



Seeking Justice with the Love of God

September 20, 2016

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

Submitted Electronically

**Re: Request for Information regarding Coverage for Contraceptive Services,
File Code No. CMS-9931-NC**

Dear Sir or Madam:

The Christian Legal Society (CLS) submits the following comments in response to the Request for Information regarding Coverage for Contraceptive Services issued on July 22, 2016.¹ Twice previously, CLS has submitted comments on the HHS Mandate, specifically, in response to the Advance Notice of Proposed Rulemaking on Preventive Services of March 21, 2012, and the Notice of Proposed Rulemaking on Preventive Services of February 6, 2013.² Each time, CLS has urged the government to respect religious employers' religious freedom, as protected by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, and the First Amendment of the United States Constitution. Both times, and in about two dozen briefs filed in seven federal courts of appeals in most of the cases involving this issue, CLS has repeatedly suggested several less restrictive alternatives to protect the religious employers' religious freedom while simultaneously securing any compelling interest that the government might legitimately have.

The Request for Information solicits comments "on whether there are alternative ways (other than those offered in current regulations) for eligible organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still ensuring that women enrolled in the organizations' health plans have access to seamless

¹ 81 Fed. Reg. 47741-47745 (July 22, 2016).

² On June 19, 2012, CLS filed comments on the Advance Notice of Proposed Rulemaking on Preventive Services, CMS-9968-ANPRM, 77 Fed. 16501-16508 (Mar. 21, 2012) <http://clsnet.org/document.doc?id=600>. On April 8, 2013, CLS filed comments on the Notice of Proposed Rulemaking on Preventive Services, CMS-9968-P, 78 Fed. Reg. 8456-8475 (Feb. 6, 2013), <http://clsnet.org/document.doc?id=599>.

coverage of the full range of Food and Drug Administration-approved contraceptives without cost sharing.”³ As it notes, the Request for Information is being made in light of the Supreme Court’s opinion in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Clearly, the Court’s basic premise in *Zubik* was that at least one less restrictive alternative must exist that respects religious freedom to a greater degree than did the various accommodations offered by the government before *Zubik* was decided.

CLS submits once again that the government has many excellent alternatives readily available to it. CLS has noted most of these alternatives in its past submissions. Because the last alternative is new, it may be of particular interest to the government. These alternatives include, but are not limited to, the following:

1. The government could provide contraceptive-only plans, as it already does through Medicaid. See, e.g., Adam Sonfield and Rachel Benson Gold, *Medicaid Family Planning Expansions: Lessons Learned and Implications for the Future*, Guttmacher Institute (Dec. 2011), <https://www.guttmacher.org/report/medicaid-family-planning-expansions-lessons-learned-and-implications-future>. In such plans, the government would be free to include whatever drugs and devices it wished.

2. The government could expand other existing government programs, such as Title X. These programs already expend hundreds of millions of dollars annually to provide family planning services, and the administrative structure for reaching persons who want these services already exists. The addition of the religious employers’ employees to the pool of participants would be hardly noticeable and would not require the creation of new administrative structures. Given that in 2012 HHS spent over \$300 million in Title X funding to provide contraceptives directly to persons, why would the government be unwilling to spend a modest amount to protect religious freedom? Implementation of the government’s previously adopted accommodations, which have involved various self-certification processes, notification processes, and adjustments of FFE user fees, have created bureaucratic waste and inefficiencies for the government, religious organizations, insurance providers, and third-party administrators. It would seem more efficient, economical, and easy for the government itself to provide contraceptives coverage through tweaking existing government programs.

3. The government could enlist willing health professionals, including willing doctors and pharmacists, to provide the drugs and devices. The government could compensate the health professionals directly for their services. Because the number of medical professionals willing to provide the drugs and devices at issue far exceeds the number of medical professionals who are religious objectors, the government could easily satisfy its goal of access to contraceptives without violating the consciences of the religious employers who object to providing drugs and devices that they sincerely believe destroys nascent human life.

³ 81 Fed. Reg. 47741 (July 22, 2016).

4. The government could make available contraceptives as over-the-counter drugs, as is already happening in many instances. By not requiring a prescription, the government would further its asserted goal of easy, cheap access to contraceptives in a much more efficient manner.

5. The government could provide plans on its own exchanges. Since the government already provides plans for millions of Americans, it would seem the most straightforward thing for the government simply to offer similar plans to the employees of religious employers who dissent from the Mandate.

6. It is conceivable that some religious employers who object to the Mandate might countenance an alternative in which employees who choose to use the exchanges could receive subsidies, or the equivalent of subsidies, either through the exchanges or possibly even from their religious employers. For example, insurance companies providing plans to employees of religious objectors could provide them with discounts equal to what they would otherwise receive in subsidies, and the government could re-pay them using discounts in exchange user fees or credits against the Health Insurance Providers Fee. Alternatively, it is also possible that religious employers who object to providing a health plan that includes abortifacients, contraceptives, or sterilization would be willing to provide their employees with a bonus or salary increase of some kind if the employee turns down the employer's plan and instead goes to the exchanges. These employers are already paying salaries to their employees which may be used for purposes that violate the employer's religion. They may find it morally permissible to provide some amount of additional salary to employees who choose to use the exchanges for any reason--for example, the \$2,000 per employee that the government currently requires when a large employer drops all health insurance--even though some employees will use it to obtain contraceptives. A solution like this could be similar to the way some Catholic employers use a "plus one" approach to spousal insurance benefits, which allows them to meet the government's goal (providing benefits to same-sex spouses) but in a way that does not violate their religious beliefs by affirming same-sex marriage. CLS urges the government to thoughtfully explore these and other ways to use the existing exchanges to provide contraceptive coverage for anyone who wants it, but to do so in ways that do not force religious groups to violate their religious beliefs.

The common thread of all these alternatives is for the government to no longer insist on tying contraceptive coverage to a dissenting religious employer's health plan. A government that can put humans on the moon is surely capable of finding a way to deliver contraceptives to employees of the relatively small number of religious employers who object to providing drugs that destroy nascent life or otherwise violate their religious consciences.

From its inception, the Mandate has been a radical and regrettable departure from the Nation's bipartisan tradition of respect for religious freedom, especially its deep-rooted protection of religious conscience rights in the context of forced participation in abortion, war, capital punishment, and other acts that destroy human life.

Religious freedom is priceless. It ranks as America's most distinctive contribution 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 diminishes religious freedom and the cultural pluralism that has made our Nation a haven for religious dissenters for four centuries.

CLS implores the government to rededicate itself to protecting all citizens' religious freedom, regardless of the popularity of their particular beliefs or the political points to be gained from restricting their religious freedom. At the end of the day, the Mandate controversy has never been about whether contraceptives are readily available to employees—access to contraceptives is plentiful and inexpensive—but whether America will remain a pluralistic society that sustains robust religious freedom for Americans of all faiths.

Respectfully submitted,

/s/ Kimberlee Wood Colby

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