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Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

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AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: RFI Regarding Faith-Based Organizations (HHS-9928-RFI)

On behalf of the American Civil Liberties Union (ACLU) and our more than two million members and supporters, we submit the following comments in response to the Request for Information (RFI) published in the Federal Register on October 25, 2017 entitled “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding.”

The RFI indicates that the Department of Health and Human Services (HHS) is considering expanding religious exemptions in HHS programs and activities or eliminating patient protections outright. This would undermine HHS’s mission, which is “to enhance and protect the health and wellbeing of all Americans.”¹ HHS programs exist to benefit the recipients of services, not to benefit contractors or grantees. Allowing taxpayer-funded providers to use a religious litmus test to determine whom they serve and which services they will provide would harm those recipients, and unconstitutionally entrench discrimination in health care.

Religious beliefs are already overriding patient care, and HHS should not allow additional discrimination

Faith-based organizations do not currently face barriers to participating in HHS programs. In fact, they have a long and successful history of partnership with HHS, and many have played an important role in delivering health and social services to communities in need. Moreover, there are already a number of religious exemptions in federal law that accommodate religious organizations, and many of those exemptions currently threaten the health and wellbeing of people across the country. For example, the so-called Church Amendments, Coats Amendment, and Weldon Amendment grant religious exemptions that can interfere with women’s access to

¹ STRATEGIC PLAN FY 2014-2018, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), available at: <https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission>.

abortion and put women’s health at risk.² In addition, some faith-based organizations have used HHS funds to discriminate and withhold needed services—and have objected to complying with existing HHS regulations, like the Affordable Care Act’s prohibition on sex discrimination in health programs or activities.³

Indeed, religion has been invoked in countless ways to deny individuals access to health care, including birth control,⁴ sterilization, abortion,⁵ certain infertility treatments,⁶ transition-related medical care for transgender patients,⁷ reproductive health care for trafficking victims,⁸ and end of life care.⁹ LGBT individuals have been denied appropriate mental health services and counseling¹⁰; a newborn was denied care because her parents were lesbians¹¹; women suffering miscarriage and other pregnancy complications have been denied abortion care¹²; and an individual was denied his HIV medication,¹³ all because of someone else’s religious beliefs. A health care provider’s religious beliefs should never determine the care a patient receives, but there are already far too many cases where it has done just that. HHS should not take steps to enable and encourage this kind of discrimination by taxpayer-funded organizations.

The use of religion to discriminate has been rejected in other contexts and should not be expanded in health care

Attempts to discriminate in the name of religion are nothing new. Faith-based organizations have long tried to deny individuals the services they need or opt out of nondiscrimination requirements in the name of religious beliefs. Shortly after the enactment of the Civil Rights Act of 1964, prohibiting discrimination based on race in public accommodations, the owner of a restaurant chain argued that the Act violated his religious beliefs opposing integration and that he should therefore be allowed to exclude African-Americans from his restaurant.¹⁴ Two decades later, Bob Jones University used the same argument. It wanted to maintain its policy denying admission to “applicants engaged in an interracial marriage or

² See Consolidated Appropriations Act 2017, Pub. L. No. 115-31, § 507 (2017); “Church Amendment” 42 U.S.C. § 300a-7(c) (2017); “Coats Amendment” 42 U.S.C. § 238n (2017).

³ *Franciscan Alliance v. Burwell*, 2016 WL 7638311, No. 7:16-cv-00108 (N.D. Tex. Dec. 31, 2016).

⁴ Robert Pear, et. al., *Trump Administration Rolls Back Birth Control Mandate*, New York Times, Oct. 6, 2017, <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>.

⁵ AMERICAN CIVIL LIBERTIES UNION, HEALTH CARE DENIED (May 2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

⁶ Nat’l Women’s Law Ctr., Health Care Refusals Harm Patients: The Threat to Reproductive Health Care (May 2014), http://www.nwlc.org/sites/default/files/pdfs/refusals_harm_patients_repro_factsheet_5-30-14.pdf.

⁷ NAT’L WOMEN’S LAW CTR., HEALTH CARE REFUSALS HARM PATIENTS: THE THREAT TO LGBT PEOPLE AND INDIVIDUALS LIVING WITH HIV/AIDS (May 2014), http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf.

⁸ *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated as moot sub nom.*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

⁹ Directive 24 denies respect for advance medical directives. U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (5th ed. 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

¹⁰ *Ward v. Wilbanks*, 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev’d and remanded sub nom.* *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), *dismissed with prej.* by *Ward v. Wilbanks*, 09-CV-11237 (E.D. Mich. Dec. 12, 2012) (case settled).

¹¹ Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*, WASH. POST, Feb. 19, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>.

¹² AMERICAN CIVIL LIBERTIES UNION, HEALTH CARE DENIED (May 2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

¹³ *Complaint, Simoes v. Trinitas Reg’l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. Law Div. May 23, 2012).

¹⁴ See *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

known to advocate interracial marriage or dating” but still get special tax status reserved for institutions that don’t discriminate—all justified by reference to religious belief.¹⁵

Other entities have argued that they should be allowed to pay women less or give them inferior benefits based on religious beliefs that “the husband is the head of the house.”¹⁶ When faced with equal pay and employment discrimination laws that require employers to treat women equally, these institutions argued those laws were an infringement of their religious liberty.¹⁷ Just as courts have rejected these attempts to discriminate in the name of religious beliefs, HHS must abandon any consideration of expanding discrimination in health care.

The U.S. Constitution and federal law prohibit HHS from creating religious accommodations that will harm third parties

The RFI solicits comments on whether to provide accommodations to entities with religious objections, but fails to ask about the effect any accommodation would have on program effectiveness, program beneficiaries, or the entities’ employees. The U.S. Constitution and federal law require HHS to consider this impact, and to reject any accommodation that would harm third parties. The Constitution bars HHS from crafting “affirmative” accommodations within its programs if the accommodations would harm program beneficiaries. It commands that “an accommodation must be measured so that it does not override other significant interests”;¹⁸ “impose unjustified burdens on other[s]”;¹⁹ or have a “detrimental effect on any third party.”²⁰

Similarly, the Religious Freedom Restoration Act (RFRA)²¹ does not require accommodations that hurt third parties. In fact, the Supreme Court made clear in *Hobby Lobby* that the impact on third parties of any accommodation must be “precisely zero” (because in that case there was a way for the federal government to ensure that employees received seamless contraception coverage, even if their employer objected to providing coverage).²² Further, RFRA is triggered only when the government “substantially burdens” religion, and even then, if the government has a compelling interest and the law is narrowly tailored to further that interest, RFRA does not require a religious exemption.

Additional religious exemptions that enable entities receiving taxpayer funding to refuse to provide critical health care services on the basis of religious objections would undoubtedly harm third parties—those they are intended to serve.

Expansion of accommodations for religious entities will most hurt those who already face barriers to care.

One of HHS’ stated goals is to “eliminate[] disparities in health, as well as [to increase] health care access and quality.”²³ However, expanding religious exemptions undermines

¹⁵ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 581 (1983).

¹⁶ *Id.* at 580.

¹⁷ *Dole*, 899 F.2d at 1393; *Fremont Christian Sch.*, 781 F.2d at 1367.

¹⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

¹⁹ *Id.* at 726.

²⁰ *Id.* at 720, 722; See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

²¹ 42 U.S.C. § 2000bb.

²² 134 S. Ct. at 2760; see also *id.* at 2781–82.

²³ STRATEGIC PLAN FY 2014-2018, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), available at: <https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission>.

this goal by denying individuals the services they need, and exacerbating the very health disparities HHS should be focused on alleviating. The consequences will fall hardest on those who already face barriers to accessing care due to health care disparities and discriminatory policies—particularly women, LGBTQ people, and people of color.

Women have been charged more for health care on the basis of sex and have continually been denied health insurance coverage for services that only women need.²⁴

Unaccompanied immigrant minors in HHS custody, many of whom have been sexually assaulted, have been denied critical reproductive health care that they are entitled to by law, including access to or even referrals for abortion and contraception, because religiously affiliated organizations that receive federal grants have argued they are entitled to refuse to provide them.²⁵

Far too many LGBTQ people are denied the care they need because of their sexual orientation or gender identity. In a survey examining discrimination against LGBTQ people in health, more than half of respondents reported that they have experienced at least one of the following types of discrimination in care: being refused needed care; health care professionals refusing to touch them or using excessive precautions; health care professionals using harsh or abusive language; being blamed for their health care status; or health care professionals being physically rough or abusive.²⁶ Further “accommodation” of religious entities threatens to increase discrimination against these and other communities and thereby worsen health care disparities that HHS should be working to reduce.

HHS should not consider allowing entities to discriminate in hiring

This RFI and other actions the Administration has taken, such as the so-called “religious liberty” guidance issued by Attorney General Sessions, also indicate that the Administration is poised to allow government-funded organizations to refuse to hire someone who does not act in accordance with particular religious beliefs—this could include someone who doesn’t regularly attend religious services, is married to a person of the same sex, undergoes a gender transition, gets divorced, uses birth control, or is pregnant and unmarried. The Department should reject such efforts—HHS grantees and contractors should not be allowed to discriminate against those they serve and employ.

HHS should stop seeking to protect entities that use religion to discriminate and should reprioritize its mandate to serve the public

The focus of HHS programs should be to assist individuals in need of critical services and supports by increasing access to health care, supporting individual decision making and informed consent, and prohibiting discrimination in the provision of human services. Given the significant threat posed to the health and wellbeing of millions of individuals, as well as the lack of any statutory authority, HHS must abandon this attempt to allow providers, health plans, or other entities to use religion to engage in taxpayer-funded discrimination. Instead, we urge HHS to turn its focus to addressing health disparities and ensuring equal access to services regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability.

²⁴ NAT’L WOMEN’S LAW CENTER, TURNING TO FAIRNESS: INSURANCE DISCRIMINATION AGAINST WOMEN TODAY AND THE AFFORDABLE CARE ACT (March 2012), <https://nwl.org/resources/turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-act/>.

²⁵ Erik Eckholm, *Suit Challenges U.S. Over Abortions and Birth Control for Immigrant Minors*, NEW YORK TIMES, June 24, 2016, <https://www.nytimes.com/2016/06/25/us/suit-challenges-us-over-abortions-and-birth-control-for-immigrant-minors.html>.

²⁶ *When Health Care Isn’t Caring: Lambda Legal’s Survey of Discrimination Against LGBT People and People with HIV* (New York: Lambda Legal, 2010). Available at www.lambdalegal.org/health-care-report.

Should you have any questions or require additional information, please contact
Georgeanne Usova (gusova@aclu.org) or Ian Thompson (ithompson@aclu.org).

Sincerely,



Faiz Shakir
Director, Washington Legislative Office



Georgeanne M. Usova
Legislative Counsel



Ian S. Thompson
Legislative Representative