April 3, 2023

TO: Internal Revenue Service, Department of the Treasury;
Employee Benefits Security Administration, Department of Labor;
Centers for Medicare & Medicaid Services, Department of Health and Human Services

RE: CMS-9903-P
Coverage of Certain Preventive Services Under the Affordable Care Act

To the Relevant Departments:

The American Center for Law and Justice ("ACLJ") submits the following comment on behalf of itself and over 501,000 of its supporters,[1] opposing the Notice of Proposed Rulemaking ("Coverage of Certain Preventive Services Under the Affordable Care Act") issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department ("Departments"), as published in the Federal Register on February 2, 2023 (hereafter "NPRM" or "Proposed Rule"). 88 Fed. Reg. 7236.

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 several significant cases involving the freedoms of speech and religion.[2]

Since the Obama Administration first imposed the HHS Mandate on the country, i.e., those 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, the ACLJ has taken an active role in challenging it in federal courts across the country. The ACLJ represented thirty-two individuals and corporations in seven actions against the government and the Mandate.[3] The ACLJ also filed amicus briefs in cases involving the

[1] *Defeat the Abortion-Pill Mandate's Assault on Liberty*, ACLJ.ORG, https://aclj.org/obamacare/defeat-the-abortion-pill-mandates-assault-on-religious-liberty-at-the-supreme-court (last visited Mar. 31, 2023).

[2] *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).

[3] *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

Mandate with the U.S. Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Zubik v. Burwell*, 578 U.S. 403 (2016), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

When the Departments first proposed the November 15, 2018, Final Rule ("Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act") that the NPRM seeks to amend, the ACLJ filed comments in support, stating that:

> The ACLJ welcomes and commends the Departments for, at long last, *truly* accommodating objecting entities and individuals from having to comply with the Mandate. The exemptions afforded by the [rules] will allow these persons to fulfill their respective roles in society without having to abandon their religious convictions or moral conscience. A Catholic order of nuns will now be able to serve the poor and needy without having to be complicit in the provision of drugs to which they object. An evangelical, family-owned business will not have to choose between shutting its doors or staying true to its beliefs. A pro-life organization will be able to continue its pro-life advocacy without having to participate in a governmental scheme that undermines its very mission and identity.[4]

While the ACLJ welcomes the NPRM keeping in place the religious exemption from complying with the Mandate, the ACLJ vigorously opposes the Departments' proposal to remove the non-religious moral exemption.

The Departments state that it is necessary to remove the moral exemption for three reasons:

(1) "[T]here have not been a large number of entities that have expressed a desire for an exemption based on a non-religious moral objection,"

(2) "[T]he Departments are under no legal obligation to provide such an exemption,"

(3) "RFRA would never apply to require such an exemption."

88 Fed. Reg. 7243.

The NPRM also states that "in light of the Supreme Court's decision in *Dobbs* [*v. Jackson Women's Health Org.*], the Departments have concluded that it is all the more critical now to ensure women's access to reproductive health care and contraceptive services without cost sharing." *Id.*

As explained herein, none of these grounds support removing the non-religious moral exemption. For many employers who oppose the HHS Mandate (such as Hobby Lobby in the Supreme Court case of the same name), the objection is not to contraceptive services *per se*, but to

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(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.).

[4] ACLJ Comment on CMS–9940–IFC and CMS–9925–IFC (Dec. 4, 2017), *available at* http://media.aclj.org/pdf/ACLJ-Comments-in-Support-of-Religious-Exemptions.pdf.

drugs that can act with an abortifacient mechanism of action. As the Supreme Court observed in *Hobby Lobby*, while many FDA-approved methods of contraception work by preventing conception, "four of those methods . . . may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." 573 U.S. at 682.

Thus, for many employers—if not most—their objection to the HHS Mandate is based on moral or religious beliefs concerning abortion. Abortion is not just a religious issue for some, but a deeply important moral one. As the Supreme Court succinctly and correctly put it in *Dobbs*, "Abortion presents a profound moral issue on which Americans hold sharply conflicting views." 142 S. Ct. 2228, 2240 (2022). *See also id*. at 2304 (Kavanaugh, J., concurring) (many pro-life persons "contend that all human life should be protected as a matter of human dignity and fundamental morality."). The belief of those who object to the Mandate "implicates a difficult and important question of religion **and** moral philosophy, namely, the circumstances under which it is immoral 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." *Hobby Lobby*, 573 U.S. at 686 (emphasis added). In other words, one can oppose abortion and not wish to facilitate it for religious reasons, moral reasons, or for both religious and moral reasons. And both reasons are worthy of protection.

The Departments' decision to comply with the demands of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., by providing a religious exemption to those who object to participating in the provision of abortion-inducing drugs, is laudable; but the same principle why the government should respect religious convictions concerning abortion should also apply to non-religious moral convictions.

Not only is the free exercise of religious beliefs a core principle of our country's founding, so too is the respect for the moral dictates of conscience. "Between 1776 and 1792, every state that adopted a constitution sought to prevent the infringement of 'liberty of conscience,' 'the dictates of conscience,' 'the rights of conscience,' or the 'free exercise of religion.'" A. Adams & C. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1600–1 (1989). In his famous 1789 letter to the Quakers, George Washington wrote:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Letter to the Annual Meeting of Quakers (1789), in The Papers of George Washington, 266 (Dorothy Twohig ed. 1993).

Thomas Jefferson observed that "[n]o 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." To the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809). Like James Madison, who opined that "[c]onscience is the most sacred of all property," Property (March 29, 1792), in The Founders' Constitution, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987), Thomas Jefferson understood the right of conscience to be a pre-political one, i.e., one that could not be surrendered to the government as a term of the social contract: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience

we never submitted, we could not submit. We are answerable for them to our God." Notes on the State of Virginia, in The Basic Writings of Thomas Jefferson, 157-58 (Philip S. Foner ed., 1944).

As the Supreme Court recognized over 50 years ago, "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). It is the longstanding commitment to that principle that has animated the "happy tradition" in our country "of avoiding unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1970).

Consistent with this history, the prohibition against coercing individuals into complicity with abortion has long been a strong societal and governmental interest. In *Roe v. Wade* itself, the Court quoted resolutions of the American Medical Association confirming that "no party to the [abortion] should be required to violate personally held moral principles." 410 U.S. 113, 143 n.38 (1973). And in *Doe v. Bolton*, the Court left intact a rule stating that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." 410 U.S. 179, 197–98. The Court explained that this was "obviously in the statute in order to afford appropriate protection to the individual and to the denominational hospital." *Id.* at 198.

The federal conscience amendments adopted in response to *Roe* and *Doe* did not limit protection to those with only a religious opposition to abortion. The Church Amendment, 42 U.S.C. § 300a-7(c), for example, provides that no entity that receives certain federal funding may discriminate against any physician or other health care personnel because he or she refused to assist in the performance of an abortion because of his "religious beliefs **or moral convictions**." 42 U.S.C. § 300a-7(c) (emphasis added).

When inserting the language in the Church Amendment specifically protecting individual conscience, Representative Heinz said the following:

> Mr. Chairman, freedom of conscience is one of the most sacred, inviolable rights that all men hold dear. With the Supreme Court decision legalizing abortion under certain circumstances, the House must now assure people who work in hospitals, clinics, and other such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent.

Mark L. Rienzi, The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers, 87 Notre Dame L. Rev. 1, 33 (2011) (quoting 119 Cong. Rec. 17,462-63 (1973)). Without further discussion, the House overwhelmingly passed the amendment and the bill by a vote of 372-1. *Id.*

The importance of protecting the conscientious right in the wake of *Roe* was not only advanced on the federal level but also on the state level. *See* Lynn D. Wardle, Protecting the Rights of Conscience of Health Care Providers,14 J. LEGAL MED. 177, 180 (1993) ("Most conscience clause provisions were adopted between 1973 and 1982, when the federal courts were broadly defining a new and very controversial constitutional privacy right to abortion. Concern about discrimination against individuals who, for religious or other moral reasons, objected to

participating in providing abortion services led to the widespread adoption of conscience clause statutes."). Indeed, most states have adopted laws that protect the right not to participate in abortions based on religious or moral reasons. Arizona, for example, provides that physicians or staff members who state in writing an objection to abortion "on moral or religious grounds [are] not required to facilitate or participate in the medical or surgical procedures that will result in the abortion." Ariz. Rev. Stat. § 36-2154 (B). Georgia law protects "any person" who states in writing an objection to participating in "any abortion or all abortions on moral or religious grounds." Ga. Code Ann. § 16-12-142 (a). Idaho provides that no medical professional should be required to "participate in the performance or provision of any abortion" if they object on the basis of "personal, moral or religious reasons." Idaho Code § 18-612 (2016). Montana protects individual medical personnel from having to "advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions." Mont. Code Ann. § 50-20-111 (2). Indeed, the states are almost unanimous in affording various levels of statutory protection to those who oppose participating in abortions on moral or religious grounds.

Protecting religious and moral convictions with respect to matters of life and death is also clearly seen in the Federal Death Penalty Act, which mandates, with no exceptions delineated, that "[n]o employee . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b). *See also* 42 U.S.C. § 2996f(b) (protecting objection to abortion funding in legal services assistance grants based on "religious beliefs or moral convictions").

In short, our country's historic concern for respecting conscience rights has included protecting both religious and moral commitments. There is no principled reason for the government to protect one and not the other. As the Supreme Court has observed, "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons." *Welsh v. United States*, 398 U.S. 333, 340 (1970) (internal quotation marks omitted). *See also March for Life v. Burwell*, 128 F. Supp. 3d 116, 128 (D.D.C. 2015) ("Recognizing the role morality plays in the lives of citizens, courts prohibit regulatory 'distinctions between religious and secular beliefs that hold the same place in adherents' lives.'").

The NPRM's proposal to eliminate the non-religious moral exemption is contrary to history, principles of tolerance and respect, and our country's jurisprudence.

The NPRM suggests that one reason the moral exemption is unnecessary is that only a small number of entities "have expressed a desire for an exemption based on a non-religious moral objection." 88 Fed. Reg. 7243. This argument is nonsensical. If only a limited number of entities have sought to invoke the moral exemption, that demonstrates the limited impact retaining the moral exemption will have on employees who work for employers morally opposed to abortion and the Mandate. While the Departments suppose it is no great burden to compel a small number of moral objectors to comply with the Mandate, they fail to appreciate the gravity of the objection. For these employers, the objection is not to safety standards in the workplace, accounting requirements, or other typical business regulations. They object to participating in the provision of abortion, an undeniably profound moral issue.

Balancing the interests of retaining a moral exemption, on the one hand, and access to drugs that the employee or others can themselves pay for, on the other, weighs vastly in favor of the employer morally opposed to what the Mandate requires. The financial penalties for failing to comply with the Mandate are staggering. *See* 26 U.S.C. § 4980D(b) (providing for an assessment of $100 per employee **per day** for failure to include the mandated preventive services). A business owner, who cannot allow his company to comply with the Mandate based on his non-religious moral beliefs, will face financial penalties so steep that he will be forced to shut down the company completely.[5] Such a result would have an obvious debilitating and negative impact on every person with something at stake in the viability of the company.

Moreover, when one weighs the interests of protecting the moral conscience of persons (a longstanding commitment of our nation) against cost-free access to abortion-inducing drugs (supported by neither the U.S. Constitution nor the country's history or traditions), the resulting calculation should be clear: to protect the morally informed conscientious objector—whether it be one objector, a handful of them, or many.

Another reason the NPRM cites for deleting the non-religious moral exemption is because of the *Dobbs* decision. The NPRM states, "Given that decision and the consequent threat to women's access to abortion and their ability to exercise control over their reproductive health care decisions, it is now all the more critical that women have access to contraceptive coverage." 88 Fed. Reg. 7250. The pro-abortion ideology implicit in this remark is glaring and demonstrates all the more why a moral exemption is necessary. Those who oppose abortion on moral grounds would surely not characterize the *Dobbs* decision as a "threat" to reproductive autonomy. Rather, they would view it as a decision that has effectively saved and will continue to save, untold numbers of unborn human lives (based on the states' now unrestricted ability to regulate abortion). To require, based on *Dobbs*, that the limited number of employers morally opposed to abortion (and who undoubtedly support *Dobbs*) facilitate the use of abortion-inducing drugs through a health plan is prejudicial, especially when the employees of such entities could be accommodated through other means, such as the "alternative pathway" offered to religious objectors. 88 Fed. Reg. 7252.

Even when this Country was under the abortion regime of *Roe* and *Casey*, the Supreme Court understood that people of goodwill differed on the subject of abortion *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) ("We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child"); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."). None of that has changed. Abortion remains a controversial subject to this day, perhaps even more so since the Supreme Court's decision in *Dobbs*. The Departments are fully aware of this but nonetheless want to compel employers to comply with the Mandate, even if doing so violates their non-religious moral beliefs. Compelling persons to violate their conscience regarding the facilitation of abortion is akin to—if not worse than—compelling them to speak a message contrary to their beliefs on that same controversial subject. Just as "[g]overnments must

[5] Frank and Phil Gilardi, owners of Freshway Foods, a closely held, family-owned business in Ohio, whom the ACLJ represented in their challenge to the Mandate, would have had to pay a penalty amounting to over $14 million per year for failing to comply with the Mandate. *Gilardi*, 733 F.3d at 1210.

not be allowed to force persons to express a message contrary to their deepest convictions," they should not be allowed to force persons to facilitate abortion contrary to their moral convictions. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring). Such compulsion of conscience is anathema under any truly ordered system of liberty.

After two Supreme Court decisions addressing the HHS Mandate, *Hobby Lobby* and *Zubik*, the previous Administration arrived at a final (and appropriate) resolution protecting both religious and moral objections to complying with the Mandate's demands. In *Little Sisters of the Poor*, the Supreme Court held that the government had the statutory authority to adopt both those exemptions and that "the rules promulgating these exemptions are free from procedural defects." 140 S. Ct. at 2386.

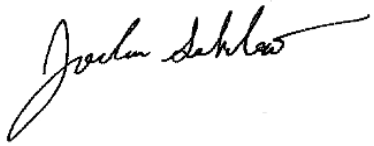
Unsurprisingly, the Biden Administration wants to end that truce. In the face of the Supreme Court's application of RFRA in *Hobby Lobby*, it has no choice but to concede defeat with respect to religious employers. But the Departments cannot "leave well enough alone," as Cardinal Timothy M. Dolan of New York, chairman of the USCCB's Committee for Religious Liberty, stated.[6] It wants to fight tooth and nail to drag any remaining conscientious objectors into compliance by revoking the non-religious moral exemption. The protection of moral convictions regarding the Mandate should not turn on which political party holds the reins of bureaucratic power.

CONCLUSION

For the foregoing reasons, the ACLJ respectfully requests that the Departments retain the non-religious moral exemption contained in the November 15, 2018, Final Rule ("Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act").

Very truly yours,

AMERICAN CENTER FOR LAW & JUSTICE



Jordan Sekulow
Executive Director

[6] "U.S. Bishops' Religious Liberty Chairman on Proposed Rule for "Contraceptive Mandate" (Feb. 1, 2023), *available at* https://www.usccb.org/news/2023/us-bishops-religious-liberty-chairman-proposed-rule-contraceptive-mandate.