



April 3, 2023

Submitted Electronically via Federal Rulemaking Portal

Secretary Xavier Becerra
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attn: CMS-9903-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9903-P)

Dear Secretary Becerra:

On behalf of Americans United for Life (“AUL”), I am writing in partial support and partial opposition to the Proposed Rules, “Coverage of Certain Preventive Services Under the Affordable Care Act,” 88 Fed. Reg. 7236.¹ AUL is the oldest and most active pro-life nonprofit advocacy organization in the country. Founded in 1971, before the Supreme Court’s decision in *Roe v. Wade*,² AUL has dedicated over fifty years to advocating for comprehensive legal protections for human life from conception until natural death. AUL attorneys are legal experts on constitutional law and conscience rights, and regularly testify before state legislatures and Congress on pro-life issues.³ Supreme Court opinions have cited AUL briefs and scholarship in major bioethics cases, including *Dobbs v. Jackson Women’s Health Organization*⁴ and *Washington v. Glucksberg*.⁵

Based on AUL’s expertise, I urge the U.S. Department of Health and Human Services (“HHS”) to maintain robust religious and moral exemptions for conscientious objectors. It is arbitrary and capricious to make a health insurance issuer’s right to

¹ Although AUL defends conscientious objections to insurance coverage of contraceptives, AUL takes no stance on the underlying issue of contraceptive use.

² 410 U.S. 113 (1973).

³ See, e.g., *What’s Next: The Threat to Individual Freedoms in a Post-Roe World Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life).

⁴ 142 S. Ct. 2228, 2266 (2022) (citing CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 127, 141 (2012)).

⁵ 521 U.S. 702, 774 n.13 (1997) (citing Brief *Amicus Curiae* on behalf of Members of the New York and Washington State Legislatures 15, n.8).

conscientiously object to contraceptive coverage contingent upon whether the covered entity or individual is a conscientious objector, and likewise remove a morally based conscience exemption. These measures are inconsistent with the United States’ robust legal history and tradition of protecting religious and moral conscientious objections within bioethics and issues affecting human life.

I. HHS Should Promulgate a Robust Religious Exemption, Which Aligns With the American Legal Tradition of Safeguarding Religious Conscientious Objections.

The Proposed Rules maintain a religious exemption for those who object to the use of contraception based on their religious beliefs. We support this exemption—except insofar as the Proposed Rules narrow the scope of the exemption by requiring both the health insurance issuer and the entity or individual receiving services to share the conscientious objection for the exemption to be applicable.

A. The United States’ Legal History and Tradition Have Strongly Protected Religious Exemptions Within Bioethics and Issues Involving Human Life.

Religious exemptions have been prevalent in the rule of law since the time of our nation’s founding. The Framers understood that religious exemptions from civil laws ought to be routinely applied.⁶ For instance, in the 18th century, it was understood that there was a “superior claim of religious ‘conscience’ over civil obligation” that trumped a civil obligation for military conscription.⁷ In a different situation in the Pennsylvania case of *Commonwealth v. Leshner*, a potential juror was allowed to step away from hearing a capital case based on his religious objection to capital punishment.⁸ These situations all point to the priority that religious conscience has over civil laws when the objections are sincerely held. As James Madison noted, religious conscience is “precedent both in order of time and degree of obligation, to the claims of Civil Society.”⁹

Congress has continued this robust legal tradition that prioritizes the protection of religious freedom rights through the enactment of the Religious Freedom Restoration Act (“RFRA”)¹⁰ and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).¹¹ Through the passage of RLUIPA, Congress directed the statute “be construed in favor of a broad protection of religious

⁶ See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1989).

⁷ *Id.* at 1469. Other examples include the right to object to the taking of oaths or in partaking in religious tithes to which one objects. *Id.* at 1467–68, 1469–71.

⁸ *Id.* at 1507 (citing *Commonwealth v. Leshner*, 17 Serg. & Rawle 155 (Pa. 1828)).

⁹ *Id.* at 1453 (citing JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 184–85 (G. Hunt ed. 1901)).

¹⁰ 42 U.S.C. §§ 2000bb to 2000bb-4.

¹¹ *Id.* §§ 2000cc to 2000cc-5.

exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”¹² These statutes show a public policy in favor of religious liberty. Accordingly, in *Little Sisters of the Poor and Paul Home v. California*, the United States Supreme Court recognized that the federal government properly crafted a religious exemption for the Little Sisters—a Catholic religious group that provides services to the poor—to be exempt from a contraceptive mandate that would have forced them to violate their religious beliefs by providing contraception.¹³ Likewise, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court recognized that closely-held for-profit corporations have religious liberty rights, granting them a similar religious exemption from the contraceptive mandate from the Affordable Care Act.¹⁴

Congress has done much more to protect conscience rights in bioethics and issues involving human life. Over the past half century, Congress has enacted numerous anti-discrimination statutes protecting medical professionals that conscientiously object to taking a human life through abortion, including the Church Amendments,¹⁵ Coats-Snowe Amendment,¹⁶ and Weldon Amendment.¹⁷ In fact, there are abortion conscience protections throughout federal law, such as in the Danforth Amendment to Title IX’s definition of sex discrimination,¹⁸ and amendments regulating managed-care providers in the Medicare and Medicaid programs.¹⁹ Congress broadly defends conscientious objections to assisting a suicide within the Affordable Care Act.²⁰ Federal laws safeguard religious conscientious objectors from military conscription and participating in capital punishment.²¹ Accordingly, HHS should maintain a robust religious exemption to contraceptive coverage, which is consistent with the American legal history and tradition of protecting religious objectors.

¹² *Id.* § 2000cc-3(g).

¹³ 140 S. Ct. 2367, 2386 (2020).

¹⁴ *See generally* 573 U.S. 682 (2014).

¹⁵ 42 U.S.C. § 300a-7.

¹⁶ 42 U.S.C. § 238n.

¹⁷ *See, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, tit. V, § 507(d), 136 Stat. 49, 496 (2022). Since 2004, every HHS appropriations bill has readopted the Weldon Amendment. Office for Civil Rights, *Conscience Protections for Health Care Providers*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 10, 2023), <https://www.hhs.gov/conscience/conscience-protections/index.html>.

¹⁸ 20 U.S.C. § 1688.

¹⁹ Lynn D. Wardle, *Protection of Health-Care Providers’ Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 31–32 (2010); *see* 42 U.S.C. § 1395w-22(j)(3)(B) (protecting conscience rights in Medicare program) *and* 42 U.S.C. § 1396u-2(b)(3)(B) (codifying conscience protections in Medicaid program).

²⁰ 42 U.S.C. 18113.

²¹ *See, e.g.*, *Welsh v. United States*, 398 U.S. 333, 344 (1970) (“[E]xempt[ing] from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”); 18 U.S.C. § 3597(b) (protecting employees who morally or religiously object to participating in executions).

B. HHS Cannot Make a Health Insurance Issuer’s Religious Exemption Contingent Upon Whether a Covered Entity or Individual Shares That Religious Conscientious Objection.

In the Proposed Rules, HHS limits the religious exemption, stating that “a health insurance issuer may not offer coverage that excludes some or all contraceptive services to any entity or individual that is not an objecting entity or objecting individual.”²² This means that a health insurance issuer’s religious exemption is contingent upon whether the entity or individual also conscientiously objects based upon religious grounds. This provision is arbitrary and capricious because it contradicts caselaw and legal tradition.

The law views conscientious objections from the perspective of the objector. It is immaterial how a state defines the “practice” of assisted suicide,²³ whether the government disagrees that abortion is a procedure that takes the life of a separate, unique, human being,²⁴ or, at issue here, whether a covered entity or individual agrees with a health insurance issuer’s religious conscientious objection. As the United States Supreme Court recognized in *Thomas v. Review Board of the Indiana Employment Security Division*, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”²⁵ The Court also stated that it should not delve into the reasonableness of a conscientious objector’s beliefs:

We see . . . [the objector] drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is “struggling” with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.²⁶

Under statutory law, such as RFRA, the Supreme Court likewise has not delved into the rationality of an objector’s belief, but, rather, limited its analysis to whether the belief is sincerely held.²⁷ In this regard, conscientious objections are from the perspective of the objector, not contingent upon a covered entity or individual’s beliefs.

²² Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7236, 7247–7248 (proposed Feb. 2, 2023) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 147, 156).

²³ See, e.g., OR. REV. STAT. § 127.885(5)(d)(B)(ii) to (iii) (1995) (defining “participate” narrowly, so that it excludes the provision of suicide assistance information and patient referrals).

²⁴ See, e.g., CAL. CONST. art. I, § 1.1 (amended 2022) (viewing abortion as a “fundamental right”).

²⁵ 450 U.S. 707, 714 (1981).

²⁶ *Id.* at 715.

²⁷ *Hobby Lobby Stores*, 573 U.S. 682 (applying the Religious Freedom Restoration Act to the sincerely held religious beliefs of a closely held for-profit corporation that objected to the Affordable Care Act’s mandate that employers provide insurance coverage for contraception).

Congress has a legal tradition of protecting health plan issuers’ conscientious objections regardless of whether a covered entity or individual shares the objection. Under the Weldon Amendment, for example, there are strong anti-discrimination protections that prevent the federal, state, and local governments from “subject[ing] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”²⁸ The Weldon Amendment recognizes that “health care entity’ includes . . . a health insurance plan . . . ,” and, notably, says nothing about a covered entity or individuals’ conscientious objections.²⁹ Rather, the conscientious objections are from the perspective of the health insurance issuer.

Congress similarly defends the conscientious objections of health insurance issuers that refuse to assist a suicide. Section 1553 of the Affordable Care Act prohibits discrimination against:

an individual or institutional health care entity . . . on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.³⁰

Under Section 1553, “health care entity’ includes . . . a health insurance plan”³¹ The provision broadly applies to “[t]he Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act . . . or any health plan created under this Act”³² Accordingly, just like the Weldon Amendment, the Affordable Care Act does not make the health insurance issuer’s conscience rights contingent upon a covered entity or individual’s objections.

In sum, caselaw and legal tradition recognize that conscientious objections are from the perspective of the objector. It is arbitrary and capricious to make a health insurance issuer’s religious exemption contingent upon a covered entity or individual’s beliefs.

II. By Removing Moral Exemptions, HHS Is Subverting the United States’ Rich Legal Tradition of Protecting Moral Conscientious Objections.

The American legal history and tradition has protected morally based conscientious objections within bioethics and issues involving human life. Yet the “[P]roposed [R]ules would remove the ability of entities to claim an exemption to establishing, maintaining, providing, offering, or arranging for contraceptive

²⁸ Consolidated Appropriations Act, 2022 div. H, tit. V, § 507(d)(1), 136 Stat. at 496.

²⁹ *Id.* § 507(d)(2), 136 Stat. at 496.

³⁰ 42 U.S.C. § 18113(a).

³¹ *Id.* § 18113(b).

³² *Id.* § 18113(a).

coverage based on a non-religious moral objection, and would remove the exemption on the basis of moral convictions applicable to objecting individuals.”³³ The Proposed Rules’ omission of a moral exemption contradicts the American legal tradition, and, accordingly, is arbitrary and capricious.

During the Vietnam War, the United States Supreme Court broadly interpreted protections for conscientious objections to a military conscription statute in two cases. The statute at issue in both cases explicitly exempted conscientious objectors who could not participate in war because of their “religious training and belief.”³⁴ The statute defined “religious training and belief” as “belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.”³⁵ In *United States v. Seeger*, the Court held that “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”³⁶ Under this test, Daniel Seeger was exempted from military service based on his belief “in a purely ethical creed.”³⁷

In *Welsh v. United States*, the Court further broadened protections for conscientious objections. Under the Court’s interpretation, the statute “exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”³⁸ A plurality of the Court held that Elliott Welsh was exempted despite “str[iking] the word ‘religious’ entirely,” on his conscientious objector application.³⁹

Moreover, Congress has consistently expanded conscience protections to also include moral convictions within bioethics and issues involving human life. At the federal level, the Church Amendments protect both “religious beliefs” and “moral convictions” to conscientiously object “to perform[ing] or assist[ing] in the performance of any . . . abortion if . . . [it] would be contrary to his religious beliefs or moral convictions.”⁴⁰ Federal law also safeguards “the moral or religious convictions” of federal and state prison employees that conscientiously object to attending or participating in capital punishment.⁴¹ The law broadly defines “participation in executions” to “include[] personal preparation of the condemned individual and the

³³ Coverage of Certain Preventive Services, 88 Fed. Reg. at 7249.

³⁴ *United States v. Seeger*, 380 U.S. 163, 173 (1965).

³⁵ *Id.*

³⁶ *Id.* at 176.

³⁷ *Id.* at 166.

³⁸ 398 U.S. at 344.

³⁹ *Id.* at 341.

⁴⁰ 42 U.S.C. § 300a-7(b)(1).

⁴¹ 18 U.S.C. 3597(b).

apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.”⁴²

Many federal laws recognize a general right to conscientiously object, regardless of whether the objection is religiously, morally, or ethically based. The Coats-Snowe Amendment prohibits discrimination against an “entity [that] refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions.”⁴³ Accordingly, the Coats-Snowe Amendment protects all “refus[al]s,” regardless of the reason of the objection. Similarly, the Weldon Amendment is not limited to religious conscientious objections, rather, protecting any “health care entity [that] does not provide, pay for, provide coverage of, or refer for abortions,” regardless of the reason for the objection.⁴⁴ The Affordable Care Act’s Section 1553 broadly proscribes “discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.”⁴⁵ Section 1553’s anti-discrimination protections are not limited by the reason for the conscientious objection.

In sum, the United States has robustly protected religious and moral conscientious objections within bioethics and issues involving human life. Accordingly, it is arbitrary and capricious, and contrary to the American legal tradition, for HHS to remove the moral exemption to contraceptive coverage.

III. Conclusion.

The United States has a strong legal history of protecting religious and moral conscientious objections within bioethics and issues involving human life. Accordingly, AUL urges HHS to maintain a robust religious exemption to contraceptive coverage and reinstate the moral exemption within the Final Rule.

Sincerely,

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Litigation Counsel
AMERICANS UNITED FOR LIFE

⁴² *Id.*

⁴³ 42 U.S.C. 238n(a)(1).

⁴⁴ Consolidated Appropriations Act, 2022 div. H, tit. V, § 507(d)(1), 136 Stat. at 496.

⁴⁵ 42 U.S.C. 18113(a).