AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

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

Re: Nondiscrimination in Health Programs and Activities, RIN 0945-AA02

Americans United for Separation of Church and State (Americans United) submits the following comments to the proposed rule, "Nondiscrimination in Health Programs and Activities," which the Department of Health and Human Services (Department) Office of Civil Rights published in the Federal Register on September 8, 2015.[1] The Department requested comment on whether the rule should incorporate a religious exemption to the bar on sex discrimination[2] and our comments focus solely on that issue.

We strongly oppose the creation of a religious exemption. The statutory language of Section 1557 of the Affordable Care Act, which provides nondiscrimination protections to the U.S. health system, does not authorize an exemption. Nor do constitutional and statutory provisions that grant religious freedom protections, such as the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA). Furthermore, a religious exemption would significantly harm women and LGBT people seeking medical care, undermining the purpose of Section 1557 and possibly violating the Establishment Clause.

There is no justification for singling out sex as the one category for which religion may be used as an excuse to discriminate.[3] Women and LGBT people deserve equitable access to healthcare programs and activities.

Americans United

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious

[1] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,171 (Sept. 8, 2015) (to be codified as 45 C.F.R pt. 92).
[2] *Id.* at 54173.
[3] 1557 does not incorporate exceptions from Title XI, Title VI, Section 504, or the Age Act.

communities to worship—or not—as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 125,000 members, supporters, and activists across the country.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease real burdens on the practice of religion. Such accommodations, however, must not foster the advancement of religion, nor may they be so broad as to negatively impact innocent third parties. Religion does not justify denying certain individuals—most likely women and LGBT people—access to necessary healthcare programs and activities. Accordingly, we oppose adding an exemption to this rule.

The Statutory Language of 1557 Does Not Authorize a Religious Exemption

Section 1557 of the Affordable Care Act (ACA) bars discrimination on the grounds prohibited under Title IX of the Education Amendments of 1972.[4] Section 1557 does not incorporate any of Title IX's exemptions.[5] This makes sense, as, in the words of the preamble, "many of Title IX's limitations and exceptions do not readily apply in a context that is grounded in health care, rather than education." Furthermore, 1557 does not authorize the creation of any new religious exemptions.

Not only does the plain language of Section 1557 support the rejection of calls for an exemption, but the purpose of the law does as well. Singling out sex discrimination for a religious exemption would be particularly odd given the ACA's focus on addressing the obstacles women have faced in obtaining health insurance and accessing health care.[6] And it would be equally odd for the rule to treat sex discrimination differently and with less protection than other forms of discrimination, as it, again, would undermine the goal of Section 1557. Because the statute does not incorporate any exemptions or authorize new exemptions, the rule properly excludes them.

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[4] 20 U.S.C. § 1681 *et seq.*

[5] Section 1557's ban against discrimination in health programs or activities includes a single exception: it applies "[e]xcept as otherwise provided" in Title I of the ACA.

[6] *See* 42 U.S.C. § 300gg(a) (2015) (allowing rating based only on family size, tobacco use, geographic area, and age, but not sex); 45 C.F.R. § 147.104(e) (2015) (prohibiting discrimination in marketing and benefit design, including on the basis of sex); *see also, e.g.*, 156 CONG. REC. H1632-04 (daily ed. March 18, 2010) (statement of Rep. Lee) ("While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children."); 156 CONG. REC. H1891-01 (daily ed. March 21, 2010) (statement of Rep. Pelosi) ("It's personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition."); 155 CONG. REC. S12026 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) ("[H]ealth care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because . . . when it comes to health insurance, we women pay more and get less."); 155 CONG. REC. S10262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) ("Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform."); 156 CONG. REC. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) ("Finally, these reforms will do more for women's health . . . than any other legislation in my career.").

A Religious Exemption Would Harm Women and LGBT Persons Seeking Access to Healthcare

The negative impacts on health caused by sex discrimination in the healthcare arena are real. Sex discrimination results in women paying more for health care,[7] receiving improper diagnoses more frequently,[8] being provided less effective treatments,[9] and sometimes being denied care altogether.[10]

Further, numerous surveys, studies, and reports have documented the widespread discrimination experienced by LGBT individuals and their families in the health system.[11] Sources such as the National Academy of Medicine[12] (formerly the Institute of Medicine), the Centers for Disease Control and Prevention, and Healthy People 2020 report that discrimination threatens the health of the LGBT population in ways that include:[13]

- Increasing risk factors for poor physical and mental health such as smoking and other substance use;[14]
- Driving high rates of HIV among transgender women and gay and bisexual men;[15]
- Barring access to appropriate health insurance coverage, especially for transgender people;[16]
- Obstructing access to preventive screenings;[17] and
- Putting LGBT people at risk of poor treatment from health care providers who are unprepared to meet the needs of LGBT patients.[18]

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[7] DANIELLE GARRETT ET AL., TURNING TO FAIRNESS: INSURANCE DISCRIMINATION TODAY AND THE AFFORDABLE CARE ACT, NAT'L WOMEN'S LAW CTR. 3 (March 2012), *available at* http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf. *See also* BRIGETTE COURTOT & JULIA KAYE, STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION, NAT'L WOMEN'S LAW CTR., (Oct. 2009), *available at* http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf.

[8] N. Maserjian et al., *Disparities in Physician's Interpretations of Heart Disease Symptoms by Patient Gender: Results of a Video Vignette Factorial Experiment*, 18 J. OF WOMEN'S HEALTH 1661 (2009).

[9] Richard J. McMurray et al., *Gender Disparities in Clinical Decision Making*, 266 JAMA 559 (1991).

[10] *See* NAT'L WOMEN'S LAW CTR., HEALTH CARE REFUSALS HARM PATIENTS: THE THREAT TO REPRODUCTIVE HEALTH CARE (Jan. 2013), http://www.nwlc.org/resource/health-care-refusals-harm-patients-threat-reproductivehealth-care.

[11] Liza Baskin, *LGBT patients find little patience in health care*, DAILY RX (July 11, 2012), http://www.dailyrx.com/lgbt-friendly-health-care-remains-out-reach-most.

[12] *See, e.g.,* Inst. of Medicine, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING (2011), *available at* http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx.

[13] U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2020: LGBT HEALTH TOPIC AREA (2015), *available at* http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health.

[14] *Lesbian, Gay, Bisexual, and Transgender Health,* CTR. FOR DISEASE CONTROL AND PREVENTION, *available at* http://www.cdc.gov/lgbthealth/about.htm (last updated Mar. 25, 2014).

[15] Office of Nat'l AIDS Policy, "National HIV/AIDS Strategy," (2015), *available at* https://www.whitehouse.gov/administration/eop/onap/nhas.

[16] Laura E. Durso, et. al., *LGBT Communities and the Affordable Care Act: Findings from a National Survey* (Oct. 10, 2013), http://www.americanprogress.org/wp-content/uploads/2013/10/LGBT-ACAsurvey-brief1.pdf.

[17] SARAH M. PEITZMEIER, PROMOTING CERVICAL CANCER SCREENING AMONG LESBIANS AND BISEXUAL WOMEN, FENWAY INST. (2013), *available at* http://www.lgbthealtheducation.org/wp-content/uploads/Cahill_PolicyFocus_cervicalcancer_web.pdf.

The prohibition on sex discrimination in Section 1557 was intended to remedy these and other harms. A religious exemption would undermine this goal by leaving numerous women and LGBT individuals with no protections from discrimination. Strong regulations implementing Section 1557, paired with robust enforcement—not exemptions that would lead to the denial of healthcare—are necessary to ensure that all women and LGBT individuals can access quality, affordable health care.

Furthermore, because a religious exemption would harm third parties, it would likely violate the Establishment Clause.[19] Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[20] its ability to provide religious exemptions is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[21] For example, in *Texas Monthly, Inc. v. Bullock,*[22] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." The denial of access to medical care is surely a significant harm, making such an exemption unlikely to survive an Establishment Clause challenge.

Neither the Free Exercise Clause Nor RFRA Require a Religious Exemption

We anticipate that some commenters may claim that the Free Exercise Clause and RFRA require a religious exemption. These arguments are misplaced. Religious freedom does not mean the right use religion as a means to deny others access to healthcare based on their sex.

In accordance with the Free Exercise Clause, religious beliefs do not excuse compliance with valid and neutral laws of general applicability.[23] Courts deem laws neutral unless they "target religious beliefs" or "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation."[24] The provisions barring sex discrimination do not single out religious organizations for disfavored treatment, nor do they contain a masked hostility towards religion. Rather, the nondiscrimination provisions apply to all covered entities equally. Accordingly, no accommodation is necessary under the Free Exercise Clause.

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[18] LAMDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY OF DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE WITH HIV (2010), *available at* http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

[19] *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)(stating that a religious accommodation "must be measured so that it does not override other significant interests."); *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985).

[20] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

[21] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

[22] 480 U.S. 1, 18 n. 8 (1989).

[23] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

[24] *Lukumi*, 508 U.S. at 533.

RFRA provides a different standard than the Free Exercise Clause: it prohibits the government from "substantially burden[ing] a person's exercise of religion" unless the government can demonstrate that the burden is justified by a compelling government interest and is the least restrictive means of furthering that interest.[25] RFRA is not triggered when there is just "the slightest obstacle to religious exercise."[26] Indeed, it is a difficult threshold to cross.

Even if we were to assume that an individual's religion would be substantially burdened by this rule, the government clearly has a compelling interest in prohibiting sex discrimination.[27] Indeed, as explained above, the bar on religious discrimination serves to protect women and LGBT people from significant harm caused by sex discrimination in the healthcare arena.

The proposed rule is also narrowly tailored. A religious exemption, in any form, could lead to the outright denial of services critical to women's health and to the health of LGBT individuals. It would put patients' health and well-being in jeopardy, and could cause catastrophic harm to those critically in need of care.

Accordingly, neither the Free Exercise Clause nor RFRA justify the addition of a religious exemption.

Conclusion

Incorporating a religious exemption into this rule is not authorized by Section 1557 nor required by the First Amendment or RFRA. Furthermore, a religious exemption would cause great harm to others, making its incorporation bad public policy and a potential Establishment Clause violation. Thank you for your consideration.

Please feel free to contact me with any questions you may have about these comments (202-466-3234 or garrett@au.org). Your attention to this matter is greatly appreciated.

Sincerely,

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Legislative Director

[25] 42 U.S.C. Sec. 2000bb-1(b).

[26] *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

[27] *See e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the government's interest in eliminating racial discrimination in education outweighed any burdens on religious beliefs imposed by Treasury Department regulations); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (holding that plaintiff could not refuse to comply with the Civil Rights Act of 1964 based on his religious beliefs); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (holding plaintiffs cannot compensate women less than men based on the belief that "the Bible clearly teaching that the husband is the head of the house, head of the wife, head of the family"); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right to fire teacher for becoming pregnant outside of marriage).