

November 8, 2015

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945–AA02)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW.
Washington, DC 20201.

Subject: Law and Religion Scholars’ Comments on 1557 NPRM (RIN 0945–AA02)

Dear Secretary Burwell:

We respectfully submit the following comments in response to the Notice of Proposed Rulemaking on Nondiscrimination in Health Programs and Activities, published in the Federal Register on September 8, 2015 (the “Nondiscrimination Rule”). As scholars of law and religion, we specifically address the question of whether the regulation should provide religious exemptions from nondiscrimination requirements related to sex.

We strongly urge the U.S. Department of Health and Human Services (HHS) to refrain from expanding exemptions beyond those already provided under federal law. The government should not fund discrimination by health programs and activities that receive federal financial assistance. Additional religious exemptions would risk imposing significant burdens on women and sexual minorities in violation of the Establishment Clause of the U.S. Constitution. Religious liberty doctrine does not require such exemptions, but rather warns against them.

We recommend that HHS make explicit the constitutional limits on the application of existing religious exemption laws. The Nondiscrimination Rule should specify that the Religious Freedom Restoration Act and other existing religious accommodations under federal law apply only insofar as identifiable third parties are not harmed.

Religious liberty doctrine bars exemptions that impose significant third-party burdens.

A longstanding constitutional principle prohibits the government from accommodating religious actors when that means shifting meaningful costs onto identifiable third parties. Grounded in both the Free Exercise Clause and the Establishment Clause, this principle guards against the government imposing the religious beliefs of some citizens onto others.¹

¹ For background on this rule, see Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Kara Lowentheil, *Where Free Exercise Is A Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014); Nelson Tebbe, Written Testimony for “Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act,” House Judiciary Committee, Subcommittee on the Constitution and Civil Justice, Feb. 13,

In a line of cases going back decades, the Supreme Court has held that the government may not grant religious exemptions when they would impose significant burdens on third parties who do not benefit from accommodation. The leading case is *Estate of Thornton v. Caldor*, which involved a Connecticut statute that provided employees with an absolute right not to work on the Sabbath day of their choosing.² In so doing, the statute shifted the costs of accommodating Sabbath observance to employers and nonobservant employees. Employers either had to assume the “substantial economic burdens” of offering premium pay to attract volunteers to cover weekend shifts or had to force other employees to assume “significant burdens” of covering these shifts irrespective of their seniority or personal preferences.³ Imposing these burdens, the Court held, violated the Establishment Clause, because “[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”⁴

In *Cutter v. Wilkinson*,⁵ the Supreme Court unanimously reaffirmed the holding and rationale of *Caldor*. Although it rejected a facial challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), the Court underscored that the statute would violate the Establishment Clause if applied so as to threaten the safety or other interests of third parties.⁶ It observed that its previous “decisions indicate that an accommodation must be measured so that it does not override other significant interests.”⁷ In applying RLUIPA, *Cutter* emphasized, “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”⁸ Where “inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution,” the Constitution will prohibit granting them.⁹

Many of the Court’s exemption decisions under the Free Exercise Clause are animated by this aversion to accommodations that burden third parties. In *United States v. Lee*, for example, the Court refused a free-exercise exemption to an Amish employer who objected to the payment of Social Security taxes for his employees.¹⁰ It reasoned that:

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

2015, http://judiciary.house.gov/_cache/files/497441bc-b2fa-4b10-8ade-91f6603588fe/tebbe-02132015.pdf; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION BLOG, Nov. 27, 2013, <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>.

² 472 U.S. 703, 710-11 (1985).

³ *Id.* at 709-10.

⁴ *Id.* at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

⁵ 544 U.S. 709 (2005).

⁶ *Id.* at 714-15.

⁷ *Id.* at 722.

⁸ *Id.*

⁹ *Id.* at 726.

¹⁰ 455 U.S. 252 (1982).

social security taxes to an employer operates to impose the employer's religious faith on the employees.¹¹

Similarly, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court construed the Fair Labor Standards Act to require a nonprofit religious organization to pay the minimum wage to its employees because of the burdens a free-exercise exemption otherwise would have inflicted on employees and competitors.¹² The Court's iconic Free Exercise decisions in *Wisconsin v. Yoder*¹³ and *Sherbert v. Verner*¹⁴ also were careful to note that the free-exercise exemptions granted to religious observers did not impose significant costs on third parties.

Interpreting the Religious Freedom Restoration Act (RFRA)¹⁵ in *Burwell v. Hobby Lobby Stores*, the Supreme Court again affirmed the importance of avoiding burden shifting.¹⁶ Writing for the majority, Justice Alito recognized that “[i]t is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”¹⁷ Justice Kennedy, who provided the fifth vote for the majority, wrote that free exercise exemptions may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”¹⁸ The four dissenting Justices also expressly endorsed this limit, saying “[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others”¹⁹

Finally, the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 also rejects accommodations that impose costs on a discrete and identifiable group of third parties. Under Title VII, an employer must make “reasonable accommodations” of an employee's religious practices unless accommodation would pose an “undue hardship.”²⁰ The Supreme Court has authoritatively decided that this provision permits

¹¹ *Id.* at 261.

¹² 471 U.S. 290, 302 (1985) (reasoning that exemption “would be likely to exert downward pressure on wages in competing businesses” to the detriment of the right of workers to earn the minimum wage).

¹³ 406 U.S. 204, 208 (1972). (observing that exemption of Amish children from school attendance would not cause “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare”).

¹⁴ 374 U.S. 398 (1963) (noting that exemption of Sabbatarian from Saturday work requirement of unemployment compensation regime would not “abridge any other person's religious liberties”).

¹⁵ 42 U.S.C. § 2000bb (2012).

¹⁶ 134 S. Ct. 2751, 2781 n.37 (2014). The Court's recent unanimous decision in *Holt v. Hobbs*, granting an RLUIPA exemption from a prison no-beard policy to a prisoner whose sincerely held religious beliefs required him to wear a short beard, further affirmed the fundamental nature of the no-third-party-harms principle. 135 S. Ct. 853 (2015); *see also id.* at 867 (Ginsburg, J., concurring) (expressing understanding that “accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief”).

¹⁷ *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

¹⁸ *Id.* at 2786-87 (Kennedy, J., concurring); *accord Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) (“[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment.”).

¹⁹ *Hobby Lobby*, 134 S. Ct. at 2801 (Ginsburg, J., dissenting); *see also id.* (“The Court ultimately acknowledges a critical point: RFRA's application must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”).

²⁰ 42 U.S.C. § 2000e(j) (2006).

accommodations of employee religion only when the costs borne by employers are *de minimis*.²¹ Any other standard, the Court held, would impose an “undue hardship” on the employer, requiring the employer to foist onto other employees the costs of accommodating a religion in which they did not believe or participate.²²

Much accommodation of religious belief is constitutionally permissible. Typically, when the law accommodates religious actors, any resulting costs are absorbed by the government or by the public. If, however, the government places those costs on the shoulders of other private citizens, it implicates the religious freedom of those third parties. As the Supreme Court has stated, “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”²³

Exemptions to the Nondiscrimination Rule risk significantly harming the health and equal citizenship of women and LGBT patients.

Religious exemptions to the Nondiscrimination Rule would impose significant costs on a discrete and identifiable group of third parties. The burdens of accommodation will fall not on the government directly or the population broadly, but rather on a discrete group of patients already disadvantaged due to their sex, sexual orientation, or gender identity.²⁴ Any such exemptions would impair basic rights to non-discrimination, security, health, and personal welfare. Under these circumstances, the Establishment Clause limits on burden shifting expressed in *Cutter* and *Caldor* have their full effect.

The healthcare context magnifies the potential for significant and even health- and life-threatening burdens on those individuals who bear the costs of accommodating religious objectors. Discrimination in healthcare sometimes presents as a matter of life or death and frequently occurs when a patient is particularly vulnerable due to disease or injury. For example, transgender men and women have encountered ridicule, refusals of treatment, and hostility in emergencies with fatal and near-fatal consequences.²⁵ The harms of

²¹ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The only exception involves exemptions that allow houses of worship and, by extension, religiously affiliated non-profits to select their members according to their religious views. *See, e.g., Corp. of the Presiding Bishop v. Amos* 483 U.S. 327 (1987) (holding that Title VII exemption for “religious organizations” does not violate Establishment Clause).

²² *Hardison*, 432 U.S. at 84 (“[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.”).

²³ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

²⁴ As HHS recognized in the proposed rule, sex discrimination includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity. 80 Fed. Reg. 54172, 54176 (Sept. 8, 2015). HHS has also indicated interest in defining sex discrimination to include sexual orientation to ensure the rule “reflect[s] the current state of nondiscrimination law.” *Id.* at 54177.

²⁵ Press Release, Gay and Lesbian Activists Alliance of Washington D.C., District Settles Hunter Lawsuit for \$1.75 Million (Aug. 10, 2000), <http://www.glaa.org/archive/2000/tyrasettlement0810.shtml> (recounting settlement of lawsuit following the death of Tyra Hunter, a transgender woman, who had been seriously injured in a car accident and was left untreated after emergency medical professionals discovered she had male genitalia); LESLIE FEINBERG, *TRANS LIBERATION* (1998) (recounting experience of being denied care for a heart condition in an emergency department after Feinberg was revealed to be transgendered);

discrimination include outright denials of care, delay, and inadequate care.²⁶ In addition to physical injuries, individuals face economic costs as they search for alternate providers of insurance or healthcare—a search that may be rendered more difficult in the many areas of the country with highly consolidated healthcare or health insurance markets.²⁷

Finally, the experience of sex discrimination—including religiously motivated discrimination—causes patients substantial dignitary harm. As the Supreme Court has long held, discrimination inflicts “stigmatic injury,” which “is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”²⁸ LGBT people and people with HIV, in particular, frequently encounter hostile healthcare settings and are stigmatized by healthcare providers.²⁹ Having been prescribed drugs for miscarriage management, women have found pharmacists unwilling to serve them.³⁰ Nurses have refused to provide pre- and post-operative care to women receiving abortions, even in emergency situations.³¹

LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: TRANSITION-RELATED HEALTH CARE (Feb. 7, 2013), http://www.lambdalegal.org/publications/trt_overcoming-health-care-discrimination (reporting refusal of care to a transgender man, Nakoia Nelson, after he had a near-fatal allergic reaction).

²⁶ See, e.g., Council on Ethical and Judicial Affairs of the American Medical Association, *Gender Disparities in Clinical Decision Making*, 266 JAMA 559 (1991) (noting ways in which gender bias results in women receiving inadequate care); LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV 5 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf (reporting that almost 8 percent of LGB survey respondents and almost 27 percent of transgender respondents had been denied care due to sex discrimination); Nat'l Women's L. Ctr., Fact Sheet, 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 (compiling studies and examples of mistreatment and refusals of healthcare to LGBT people and people living with HIV/AIDS).

²⁷ See, e.g., David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 JAMA 1964, 1966 (2013) (“Nearly half of hospital markets in the United States are highly concentrated, another third are moderately concentrated, and the remaining one-sixth are unconcentrated. No hospital markets are considered highly competitive.”); Leemore Dafney, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161, 1183-84 (2012) (“[M]ost Americans live in markets served by a small number of insurers, and most markets are becoming more concentrated over time. We estimate that the fraction of local markets falling under the “highly concentrated” category . . . increased from 68 to 99 percent between 1998 and 2006.”).

²⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

²⁹ LAMBDA LEGAL, *SUPRA* NOTE 26, AT 5 (survey of 5,000 people found that more than half reported experiencing discrimination in healthcare); see also Chris Fry, *Doctors With Gay Bias Denied Meds, Man Says*, COURTHOUSE NEWS, June 1, 2012, <http://www.courthousenews.com/2012/06/01/47019.htm> (reporting on lawsuit alleging that a hospital had denied a gay, HIV-positive man medication and visitors after the treating doctor determined he was gay and had told him “This is what he gets for going against God’s will”); *Lambda Legal Sues Doctor, Clinic for Denying Care to Transgender Woman*, LGBTQ NATION, Apr. 17, 2014, <http://www.lgbtqnation.com/2014/04/lambda-legal-sues-doctor-clinic-for-denying-care-to-transgender-woman/> (reporting on a lawsuit claiming that an Illinois health care services group denied medical care to a transgender woman after she requested hormone replacement therapy, telling her that it “does not have to treat people like you”).

³⁰ Amie Newman, *Idaho Pharmacy Board Gives a Pass to Pharmacist Who Refused to Fill Prescription*, RH REALITY CHECK, Jan. 26, 2011, <http://rhrealitycheck.org/article/2011/01/26/idaho-pharmacist-refused-fill-prescription-gets-pass/> (reporting on a Walgreens pharmacist who refused to fill a prescription for Methergine, which halts uterine bleeding, because she believed the patient might have had an abortion); Molly Redden, *The Scary Law That Allowed Pharmacists to Deny This Woman the Drugs She Needed After*

Stigma in turn may lead to future healthcare avoidance, resulting in potentially severe health consequences. If they are denied emergency contraception or subjected to judgment, victims of sexual assault may avoid future encounters with physicians.³² Fearing stigma and discrimination, more than 20 percent of LGBT older adults have not revealed their LGBT status to their physicians.³³ The result—the American Medical Association has recognized—can be “failure to screen, diagnose or treat important medical problems.”³⁴

If HHS were to grant religious exemptions, it would effectively create two tiers of patients. Whereas religious objectors would be obligated to refrain from discriminating on the basis of race, national origin, color, disability, and age, they might be authorized to discriminate against individuals due to their sex, sexual orientation, or gender identity. In short, religious exemptions specific to sex would deprive individuals of equal citizenship in the healthcare system.

Federal funds should not support discrimination by health programs and activities that are subject to the Nondiscrimination Rule. For the government to fund discriminatory practices would fundamentally change the relationship of the disfavored minority group to the nation. It would send a message of endorsement of sex discrimination to the detriment of individuals within these groups and of society at large. As the Supreme Court has explained, sex discrimination “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”³⁵

To grant religious exemptions would retrench on preexisting rights of patients who do not share the commitments of conscience of their healthcare providers and insurers. Even prior

Her Miscarriage, MOTHER JONES, Apr. 16, 2015 <http://www.motherjones.com/politics/2015/04/pharmacists-refused-woman-drugs-miscarriage-walmart> (reporting on pharmacies refusing to dispense Misoprostol to women who had been prescribed the drug as part of miscarriage management).

³¹ Rob Stein, *New Jersey Nurses Charge Religious Discrimination Over Hospital Abortion Policy*, WASH. POST, Nov. 11, 2011, https://www.washingtonpost.com/national/health-science/new-jersey-nurses-charge-religious-discrimination-over-hospital-abortion-policy/2011/11/15/gIQAYdgm2N_story.html (reporting on a lawsuit filed by nurses who refused to care for patients before or after they had undergone an abortion procedure); *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 223 (3d Cir. 2000) (involving labor and delivery nurse who refused to assist in an emergency cesarean-section of an eighteen-weeks-pregnant woman “standing in a pool of blood,” causing a thirty-minute delay of emergency surgery).

³² Sabrina Rubin Erdely, *Doctors’ Beliefs Can Hinder Patient Care*, NBC NEWS, June 22, 2007, http://www.nbcnews.com/id/19190916/ns/health-womens_health/t/doctors-beliefs-can-hinder-patient-care/#.VigGiX6rS00 (recounting experience of sexual assault victim who was denied emergency contraception by an emergency room physician who said it was “against my religion” and who was so traumatized by the experience that she had not been to a gynecologist two and a half years later due to fear of again being judged).

³³ Karen Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults 2* (2011); *see also* MetLife Mature Market Institute, *Out and Aging: The MetLife Study of Lesbian and Gay Baby Boomers 14* (2006) (reporting that 19 percent of gay and lesbian baby boomers had little or no confidence that the health care system would treat them respectfully).

³⁴ Am. Med. Ass’n, *Policy H-160.991—Health Care Needs of the Homosexual Population*, <https://www.ama-assn.org/ssl3/ecom/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-160.991.HTM>.

³⁵ *Jaycees*, 468 U.S. at 625 (recognizing the government’s “compelling interest in eradicating discrimination against its female citizens”).

to the passage of the Affordable Care Act (ACA), healthcare providers had ethical obligations not to discriminate against patients on the basis of gender and sexual orientation, irrespective of their religious or moral beliefs.³⁶ For more than five years, the American people have had the protection of Section 1557 of the ACA. Women and transgender people have filed complaints against sex discrimination under Section 1557.³⁷ HHS already has included explicit prohibitions against sex and sexual orientation discrimination in final rules for health insurance exchanges and qualified health plans.³⁸ More broadly, the ACA has aimed to make healthcare more integrated and nondiscriminatory on the basis of sex.³⁹

³⁶ See, e.g., Am. Med. Ass’n, Opinion E-9.12—Patient-Physician Relationship: Respect for Law and Human Rights, <https://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.page> (concluding that “physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, or any other basis that would constitute invidious discrimination.”); Am. Med. Ass’n, Opinion E-10.05—Potential Patients, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1005.page?> (“(2) The following instances identify the limits on physicians’ prerogative: ... (b) Physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination. ... (3) In situations not covered above, it may be ethically permissible for physicians to decline a potential patient when: ... (c) A specific treatment sought by an individual is incompatible with the physician’s personal, religious, or moral beliefs.”).

³⁷ See, e.g., *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, *1 (D. Minn. Mar. 16, 2015) (holding that a transgender patient could proceed in a suit against his local hospital for discrimination based on his suffering verbal insults, delays that put him at risk of sepsis, and unnecessary and invasive procedures by physicians and nurses); Letter of Leon Rodriguez to Maya Rupert dated July 12, 2012 (OCR Transaction Number: 12-000800) (concluding that Section 1557’s sex discrimination prohibition includes discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity, as well as other forms of sex discrimination regardless of the individual’s actual or perceived sexual orientation or gender identity); Nat’l Women’s L. Ctr., Admin. Compl. Against Auburn Univ., June 4, 2013, http://www.nwlc.org/sites/default/files/pdfs/2013-06-04_auburn_univ_1557_ocr_complaint.pdf.

³⁸ See, e.g., 45 C.F.R. § 155.120(c) (nondiscrimination in exchanges); *id.* at § 156.200(e) (for Qualified Health Plans); *id.* at § 147.104(e) (marketing and benefit design).

³⁹ The focus on nondiscriminatory access to healthcare on the basis of sex is apparent in numerous provisions of the ACA. Affordable Care Act § 1302(C) (stating that in defining essential health benefits, the Secretary should “take into account the health care needs of . . . women”); Affordable Care Act § 2713 (requiring all new insurance plans to cover cover any preventative care and screening for women without cost-sharing); Affordable Care Act § 10413 (providing support for breast health awareness for young women); Affordable Care Act § 3509 (creating an Office for Women’s Health within the Department of Health and Human Services); Affordable Care Act § 4302 (providing guidelines for collecting, managing, and analyzing data based on race, ethnicity, sex, primary language, and disability status).

Congress repeatedly emphasized sex equality in debates. See, e.g., 145 CONG. REC. S11946 (Nov. 21, 2009) (statement of Sen. Kay Hagan) (“I think one of the key points is the fact that this bill is going to eliminate discrimination based on gender and preexisting conditions.”); 145 CONG. REC. S11963 (Nov. 21, 2009) (statement of Sen. Maxwell Baucus) (“No longer will insurance companies be able to discriminate based on gender or health status.”); 145 CONG. REC. H1873 (Mar. 21, 2010) (statement of Rep. Lynn Woolsey) (“[T]he whole Nation desperately needs health care reform, but no group of Americans needs it more than women who face discrimination and insult at the hand of the broken status quo every single day.”); 145 CONG. REC. S12026 (Dec. 1, 2009) (statement of Sen. Barbara Mikulski) (“We, the women of the Senate, are concerned that even being a woman is being viewed by the insurance companies as a preexisting condition.”); 145 CONG. REC. S11918 (Nov. 21, 2009) (statement of Sen. Kristen Gillibrand) (“This bill also ends discrimination against women, which we have faced in our health care system for far too long. Women shoulder the worst of the health care crisis, including outrageous discriminatory practices in care and coverage.”).

Protections against discrimination under Section 1557 further compelling interests in eradicating sex discrimination.⁴⁰ They—like other nondiscrimination obligations—reflect “the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”⁴¹ Granting exemptions to these requirements in the healthcare marketplace for recipients of federal financial assistance would raise substantial health and equality concerns. Like the salespeople in the retail store in *Caldor*,⁴² or the farmhands and carpenters employed by Mr. Lee,⁴³ the disadvantaged minority groups affected here would be compelled to bear the costs of practicing someone else’s religion in violation of the Constitution.

Additional accommodation of religious objectors is unnecessary.

As scholars of law and religion, we share a commitment to religious liberty for citizens of all beliefs. Existing federal laws provide ample safeguards for religious concerns in the context of the Nondiscrimination Rule. Where they do not unduly burden identifiable third parties, they may apply. Granting further exemptions to sex nondiscrimination requirements, however, would expand the religious practice of healthcare programs at the cost of the religious liberty, equality, and health of patients.

The statutory language of Section 1557 is clear as to the exemptions that apply to the anti-discrimination requirements: Nondiscrimination protections apply “Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not...”⁴⁴ Title I of the ACA, in which 1557 is found, specifically leaves in effect existing federal conscience protections⁴⁵ and exemptions for objections to assisted suicide.⁴⁶ It also allows states to prohibit abortion coverage in the state exchanges.⁴⁷ Title I further indicates that the ACA shall not “preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.”⁴⁸ The ACA is also subject to RFRA.

⁴⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (recognizing the government’s “compelling interest in eradicating discrimination against its female citizens”); *see also* *Bd. Of Dirs. Of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (same).

⁴¹ *Jaycees*, 468 U.S. at 626.

⁴² *Estate of Thornton v. Caldor*, 472 U.S. 703, 705 (1985).

⁴³ *United States v. Lee*, 455 U.S. 252, 254 (1982).

⁴⁴ 42 U.S.C.A. § 18116(a) (2010)

⁴⁵ 42 U.S.C.A. § 18023(c)(2)(a)(i) (2010) (“Nothing in this Act shall be construed to have any effect on Federal laws regarding . . . conscience protection.”). These include the Church Amendment, 42 U.S.C. § 300a-7 (2000) (prohibiting discrimination against healthcare providers based on their refusals to provide sterilization or abortion), the Coats Amendment, 42 U.S.C. § 238n (2012) (prohibiting the federal government and recipients of federal funding from discriminating against providers that refuse to participate in training for abortion services due to religious objections), and the Weldon Amendment, Pub. L. No. 111-8 § 508(d)(1), 123 Stat. 524, 803 (2009) (prohibiting HHS appropriations from being made available to any state or local government discriminating against any healthcare entity that “does not provide, pay for, provide coverage of, or refer for abortions”).

⁴⁶ 42 U.S.C.A. § 18113 (2010).

⁴⁷ 42 U.S.C.A. § 18023 (2010).

⁴⁸ 42 U.S.C.A. § 18023(c)(1)-(2) (2010).

Any broader exemptions would be inconsistent with the text and with Congress' considered judgment about the scope of exemptions. Congress expressly rejected broader conscience exemptions in the context of the Women's Health Amendment.⁴⁹ Congress also voted against expanding the federal conscience clause to prevent "requir[ing] an individual or institutional health care provider to provide, participate in, or refer for an item or service to which such provider has a moral or religious objection, or require such conduct as a condition of contracting with a qualified health plan."⁵⁰

Conclusion

The prohibition on third-party burdens under the Establishment Clause and the Free Exercise Clause constrains any religious exemptions that HHS may provide to the Nondiscrimination Rule. Here, granting of religious exemptions would impose substantial burdens on patients already disadvantaged by their sex, sexual orientation, or gender identity contrary to this constitutional principle.

To avoid Establishment Clause concerns, HHS should include an explicit limitation on harm to third parties. To reflect constitutional limits on accommodation, the Nondiscrimination Rule should clarify that existing religious exemptions in federal law should apply only where they do not result in significant burdens on third parties.⁵¹ With this modification, religious concerns would be adequately addressed, and vital health care services would be broadly and nondiscriminatorily available to individuals throughout the country.

Thank you for your consideration.

Respectfully submitted,⁵²

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⁴⁹ *See, e.g.*, 155 CONG. REC. S13193-01 (Dec. 14, 2009).

⁵⁰ *Id.*

⁵¹ *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries").

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