



Office of the General Counsel

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Submitted Electronically

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Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Discrimination on the Basis of Sex,
RIN 1250-AA05**

Dear Ms. Carr:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on proposed OFCCP regulations on sex discrimination. 80 Fed. Reg. 5246 (Jan. 30, 2015).

The proposed regulations are intended to implement a provision of Executive Order 11246 that forbids federal contractors and subcontractors to discriminate on the basis of sex. In defining sex discrimination, the regulations purport to be based on the existing prohibition on sex discrimination set forth in Title VII of the Civil Rights Act of 1964. *See* 80 Fed. Reg. at 5246 (“OFCCP interprets the nondiscrimination provisions of the Executive Order consistent with the principles of title VII of the Civil Rights Act”); *id.* at 5248 (“OFCCP’s interpretations of a contractor’s nondiscrimination mandate on the basis of sex follow title VII principles”).

The regulations are problematic in at least four respects. They (1) require employer-sponsored health plans in some instances to include coverage of abortion; (2) require such plans to include coverage of contraceptives; (3) forbid discrimination against employees because they are in “a relationship with a person

of the same sex,” and (4) forbid discrimination on the basis of “gender identity” or “transgender status.”

The first requirement violates the Weldon amendment, which forbids discrimination against health care providers and health plans that decline involvement in abortion. The other three are inconsistent with Title VII. Because they either conflict with a federal statute or are inconsistent with the statute on which they purport to be based, all four regulatory requirements violate the Administrative Procedure Act (“APA”). Even if this were not the case, each of the requirements—the first two as applied to prospective or actual federal government contractors and subcontractors with religious objections to abortion or contraceptive coverage, and the last two as applied to prospective and actual federal government contractors and subcontractors with religiously-motivated employee conduct standards at odds with the stated prohibitions—violates the Religious Freedom Restoration Act (“RFRA”).

More detailed comments follow.

I. Violation of the Weldon Amendment

The proposed regulations would require federal contractors and subcontractors to provide abortion coverage in their employee health plan in cases where the mother’s life would be endangered if the unborn child were carried to term. 80 Fed. Reg. at 5278.

This provision is based on the Pregnancy Discrimination Act (“PDA”). Passed in 1978, the PDA amends Title VII’s definition of sex discrimination to forbid discrimination on the basis of pregnancy. The PDA states that the prohibition against pregnancy discrimination “shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term....” 42 U.S.C. § 2000e(k).

Shortly after its enactment, we filed suit to challenge the PDA’s requirement to provide abortion coverage. The litigation was dismissed due to the absence of a case or controversy. *National Conference of Catholic Bishops v. Bell*, 490 F.Supp. 734 (D.D.C. 1980). The district court concluded, among other things, that there was no immediate prospect that the government would require employers to provide health coverage of abortion. *Id.* at 739-40. The court of appeals affirmed the district court’s judgment for the reasons set out in the district court’s opinion,

and that opinion is set as an appendix to the court of appeals' *per curiam* order. *National Conference of Catholic Bishops v. Smith*, 653 F.2d 535 (D.C. Cir. 1981).

This occurred in 1981. Since then, the federal government has never, to our knowledge, brought an enforcement action against any employer, religious or secular, to require abortion coverage under the PDA, and no court, to our knowledge, has ever ordered such coverage under the PDA.

Eleven years ago, the right to exclude abortion coverage was explicitly codified through enactment of the Weldon amendment. That amendment, which has been included in every Labor/HHS appropriations law enacted since 2004, states that “None of the funds made available in this Act may be made available to a Federal agency or program ... if such agency ... [or] program ... subjects 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.”¹ The term “health care entity” includes “a health insurance plan, or any other kind of health care ... plan.”²

Catholic health care providers in particular are bound by Catholic teaching against all direct abortion, as is reflected in the Ethical and Religious Directives for Catholic Health Care Services published by the Catholic bishops of the United States.³ Catholic and other faith-based employers do, in fact, provide life-saving treatment for pregnant women and coverage for such care, but the treatment is not abortion. Independent studies confirm that these religious institutions provide

¹ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. G, tit. V, § 507(d) (Dec. 16, 2014).

² *Id.* One claiming the protection of the Weldon amendment is not required to assert a religious or moral objection to abortion. This is clear from the text of the amendment, which says nothing about religious or moral objections.

³ U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (Washington DC 2009), Directive 45: “Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation.”

higher-quality health care than their secular counterparts (whether for-profit or not-for-profit).⁴

Indeed, there is significant credible evidence that the universe of abortions “necessary” to save a woman’s life comprises an empty set. Writes one physician who has performed abortions for decades: “The idea of abortion to save the mother’s life ... medically speaking ... probably doesn’t exist. It’s a real stretch of our thinking.”⁵ Nearly 50 years ago, the physician after whom Planned Parenthood named its research arm stated that “it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness such as cancer or leukemia and, if so, abortion would be unlikely to prolong, much less save, life.”⁶ In 1980, a medical expert who later served as U.S. Surgeon General stated: “In my 36 years in pediatric surgery I have never known of one instance where the child had to be aborted to save the mother’s life.”⁷ Writing in 1992, five of Ireland’s top gynecologists “affirm[ed] that there are no medical circumstances justifying direct abortion, that is, no circumstances in which the life of a mother may only be saved by directly terminating the life of her unborn child.”⁸ In 1974, the Director of Medical Genetics for the Mayo Clinic stated that “there are no medical indications for terminating a pregnancy.”⁹

⁴ A study of 255 health systems found that “Catholic and other church-owned health systems had significantly better quality performance that surpassed investor-owned systems. Catholic health systems are also significantly more likely to provide higher quality performance to the communities served than secular not-for-profit health systems.” David Foster, Ph.D., M.P.H. *Research Brief: Differences in Health System Quality Performance by Ownership*, p. 1 (Thomson Reuters, Aug. 9, 2010), http://www.nonprofithealthcare.org/uploads/Study_Finds_Quality_in_Nonprofit_Health_Systems_Better-with_Church-Owned_the_Best.pdf.

⁵ Don Sloan, M.D. and Paula Hartz, *CHOICE: A DOCTOR’S EXPERIENCE WITH THE ABORTION DILEMMA*, p. 46 (New York: International Publishers, 2nd ed., 2002).

⁶ Alan F. Guttmacher, M.D., “Abortion—Yesterday, Today, and Tomorrow,” in *THE CASE FOR LEGALIZED ABORTION NOW* (Berkeley Cal.: Diablo Press, 1967).

⁷ C. Everett Koop, M.D., as told to Dick Bohrer, in *Moody Monthly* (May 1980).

⁸ John Bonner, Eamon O’Dwyer, David Jenkins, Kieran O’Driscoll, Julia Vaughan, “Statement by Obstetricians,” *The Irish Times* (April 1, 1992).

⁹ Dr. Hymie Gordon, Director of Medical Genetics, Mayo Clinic, Rochester, MN (Oct. 15, 1974).

All of this was true 30 to 50 years ago, and is certainly no less true today given the improvements in obstetric care that have occurred in recent decades. This was acknowledged in letters to Congress from four experts in emergency medicine and high-risk obstetrics in 2011, when they endorsed conscience language on abortion similar to that of the Weldon amendment as part of a proposal to amend the Affordable Care Act (“ACA”). These experts, speaking from over a century of accumulated medical experience, testified that abortion is not the only way to defend a woman’s life in “emergency” situations and that they knew of no case in which a woman’s life was endangered due to exceptionless conscience clause laws on abortion.¹⁰

The President and Administration officials have previously expressed unequivocal support of the Weldon amendment.¹¹ In regulations enforcing federal conscience laws like the Weldon amendment, the Administration has declared that such laws “have operated side by side often for many decades” with other federal statutes, including statutes on the provision of treatment in medical emergencies, and that the conscience laws as well as these other laws can and should continue to be fully enforced and do not conflict with each other. 76 Fed. Reg. 9968, 9973 (Feb. 23, 2011).

Requiring abortion coverage in some instances, as the proposed regulations would do, would alter the government’s enforcement policy over the last 35 years and violate the Weldon amendment, which denies the Executive Branch any authority to require abortion coverage. The requirement should therefore be removed from the OFCCP regulations.

¹⁰ Drs. Edward Read Jr., John Thorp, Byron G. Calhoun, and Steve Calvin, letters in support of conscience provisions in the Protect Life Act (112th Congress, H.R. 358), in *Cong. Record*, October 13, 2011, pages H6877-8.

¹¹ Executive Order 13535, *Patient Protection and Affordable Care Act’s Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion*, § 1 (March 24, 2010) (citing with approval “longstanding Federal laws to protect conscience . . . such as . . . the Weldon Amendment”); Letter of Georgina C. Verdugo, Director, HHS Office for Civil Rights, to Congressman Christopher H. Smith, March 9, 2011 (stating that the Administration fully supports the Weldon amendment and other federal conscience laws).

II. Inconsistency with Title VII

A. Contraceptive Coverage

The proposed regulations would require federal contractors and subcontractors to cover contraceptives in their employee health plan to the same extent that health care costs are covered for other medical conditions. 80 Fed. Reg. at 5278.

This requirement purports to track Title VII as amended by the PDA. But neither Title VII nor the amendments to that title made by the PDA say anything about contraceptives. Neither does the legislative history. The Equal Opportunity Employment Commission (“EEOC”) has argued for years that Title VII requires contraceptive coverage, but the argument has received a mixed reception in the federal district courts and has been rejected by the only federal court of appeals to consider it. *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007) (noting the conflict in the district courts, expressly rejecting the EEOC’s position, and holding that Title VII does not require coverage of contraceptives). As the Eighth Circuit noted in *Union Pacific*, contraception is not related to pregnancy for PDA purposes because contraceptives, by definition, are intended to *prevent* pregnancy from occurring. *Id.* at 943. In addition, a plan that excludes contraceptives, tubal ligations, condoms and vasectomies is gender neutral. *Id.* at 944-45.

Finally, the claim that Title VII requires contraceptive coverage is difficult to square with the Administration’s position in defending regulations issued under the “preventive services” provision of ACA. The ACA regulations require health plans to cover contraceptives, but provide a limited exemption for some religious employers and propose what the government characterizes as an “accommodation” for other employers. The regulations have given rise to scores of lawsuits by employers who object on religious grounds to including or facilitating coverage of all or some contraceptives in their employer-sponsored plan. If Title VII, as amended by the PDA, provided a plausible alternative ground for mandating contraceptive coverage, one would have expected the federal government at least to have made that argument. But to our knowledge, it has not done so. The fact that not a single federal court of appeals has accepted the EEOC’s claim that Title VII requires coverage of contraceptives would be one logical explanation as to why the government abandoned any such claim in the ACA litigation.

B. Same-Sex Relationships

The proposed regulations would forbid federal contractors and subcontractors to subject an employee to “[a]dverse treatment . . . because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex.” 80 Fed. Reg. at 5279.

It is not clear what OFCCP means by “being in a relationship with a person of the same sex,” or how broadly or narrowly it construes “conform[ity]” to “sex-role expectations.” If, however, this provision is intended to say that Title VII protects sexual conduct between persons of the same sex, then it is incorrect as a matter of law. Title VII says nothing about same-sex relationships or conduct. In light of this statutory silence, it is not surprising that the federal courts of appeals have uniformly held that Title VII does not forbid discrimination on the basis of “sexual orientation.”¹²

If Title VII *already* prohibited discrimination on the basis of “sexual orientation” (however one construes that term), it would be impossible to account for efforts over the past several years to enact the Employment Non-Discrimination Act (“ENDA”), a bill that expressly prohibits workplace discrimination on the basis of sexual orientation. No proposals would have been made in past congresses, as there have been for years, to prohibit sexual orientation discrimination if such discrimination were already prohibited under federal law. Congress’s refusal to enact such proposals “is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation.” *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

¹² *Larson v. Unites Air Lines*, 482 F. App’x 344, 348 n.1 (10th Cir. 2012); *Gilbert v. Country Music Association*, 432 F. App’x 516, 520 (6th Cir. 2011); *Pagan v. Gonzalez*, 430 F. App’x 170, 171-72 (3d Cir. 2011); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Osborne v. Gordon & Schwenkmeyer Corp.*, 10 F. App’x 554, 554 (9th Cir. 2001); *Richardson v. BFI Waste Systems*, 2000 WL 1272455, *1 (5th Cir. Aug. 15, 2000); *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701, 704, 707 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); *Williamson v. A.G. Edwards and Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981; see *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)). The case law often does not differentiate between inclination and conduct; none of the cited cases affirmatively suggests that either sexual inclination or conduct is protected under Title VII.

C. Gender Identity

The proposed regulations would forbid employment discrimination on the basis of actual or perceived “gender identity” or “transgender status.” 80 Fed. Reg. at 5277, 5279. Inclusion of these categories in the regulations is problematic for several reasons.

First, Title VII says nothing about “gender identity” or “transgender status.” Because Title VII says nothing about these categories, there is no statutory basis for including them in a regulatory definition of sex discrimination that is intended to mirror Title VII.¹³

Second, the term “gender identity,” which is undefined in the proposed regulations, is ambiguous, and the ambiguity allows for results that are positively at odds with case law interpreting Title VII. “Gender identity” could be construed, for example, to include *per se* protection of transsexualism, to preclude reasonable workplace rules requiring different dress and grooming standards for men and women, or to preclude the use of workplace restrooms and locker rooms based on one’s biological sex.¹⁴ Courts have held, however, that Title VII’s prohibition of “sex discrimination” does *not* make transsexuals a protected class,¹⁵ does *not* preclude reasonable workplace rules requiring different dress and grooming

¹³ The legislative history is likewise silent. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984).

¹⁴ Our use of terms such as “transsexualism” and “sex change” should not be read as a concession that a person can, in fact, actually change his or her given sex, such as through surgical alteration of the genitalia, nor should it be read to suggest that we consider such actions morally licit.

¹⁵ *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221(10th Cir. 2007) (“This Court agrees with ... the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”). While some courts have allowed Title VII sex discrimination claims by transsexual employees on the *Price Waterhouse* theory of “sex stereotyping,” most have held that such stereotyping is a distinct legal category that is not congruent with gender identity. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (noting that an individual’s status as a transsexual is irrelevant to the availability of Title VII protection under *Price Waterhouse*); *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that an accounting firm’s failure to admit a female employee to partnership because it considered her to be too “macho” was sex stereotyping in violation of Title VII’s prohibition of sex discrimination).

standards for men and women,¹⁶ and does *not* preclude the reservation of restrooms and locker rooms based on biological sex.¹⁷ In this respect, use of the term “gender identity” in the proposed regulations is over-inclusive because it goes beyond what Title VII proscribes with regard to sex discrimination. On the other hand, if OFCCP is intending merely to follow *Price Waterhouse*, *see* note 15, *supra*, then the use of the term “gender identity” is under-inclusive because claims of sex stereotyping do not require a showing of discrimination based on gender identity.¹⁸ For these reasons, the term “gender identity” is a poor fit with Title VII’s ban on sex discrimination.

Third, as noted above with respect to sexual orientation discrimination, if Title VII *already* prohibits discrimination on the basis of gender identity, then efforts to enact a bill such as ENDA, expressly prohibiting workplace discrimination on the basis of gender identity, would be inexplicable. There would have been no proposals in past congresses (as there have been) to prohibit “gender identity” discrimination if federal law already prohibited it.

Fourth, we believe that inclusion of “gender identity” in the OFCCP regulations would have an adverse impact on the rights of other employees. Employees have, for example, a legitimate expectation of privacy in workplace restrooms and locker rooms. The failure to even advert to these interests in the

¹⁶ *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (holding that “grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex”); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (stating that “there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards”), cited with approval in *Etsitty*, 502 F.3d at 1224-25.

¹⁷ *Etsitty*, 502 F.3d at 1225 (noting that “an employer’s requirement that employees use restrooms matching their biological sex ... does not discriminate against employees who fail to conform to gender stereotypes”); *see Johnson v. Fresh Mark*, 98 F. App’x 461 (6th Cir. 2004) (holding that an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex change surgery, to use the women’s restroom).

¹⁸ Ann Hopkins, the plaintiff in *Price Waterhouse*, is a prime example. Hopkins was denied admission to partnership in her accounting firm because of her perceived masculine mannerisms and for not dressing more “femininely.” There is no indication that she identified with *being* a man. Further, as courts have noted, there are limits to how far one can stretch *Price Waterhouse*. There is no suggestion in the opinion, for example, that Title VII requires an employer to allow an employee to cross-dress at work or to use a restroom reserved for the opposite sex, and the case law under Title VII is to the contrary. *See* notes 16 & 17, *supra*.

context of “gender identity” is surprising given the references elsewhere in the preamble to the proposed regulations to the privacy interests of employees. *E.g.*, 80 Fed. Reg. at 5253 (noting that if a contractor provides restrooms or changing facilities, it “must provide separate or single-user restrooms or changing facilities to assure privacy between the sexes”). Inclusion of gender identity in the regulations would violate those reasonable expectations.

III. Administrative Procedure Act

Because they are in direct conflict or are otherwise inconsistent with relevant federal statutes, the four requirements discussed in this letter violate the APA. 5 U.S.C. § 706 (authorizing a court to “hold unlawful and set aside agency action[s]” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

IV. Religious Freedom Restoration Act

Even if the four requirements discussed in this letter could be squared with the Weldon amendment, Title VII, and the APA, RFRA would forbid their application to prospective and actual government contractors with religious objections to abortion or contraceptive coverage or with religiously-motivated employee conduct standards at odds with the stated prohibitions concerning same-sex relationships and gender identity/transgender status.

A. RFRA’s Applicability to Government Contracts

RFRA forbids the federal government to substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless the burden furthers a compelling government interest by the means least restrictive of religious exercise. 42 U.S.C. § 2000bb-1.

RFRA applies to the denial of government contracts for three independent and mutually reinforcing reasons. First, the statute “applies to all Federal law, and the implementation of that law, whether statutory or otherwise....” 42 U.S.C. § 2000bb-3. Second, the stated purpose of RFRA, as set forth in 42 U.S.C. § 2000bb(b)(1), is “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963),” a case that involved a challenge to the denial of government benefits. Third, and most importantly, RFRA makes specific reference to government funding. The relevant text (42 U.S.C. § 2000bb-4) states:

Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter [*i.e.*, RFRA]. As used in this section, the term “granting,” used with respect to government funding, benefits, or exemptions, *does not include the denial of government funding, benefits, or exemptions.* [Emphasis added.]

Since “granting” funding is not a violation of RFRA, but “granting” does not include “the denial of funding,” Congress clearly contemplated that a denial of government funding may be a violation of RFRA. The Department of Justice has reached the same conclusion.¹⁹ Whether denial of funding is a RFRA violation in a particular case, of course, depends on whether religious exercise is substantially burdened by government action that is not the least restrictive means of furthering a compelling government interest. As detailed further below, we believe that the four problematic requirements identified above would violate RFRA.

B. Substantial Burden

Conditioning receipt of a government contract on a requirement to provide coverage of abortion or contraceptives, or to waive religiously-motivated employee conduct standards regarding human sexuality, would impose a “substantial burden” on an employer’s exercise of religion. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-79 (2014) (contraceptive mandate imposed a substantial burden on closely-held for-profit company with religious objections to such coverage); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). If a condition on the availability of a government benefit—in this case, funding through a government contract—“forc[es] [an institution] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order to [qualify for benefits], on the other hand,” the government has “put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [the institution] for [its exercise of

¹⁹ Office of Legal Counsel, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, June 29, 2007, at <http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf>. *See also* Letter of Douglas Laycock to Eric Holder, Nov. 13, 2009, at <http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf>.

religion].” *Sherbert*, 374 U.S. at 404, quoted in the legal opinion of the Department of Justice’s Office of Legal Counsel, *supra* note 19, at 12.

C. Compelling Interest and Least Restrictive Means

Once a substantial burden is demonstrated, the government bears the burden of proving that its action is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b). As a unanimous Supreme Court emphasized earlier this year, this standard has teeth. A “broadly formulated interest” does not suffice for purposes of demonstrating a compelling interest. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). Instead, the government must prove that its action furthers a compelling interest as applied to the *specific* individuals or organizations whose religious convictions are thereby burdened. *Id.* at 863. The least-restrictive-means standard, in turn, is “exceptionally demanding” and requires the government to show “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.” *Id.* at 864. “If a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Id.*

We do not believe that the government can meet the particularized and “exceptionally demanding” burden that RFRA places upon it with respect to any of the four proposed regulatory requirements discussed in this letter.²⁰

Contractors and subcontractors with religious and moral objections to abortion or contraceptive coverage are very likely to prevail on a RFRA claim under *Hobby Lobby*. In that case, the Court held that RFRA forbade a contraceptive mandate as applied to three closely-held for-profit companies with religious objections to contraceptive coverage under ACA. The government had offered an exemption to some employers and what it characterized as an “accommodation” to others, but it offered neither an exemption nor an accommodation to for-profit companies. The Court concluded that the mandated coverage was not tailored narrowly to further a compelling government interest, because the government had at its disposal at least one alternative that was less restrictive of religious freedom, namely, the “accommodation” it had offered to

²⁰ Failure to grant a meaningful accommodation would also be irreconcilable with Executive Order 13279, as amended by President Obama on November 17, 2010, and related regulations, which state that faith-based groups are to be allowed, without impairing their religious character, to participate in federal social service programs on equal footing with other groups.

some religious employers. In this case, the government’s position would be even *less* defensible than in *Hobby Lobby* (a case the government lost) because the proposed regulations contemplate no exception or accommodation of *any* kind for *any* employer, religious or not. Put another way, the proposed contraceptive mandate in this case is even more intrusive into free exercise, and less accommodating of religious objections, than the contraceptive mandate that the Supreme Court has already struck down under RFRA, making it likely that the former regulations will face the same fate as the latter.

The failure to suggest any exception or accommodation in the context of contraceptive coverage is also remarkable in light of not just the ACA, but other federal laws on this subject. Every year since 1986, for example, Congress has prohibited discrimination against foreign aid grant applicants who offer only natural family planning on account of their religious or conscientious convictions.²¹ Every year since 1999, Congress has exempted religious health plans from a contraceptive coverage mandate in the federal employees’ health benefits program, and prohibited other health plans in this program from discriminating against individuals who object to prescribing or providing contraceptives on moral or religious grounds.²² Every year since 2000, Congress has affirmed its intent that a conscience clause protecting religious beliefs and moral convictions be a part of any contraceptive mandate in the District of Columbia.²³ If contraceptive coverage is so compelling in the Title VII context,

²¹ For the most recent enactment, *see* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. J, tit. III (“Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant’s religious or conscientious commitment to offer only natural family planning”).

²² For the most recent enactment, *see id.*, Div. E, tit. VII, § 726 (“Nothing in this section shall apply to a contract with ... any existing or future plan, if the carrier for the plan objects to such coverage on the basis of religious beliefs... In implementing this section, any plan that enters into or renews a contract under this section may not subject any individual to discrimination on the basis that the individual refuses to prescribe or otherwise provide for contraceptives because such activities would be contrary to the individual’s religious beliefs or moral convictions”).

²³ For the most recent enactment, *see id.*, Div. E, tit. VIII, § 808 (“Nothing in this Act may be construed to prevent the Council or Mayor of the District of Columbia from addressing the issue of the provision of contraceptive coverage by health insurance plans, but it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions”).

one might ask, why are such broad exemptions allowed in other contexts? See *Gonzales v. O Centro Espírita*, 546 U.S. 418, 433 (2006) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest “of the highest order” when it leaves appreciable damage to that supposedly vital interest unprohibited.’”) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)). In this regard, it is especially ironic that the government would cite the interest in *reducing* legal expenses (80 Fed. Reg. at 5248) as a justification for the proposed regulations, when the contraceptive coverage that they would mandate seems virtually assured of increasing legal expenses and litigation costs for both conscientiously-objecting employers and the government.

The proposed sexual orientation and gender identity nondiscrimination rules fare no better under RFRA. Here the government’s interests, even if deemed compelling, are at cross purposes with, and compromise, other legitimate interests. See *Hobby Lobby*, 134 S. Ct. at 2780 (“Even a compelling interest may be outweighed in some circumstances by another even weightier consideration.”). The Supreme Court has held, for example, that the federal constitutional right of expressive association of a membership organization trumps a state law forbidding sexual orientation discrimination in public accommodations. *Boy Scouts v. Dale*, 530 U.S. 640 (2000). Significantly, the employer in that case had no religious affiliation. By virtue of the additional protection they enjoy under the Religion Clauses of the First Amendment, faith-based organizations would have even *stronger* interests in an exemption.²⁴ Indeed, some state courts, applying tests identical or similar to that of RFRA, have already concluded that the government’s interest in sexual orientation nondiscrimination in the workplace does not justify interference with a religious employer’s right to govern itself.²⁵

²⁴ The Supreme Court has recognized the important interest in preventing government encroachment upon church governance and operation since at least the mid-19th century. *Watson v. Jones*, 80 U.S. 679 (1872); *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). Later cases recognize that this interest is protected under the First Amendment Religion Clauses. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

²⁵ *Madsen v. Erwin*, 481 N.E.2d 1160, 1165 (Mass. 1985) (religiously affiliated newspaper’s “decision to fire [employee] because of her sexual preference can only be construed as a religious one, made by a Church as employer,” which is unreviewable by the courts); *Walker v.*

We also believe, in the case of faith-based organizations in particular, that it would be difficult for the government to satisfy the “exceptionally demanding” least-restrictive-means test. It seems fair to conclude that persons who voluntarily associate with a religious organization, whether as employees or otherwise, implicitly consent to the religious and moral convictions that animate and underlie the organization’s work. *E.g.*, *Watson*, 80 U.S., at 729 (“All who unite themselves to [voluntary religious associations] do so with an implied consent” to ecclesiastical governance); *cf.* 78 Fed. Reg. 39870, 39874 (July 2, 2013) (stating that houses of worship and their integrated auxiliaries are “more likely than other employers to employ people of the same faith” who share the same religious and moral convictions as the employer, but declining to apply this reasoning to all religiously-affiliated employers); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Col. L. Rev. 1373, 1408-09 (1981) (“[C]hurches are entitled to insist on undivided loyalty from [their] employees. The employee accepts responsibility to carry out part of the religious mission.... [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.”).

The fact that ENDA and most state laws on sexual orientation nondiscrimination have a religious exemption²⁶ also suggests that the government can satisfy its interests by means less restrictive than burdening the religious liberty of employers with respect to human sexuality. *Cf. Holt* at 866 (the fact that the federal government and the vast majority of states allow prisoners to grow ½-inch beards suggests that the prison, which banned beards for security reasons,

First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762, 1980 WL 4657, *3 (Cal. Super. Ct. 1980) (concluding that if plaintiff “were allowed to collect damages from defendants because he was discharged for being gay, defendants would be penalized for their religious belief that homosexuality is a sin for which one must repent”); *Lewis ex rel. Murphy v. Buchanan*, 21 Fair Empl. Prac. Cas. (BNA) 696, 1979 WL 29147 (Minn. Dist. Ct. 1979) (refusing to enforce against church pastor an ordinance forbidding employment discrimination based on sexual preference).

²⁶ See Center for American Progress Action Fund, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES (June 2012), at 3-4 (showing that 21 of 31 states with sexual orientation nondiscrimination laws have religious exemptions), <https://www.americanprogress.org/issues/lgbt/report/2012/06/11/11696/a-state-by-state-examination-of-nondiscrimination-laws-and-policies/>.

could have satisfied its security concerns through means less restrictive than denying Muslim petitioner an exemption from the ban).

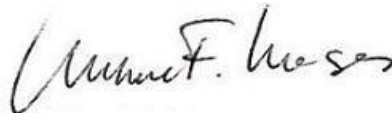
III. Conclusion

The proposed regulations would require all federal government contractors and subcontractors to offer abortion and contraceptive coverage, and would forbid employment discrimination with respect to sexual conduct, gender identity and transgender status. These requirements and prohibitions are irreconcilable with federal law, and should be eliminated from the final rule.

Respectfully submitted,

Handwritten signature of Anthony R. Picarello, Jr. in blue ink.

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

Handwritten signature of Michael F. Moses in black ink.

Michael F. Moses
Associate General Counsel