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March 8, 2013

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To Whom it May Concern:

Americans United for Separation of Church and State submits the following comments to the proposed rule, "Coverage of Certain Preventative Services Under the Affordable Care Act," ("Proposed Rule"), which was published in the Federal Register on January 30, 2013. Our comments will explain that the new accommodation set out in the Proposed Rule:

- (1) is neither required by nor violates the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA);¹
- (2) could violate the Establishment Clause if further expanded or used in other contexts;
- (3) should not be expanded to for-profit organizations and corporations;
- (4) should not apply to organizations that accept government funds; and
- (5) should be enforced in a manner that ensures organizations using the exemption qualify for the exemption.

Americans United

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such accommodations, however, must not be applied more broadly than is necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties, such as women seeking access to contraceptive coverage.

The Proposed Rule

On February 10, 2012, the Obama Administration issued a final rule that exempted certain religious employers from the requirement that they provide insurance coverage for contraceptives under the

¹ 42 U.S.C. § 2000bb-1(b).

Patient Protection and Affordable Care Act (“2012 Final Rule”).² The “primary goal of the exemption was to exempt the group health plans of houses of worship.”³ At the same time, the Administration announced its intent to create a new broader category of religious organizations that would not qualify for the original *exemption*, but would be granted an *accommodation*. Organizations that qualify for the *accommodation* also would not be required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. Their employees, however, would still be provided contraceptive coverage at no additional cost. This Proposed Rule sets out the parameters of the new accommodation.

The Constitution Does Not Require Adoption of the New Religious Accommodation

Americans United continues to believe that expansion of the original exemption is unnecessary. The original exemption for houses of worship and similar religious organizations was certainly sufficient. Indeed, two courts have already upheld religious exemptions that are nearly identical to the one adopted by the 2012 Final Rule.⁴ In both cases, the courts concluded that the exemption violates neither the Establishment Clause nor the Free Exercise Clause of the United States Constitution. The real constitutional danger is a broad expansion of the exemption or a new accommodation. As religious accommodations and exemptions become more expansive they also become more likely to violate the Establishment Clause.

Last year, Americans United submitted comments when the 2012 Final Rule was first proposed. In those comments we further explained that expansion of the 2012 Final Rule’s exemption for religious organizations is not required by the Free Exercise or Establishment Clauses of the United States Constitution or RFRA.⁵

Yet, even after the Administration has now proposed an entirely new accommodation for an even broader scope of organizations, some are still voicing opposition and demanding further expansion. Arguments that the exemption and accommodation violate the Constitution because they are too narrow remain unfounded. And continued objection even where the accommodation requires organizations to do nothing more than fill out a self-certification form demonstrates that nothing short of a wholesale repeal of the mandate will satisfy detractors. The current exemption and accommodation far surpass necessity and the Administration should reject further arguments to extend them.

The Exemption and Accommodation Do Not Violate RFRA

Opponents of the insurance mandate maintain that, even with the exemption and the new accommodation, the mandate violates RFRA. RFRA prohibits the government from “substantially burden[ing] a person’s exercise of religion” unless the government can demonstrate that the burden is

² Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130).

³ Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. 8456, 8,461 (proposed Feb. 6, 2013).

⁴ *Catholic Charities of Sacramento v. Superior Court*, 85 P. 3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E. 2d 459 (N.Y. 2006).

⁵ For the sake of brevity, we will not repeat our arguments here, but will instead refer you to our prior comments. See Comments from Americans United for Separation of Church and State on Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act to Ctrs. for Medicare & Medicaid Servs. Dept. of Health and Human Servs. (June 19, 2012) available at https://www.au.org/files/09-30-11-PreventativeServices_AUComments.pdf

justified by a compelling government interest and is the least restrictive means of furthering that interest.⁶ RFRA is not triggered whenever there is “the slightest obstacle to religious exercise.”⁷ To the contrary “a ‘substantial burden’ is a difficult threshold to cross.”⁸ But even without the accommodation, any religious burden caused to an employer by the insurance mandate falls far short of “substantial,” and is, at most, incidental. With the accommodation, the burden is nothing more than *de minimus*.

The connection between an employer who objects to the use of contraceptives and an employee’s usage of contraceptives that are covered by insurance is highly attenuated. First, the regulations do not require an employer to use, provide, purchase, or endorse the use of contraception. Second, contraceptive coverage is just one item among a much wider range of healthcare procedures and services provided within the insurance plan, making it unlikely that coverage conveys the message that the employer promotes or condones any one particular item among the many.⁹ Third, the purchase of contraception takes place only after an employee consults with a physician and then makes the personal choice to make the purchase. This “independent conduct of [a] third part[y]” with whom the employer has “only a commercial relationship” further distances the employer from any connection to purchase or use of contraceptives.¹⁰

In the end, the provision of a comprehensive set of healthcare benefits is really no different than the provision of a paycheck; employees are free to utilize both kinds of benefits in any manner that they wish, and the employer cannot reasonably be perceived to support or endorse any particular use thereof. Thus, the requirement that entities include insurance coverage for contraceptives as part of group insurance plans places no substantial burden on the employer.

The accommodation makes any connection between the employer and purchase or usage of contraception virtually non-existent. Under the accommodation, the employer does not contract, pay, refer, or arrange for coverage. All the religious organization must do is fill out a form stating its objection to providing coverage and provide it to its insurer. Indeed, the only activity the employer must do is condemn the usage of contraceptives. The connection between an employer and the purchase or use of contraceptives is so attenuated that any potential burden is unsubstantial. RFRA, therefore, is not triggered.

Even if RFRA were triggered, however, the state clearly has a compelling interest: The mandate ensures gender equality in healthcare, as well as reproductive health and autonomy. Courts have already concluded that the state’s interest in “fostering equality between the sexes, and in providing women with better healthcare” is sufficiently compelling to justify the law.¹¹

Further Expansion of the Accommodation or Use of the Accommodation in Other Contexts Could Violate the Establishment Clause

Contrary to the claims of those objecting even to the new, broad accommodation provision, it is the more expansive exemptions—rather than the narrowly tailored religious exemptions and

⁶ 42 U.S.C. Sec. 2000bb-1(b).

⁷ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

⁸ *Living Water Church of God v. Charter Twp.*, 258 F. App’x 729, 736 (6th Cir. 2007).

⁹ See e.g., *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that the University did endorse a religious student publication because that publication was just one among a wide range of student publications that received University funding).

¹⁰ *Hobby Lobby Stores v. Sebelius*, No. 12–6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012).

¹¹ *Serio*, 859 N.E. 2d at 468.

accommodations—that are most likely to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,¹² its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”¹³ For example, in *Texas Monthly, Inc. v. Bullock*,¹⁴ the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.” Any further expansion would increase the likelihood that the scheme will be found unconstitutional.

The Establishment Clause would also likely prohibit the government from utilizing this accommodation in most other contexts. The insurance mandate is unique in that the government itself is taking significant steps to lessen the burden on most of the third parties who are burdened by the accommodation—it is finding ways to provide women with contraceptive coverage rather than allow them to go without. It is unlikely, however, that the government will have the ability to similarly mitigate the harm to others in most other statutory and regulatory schemes. Accordingly, we urge the Administration to stay true to their statement that this rule “is not intended to set a precedent for any other purpose.”¹⁵ One way to better effectuate that intent, would be to include such language in the rule itself.

The Proposed Rule Properly Excludes For-Profit Organizations from the Exemption and Accommodation

For-profit organizations have entered into commercial activity as a matter of choice and as a way to earn money. For-profit organizations should not be allowed to reap the benefits and profits of a commercial enterprise and also be exempted from the rules, restrictions, and regulations placed on all other for-profit entities. In short, “voluntary commercial activity” should not receive the same treatment as “directly religious activity.”¹⁶

As explained by the Supreme Court in *United States v. Lee*:¹⁷

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.

For-profit organizations and business owners, whether religious or secular, are subject to a myriad of federal, state and local laws, ranging from sales and use¹⁸ and social security taxes,¹⁹ to Sunday closing²⁰

¹² Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

¹³ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

¹⁴ 480 U.S. 1, 18 n. 8 (1989).

¹⁵ “The definition of religious employer or eligible organization in these proposed rules is not being proposed to apply with respect to, or relied upon for the interpretation of, any other provision of the PHS Act, ERISA, the Code, or any other provision of federal law, nor is it intended to set a precedent for any other purpose.” *Proposed Rule* at 44-45.

¹⁶ *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994).

¹⁷ 455 U.S. 252, 261 (1982).

and nondiscrimination laws.²¹ These obligations are part of doing business in the commercial sector. For-profit entities should not be exempt from the general rules covering business entities simply because they assert a religious objection. This is especially true where granting such exemptions trample on the civil rights and liberties of others.

Furthermore, granting for-profit organizations a “conscience exemption” threatens to erode the reach of other public safety, non-discrimination, and public health laws that apply to businesses. If the government justifies this exemption, the reach of future exemptions could be unlimited. Should a for-profit corporation claim a religious exemption in order to fire an unmarried pregnant woman, or to refuse medical leave to an employee who needed a blood transfusion? Surely the answer is no. But extension of this rule to for-profit organizations would establish such a precedent.

For-profit companies should not be allowed to both line their pockets and be exempt from laws established to protect the health of others. Accordingly, neither the exemption nor the accommodation should be expanded to for-profit organizations.

Neither the Exemption Nor the Accommodation Should Apply to Religious Organizations that Accept Direct Grants and Contracts from the Government

The proposed exemption and accommodation should be amended to reflect that a religious organization is not eligible if it accepts direct government funds. Religious organizations that accept federal funds should have to adhere to the same rules as other organizations that receive federal funds. It defies common sense to think that the government would *loosen* the rules regarding insurance coverage for religious organizations that wish to receive the benefit of public tax dollars. Along with government funds comes certain requirements and, even if the group accepting the funds is a religious organization, those rules must continue to apply.

Furthermore, it is unfair for the government to create two tiers of government workers—those whose jobs are funded by the government and those whose jobs are funded by the government but whose positions are overseen by religious organizations. A worker should not be denied direct insurance coverage for contraceptives simply because the government grant funding her position is overseen by a religious organization opposed to contraceptives.

Accordingly, organizations that reap the benefits of federal funding should undoubtedly be denied an exemption or accommodation from the insurance mandate.

A Religious Organization Seeking An Accommodation Should Be Required to File a Request for the Accommodation with the Government

Protections for employees are only effective if they are enforced. And enforcement is impossible if the government is not informed that the accommodation is being utilized. Yet, the Proposed Rule does not require an organization to inform the government in any way that it is utilizing the accommodation. Instead, the religious organization need only fill out a form, provide it to the insurer, and maintain it in its own office. There is no requirement that the employee submit the form to the government.

¹⁸ *Swaggart v. California Equalization Bd.*, 493 U.S. 378 (1990) (upholding a sales and use tax placed on the sale of Bibles and other religious materials).

¹⁹ *Lee*, 455 U.S. 252.

²⁰ *Braunfeld v. Brown*, 366 U.S. 599 (1961).

²¹ *Swanner*, 874 P.2d 274; *Smith v. Fair Employment and Hous. Comm’n*, 51 Cal.Rptr.2d 700 (Cal. 2001).

Requiring that religious organizations file their self-certification form with the government is important for several reasons. First, it would permit the government to ensure that organizations utilizing the exemption actually qualify for the exemption. The government cannot enforce the restrictions placed on the exemption if it does not know what entities are utilizing it. Second, it would allow the government to determine whether a certification is truthful and accurate. The government should have the opportunity to review the certification and determine if there is good cause to question the certification.²² This does not lead to an inquiry into an organization's character, mission, or practices, but instead whether it meets the regulatory requirements. Third, it would provide a way for the government to determine whether the accommodation procedures are being implemented properly and employees are being provided the insurance coverage to which they are entitled.

At the same time, requiring a religious organization to mail in or file the self-certification form electronically with the government is not burdensome. Indeed, religious organizations must submit such filings in many other contexts.²³ "There are no reasonable objections to self-certification forms, which will ultimately benefit religious organizations through better government management.

Thank you for the consideration of our comments and concerns. If you have questions about these comments, please contact me at (202)-466-3234.

Sincerely,



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²² See e.g., Department of Labor, "The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance" available at <http://www.dol.gov/oasam/grants/RFRA-Guidance.htm> (stating that the agency can request additional documentation and deny the request for exemption if there is good cause to believe that the self-certification is untruthful or a material change in circumstances has rendered it invalid.)

²³ *Id.* ("[A] recipient that wishes to request an exemption from the application of a religious non-discrimination provision must submit a request for exemption to the Assistant Secretary.").