



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

From: Thomas More Society, 309 W. Washington Street, Ste 1250, Chicago, IL 60606

Date: Monday, April 3, 2023

RE: Comments on Proposed Rulemaking: *Coverage of Certain Preventive Services Under the Affordable Care Act*, 88 Fed. Reg. 7236 (February 2, 2023)

RIN: 0938-AU94

1210-AC13

1545-BQ35

\*Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

\*Microsoft Word “print-to-PDF” format

## INTRODUCTION

These Comments are submitted in response to a Notice of Proposed Rulemaking (“2023 NPRM”) announced by the Department of the Treasury, Department of Labor and Department of Health and Human Services (collectively, the Departments) on January 30, 2023, and published in the Federal Register, 88 Fed. Reg. 7236, on February 2, 2023. The 2023 NPRMs propose to rescind the moral exemption rule to the Affordable Care Act’s (ACA) contraceptive mandate.

## COMMENTS

**Rescission of the moral exemption rule violates the Fifth Amendment guarantee of Equal Protection, and to the extent the Departments want to ensure contraceptive access to employees of moral objectors, the Departments’ new “individual contraception arrangement” would serve that purpose.**

### **A. The prevalence of moral, secular opposition to abortion in society**

Although the pro-life movement has historically been linked to religious affiliation—mostly Catholic and Evangelical—recent Gallup polling shows that 21% of individuals who

identify as non-religious find abortion to be “morally wrong.”<sup>1</sup> “Pro-choice people act as if they are morally neutral,” one non-religious opponent to abortion told Christianity Today; “But abortion is not amoral.”<sup>2</sup>

Secular pro-lifers exist but tend to hide in the shadows, suffering from possible ostracization because atheists and agnostics are generally expected by social circles to fit in with the dominant pro-choice position. But grassroots organizations have begun providing a voice for these individuals. Secular Pro-Life, founded by atheist Kelsey Hazzard in 2009, provides social media content demonstrating to nonreligious women who oppose abortion that they are not alone. The hashtag #secularprolife has more than 3.6 million views on TikTok, and #prolifefeminist has over 4.1 million.<sup>3</sup> Feminists Choosing Life of New York, also nonreligious, conducts grassroots outreach in a variety of contexts and settings, including public forum canvassing, petition and sign drives, billboard operations, and informal dialogue circles.<sup>4</sup> March for Life<sup>5</sup> (discussed below) and New Wave Feminists<sup>6</sup> are two of the many other secular, pro-life organizations.

Nat Henthoff, an American historian, novelist, music critic, columnist for *The Village Voice* and *The Wall Street Journal*, and an atheist, described the completely nonreligious logic behind his opposition to abortion:

Once the sperm and the egg meet, and they find a sort of nesting place in the uterus, you now have a developing human being. It's not a kangaroo. It's not a giraffe. It's a human being. And that development in the womb until the person comes out is a continuing process. Therefore, if you kill it at any stage—first three weeks, first three months—you're killing a developing human being.<sup>7</sup>

Charles C.W. Cooke, an atheist then writing for *National Review*, used similar logic:

As far as I am concerned, the core case against abortion neither presumes nor relies upon the existence of God, but holds simply that abortion involves the killing of an innocent human being, and that the killing of innocent human beings is wrong. For me, at least, God doesn't enter into it.

...

Over the years, I have had all manner of intricate explanations thrown in my face as to why I, a nonbeliever, might be so invested in saving the lives of human beings who, if left to their own devices, will get to experience all the beauty, heartbreak, and mystery of life. But, all told, the answer is simple: I am one.<sup>8</sup>

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<sup>1</sup> Frank Newport, Personal Religiosity and Attitudes Toward Abortion, Gallup, May 13, 2022

<https://news.gallup.com/opinion/polling-matters/392648/personal-religiosity-attitudes-toward-abortion.aspx>

<sup>2</sup> Kathryn Watson, They're Not Religious. But They Oppose Abortion, Christianity Today, November 21, 2022

<https://www.christianitytoday.com/ct/2022/december/pro-life-none-non-religious-secular-atheist-feminist-ally.html>

<sup>3</sup> *Id.*

<sup>4</sup> Feminists Choosing Life of New York, Grassroots Educational Campaigns <https://www.fclny.org/grassroots-educational-campaign>

<sup>5</sup> <https://marchforlife.org>

<sup>6</sup> <https://www.newwavefeminists.com>

<sup>7</sup> <https://www.youtube.com/watch?v=BVoAJ6mmRQ8&t=33s>

<sup>8</sup> Charles C. W. Cooke, *The Secular Case against Abortion*, National Review, Nov. 29, 2021

<https://www.nationalreview.com/magazine/2021/11/29/the-secular-case-against-abortion/>

**B. *March for Life* litigation regarding moral, secular opposition to the contraceptive mandate, and the case law supporting *March for Life***

*March for Life v. Burwell*<sup>9</sup> involved a non-profit, non-religious pro-life Plaintiff founded in 1973 following the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). Plaintiff March for Life offered health insurance to its employees, but opposed supporting abortion in any way, and, as such, opposed coverage in its health insurance plan for contraceptive methods it deemed “abortifacients.” Coverage for certain abortifacients were and are required under the contraceptive mandate.

March for Life’s primary challenge to the contraceptive mandate was that it violated the Fifth Amendment’s guarantee of equal protection because it treated March for Life differently than it treated similarly situated employers—namely employers who also opposed abortion but were exempt from the mandate because they were religious.

The Equal Protection Clause prohibits lawmakers from “treating differently [entities that] are in all relevant respects alike.” See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). Under equal protection doctrine, the government cannot make a distinction that “bears no rational relationship to a legitimate governmental interest.” See *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). Equal protection requires “that government not treat similarly situated individuals differently without a rational basis.” *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Under this rational-basis review, the court in *March for Life* said, “it is incumbent on the Court to find ‘the relation between the classification adopted and the object to be attained.’” *March for Life*, 128 F. Supp. at 126 (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). “Were the Court to abdicate this search, it would disregard basic principles of equal protection, which secure not only the rights of domestic persons, but also the limits of regulatory authority.” *Id.*

The plaintiffs in *March for Life* cited *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014) in their equal protection analysis, arguing that the government cannot treat organizations with moral opposition to abortion less favorably than church organizations in this respect simply because they are “non-religious ethical groups.” *Ctr. for Inquiry*, 758 F.3d at 872. In *Center for Inquiry*, the Seventh Circuit held it to be an equal protection violation when a state offered the benefit of marriage solemnization to religious persons but not atheist humanists, though in that respect their interests were indistinguishable. The court held that the government cannot “favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions.” *Id.* at 873; *cf. Welsh v. United States*, 398 U.S. 333, 340 (1970) (holding that an individual who “deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience” was equally entitled to a religious conscientious objector exemption under that statute).

The Seventh Circuit ruled for the plaintiff on its equal protection claim, finding it impermissible that “[t]he current statute discriminates arbitrarily among religious and ethical beliefs.” *Id.*

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<sup>9</sup> *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015).

Just as “[i]t is irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a ‘religion,’” *Ctr. for Inquiry*, 758 F.3d at 875, March for Life argued that it would have been irrational to allow March for Life an exemption from the contraceptive mandate if and only if it claimed to be religious and became a church.

The court in *March for Life* ruled in favor of March for Life, explaining that “[w]hile it is true, as defendants assert, that religious employers have long enjoyed advantages over their secular counterparts, ‘religion’ is not a talisman that sweeps aside all constitutional concerns.” *March for Life*, 128 F. Supp. at 127. “Our jurisprudence has long recognized that ‘[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.’” *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970) (internal quotation marks omitted) (accommodating a secular pacifist’s objections to the draft because he held them “with the strength of more traditional religious convictions.” *Id.* at 343); see also *United States v. Seeger*, 380 U.S. 163, 187 (1965) (accommodating a secular pacifist’s objections to the draft because his beliefs “occup[y] the same place in his life as the belief in a traditional deity holds in the lives of” adherents to religion);<sup>10</sup> *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (concluding sincerity of belief was more important than adherence to or membership in an established religious body in order to qualify for protection).

### C. The Departments’ options for appeasing all relevant parties

The 2018 moral exemption honors the reasoning in *March for Life*, *Center for Inquiry*, *Welsh*, *Seeger* and *Frazee* by protecting a sincerely held opposition to abortion,<sup>11</sup> even if not grounded in religion.

The Departments state now, however, that their previous accommodation on moral grounds, as opposed to religious grounds, was wrong because of the “strong public interest in making contraceptive coverage as accessible to women as possible.” 88 Fed. Reg. at 7250. This reasoning is hollow. The Departments would have everyone believe that erasing the moral exemption would advance their interests dramatically, but elsewhere in their proposed rule, they state that the moral exemption “likely affects very few individuals.” 88 Fed. Reg. at 7249.

The solution to the problem created by negating the moral exemption possibly lies elsewhere in the proposed rules. Regarding religious employers, the Departments propose an “independent pathway” to cost-free contraception called the “individual contraception arrangement,” which would involve a separate “provider of contraception services”—not the employers’ plan and not the third-party administrator. 88 Fed. Reg. at 7243. This separate provider would provide these services at no cost, and then seek reimbursement “from an issuer with which it has a signed agreement for the cost of providing contraceptive services to women covered under these plans.” *Id.*

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<sup>10</sup> The effect of the holding in *Seeger* “essentially eroded any distinction between religious and nonreligious claims to conscientious objection.” Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 909 (2010).

<sup>11</sup> Although the mandate at issue is often termed “the *contraceptive* mandate,” the Departments recognize that the “contraceptives” at issue may reasonably be seen by many as abortifacient: “Because FDA includes in the category of ‘contraceptives’ certain drugs and devices that may not only prevent conception (fertilization), but may also prevent implantation of an embryo, the IOM’s recommendation included several contraceptive methods that many persons and organizations believe are abortifacient—that is, as causing early abortion . . .” 82 Fed. Reg. 47792, at 47794.

Without endorsing this plan, Thomas More Society makes the following suggestion. Since the Departments like this idea enough to propose it as a new rule, why not apply it to employees of entities with moral exemptions? The “few individuals” affected by the exemption would be able to use the “individual contraception arrangement,” and the employers would still enjoy their exemption, at least by the Departments’ reckoning. The Departments’ objection to this path, after noting that it considered it, is strange: “it is possible that through the individual contraceptive arrangement, an eligible individual would need to seek care from a provider who is not one of their regular providers, which not only adds inconvenience, but also could lead to disruptions in care.” 88 Fed. Reg. at 7250. This reasoning would apply to religious employers as well; does the new individual contraception arrangement solve a problem or not? If this new mechanism adequately advances the government’s interests with objecting religious employers, then it should advance the same interests regarding objecting non-religious employers.

Thank you for your attention to the foregoing Comments.

Respectfully submitted,

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