available through a variety of publicly-funded means.

Indeed, the Supreme Court instructed the government that "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780. As the Court explained, "This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see § 2000bb–1(b)(2), that this is not a viable alternative." *Id.*

Given that HHS in 2012 spent over $300 million in Title X funding to provide contraceptives directly to women, why is the government unwilling to spend a modest amount to protect our "first freedom"? Particularly in light of the bureaucratic expense and waste created for the government, employers, insurers, and third-party administrators by implementation of an "accommodation" for employers with religious objections, including the costs of any notification process and claims adjustments for issuers' FFE user fees, it seems clearly more efficient, economical, and easy for the government itself to provide the objectionable coverage directly or through tax credits.

What price can be placed on our religious liberty? A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily

taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

Respectfully submitted,

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