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JON BRUNING
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May 11, 2012

Via www.regulations.gov

The Honorable Kathleen Sebelius
Secretary, U.S. Department of Health and Human Services
Attention: CMS-9968-ANPRM
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Advance Notice of Proposed Rulemaking Regarding Certain Preventive Services Under the Affordable Care Act (file code: CMS-9968-ANPRM)

Dear Secretary Sebelius:

On behalf of the people of the State of Nebraska and in my capacity as Attorney General of Nebraska, I appreciate the opportunity to comment on the Advance Notice of Proposed Rulemaking Regarding Certain Preventive Services Under the Affordable Care Act ("ANPRM") published by the Department of Health and Human Services (the "Government") in the Federal Register on March 21, 2012. Specifically, I believe the Government's latest attempt to adopt a religious employer exemption continues to fall short of passing Constitutional muster.

The issuance of this ANPRM is indicative of the Government's recognition that its original religious employer exemption language was wholly inadequate to protect religious organizations from being unconstitutionally coerced into taking action in contravention of their beliefs. Indeed, since the Government issued its Final Rule on February 15th (the "Final Rule"), which imposed the contraceptive coverage mandate, a veritable flurry of press releases and public statements have been issued, ostensibly with the goal of assuring concerned stakeholders that the Government is diligently working toward a "compromise" which would have the effect of "accommodating" religious organizations objecting to the prospect of being required to subsidize or facilitate activity which violates their beliefs.

None of the Government's discussion of compromises and accommodations account for the fact that the coverage mandate *already exists* as an operational regulation, having been issued on February 15th as a Final Rule. Only by the grace of the Government's own self-imposed "temporary enforcement safe harbor" (the very existence of which suggests the Government's

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lack of confidence in the validity of its own Final Rule) are affected religious organizations granted a tenuous and uncertain reprieve from the Final Rule's coercion. Even then, such a reprieve would only be until the fixed date of August 1, 2013. From a regulatory standpoint, however, the unilateral declaration of an enforcement safe harbor carries no legal weight; religious organizations excluded from the Government's too-narrow exemption are subject to the contraceptive coverage mandate *now*.

Notwithstanding my preceding assessment of the Government's confusing, inconsistent, and fluid approach to-date to the ultimate adoption of a satisfactory religious employer exemption, I regard the March 21st ANPRM as a positive acknowledgement by the Government that religious organizations must be shielded from the Rule's coercive effects. Indeed, the ANPRM itself states that it is the Government's aim **"to protect such religious organizations from having to contract, arrange, or pay for contraceptive coverage."** I share that goal and, accordingly, am pleased to offer what I believe is the only constitutionally acceptable religious employer exemption the Government could adopt.

As a caveat, however, I note that the ANPRM does not appear to carry any legal significance, nor does it represent the formal commencement of a rulemaking process. Rather, it is merely evidence of the information gathering process of an agency which may or may not initiate future rulemaking to correct the flaws in its currently promulgated Final Rule.

Quite simply, the Government should discard the Final Rule in its entirety. Its current flawed and unconstitutional form is irreparable. If desired, the Government should reintroduce the substance of the regulation with an exemption for any religious organization as *already defined in statute*. This includes, for example, the "church plan" definition provided for under ERISA, which sets forth a broad exemption for a diverse array of religious employers. Such broad exemptions have been in place for decades. Their legitimacy and usefulness in shielding religious organizations from what would otherwise be unconstitutional requirements upon them is uncontested. Indeed, it is remarkable that the Government felt compelled to re-invent the concept of a religious employer exemption for the purposes of this Final Rule when it already had established, practical, and *constitutional* alternatives provided for in existing statutes.

None of the various other arrangements discussed or mentioned in the ANPRM would be acceptable or consistent with the Government's explicitly stated aim of "protect[ing] religious organizations from having to contract, arrange, or pay for contraceptive coverage." Any arrangement that does not categorically exempt religious employers from the unconstitutional requirements under the Final Rule would inevitably result in such employers having to refer to, administer, facilitate, or otherwise involve themselves with the provision of products and services in violation of their religious beliefs.

I urge the Government to utilize the statutory means at its disposal and withdraw this unacceptable and unconstitutional Final Rule. As you are undoubtedly aware, Nebraska, along with several other states and private Plaintiffs, has separately initiated a lawsuit in Federal District Court to enjoin the enforcement of the Rule due to its unconstitutional coercion of religious belief. The basis upon which we filed that action is undiminished by the Government's

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varied avenues to a “compromise.” No exemption, short of one which *totally* excludes all religious organizations from the Rule’s requirements, such as that provided for under ERISA, will provide an adequate accommodation for religious organizations and the free exercise of their beliefs.

Again, I appreciate the opportunity to comment upon the ANPRM. My hope is that the Government will soon abide by the commands of the First Amendment to the Constitution and discard its deeply flawed Final Rule as currently written. I am optimistic that the Government will soon take the necessary steps to eliminate the unconstitutional harm the Final Rule poses. However, until I am assured that the Government’s Final Rule will not violate the free exercise of religious beliefs by thousands of individuals and organizations in Nebraska and across the United States, I stand ready to fight the unconstitutional coercion of those beliefs with every means at my disposal.

Thank you for your consideration.

Respectfully,

A handwritten signature in blue ink, appearing to read "Jon Bruning", with a large, stylized flourish extending to the right.

JON BRUNING

Attorney General of Nebraska