INDEPENDENCE
LAW CENTER

Advancing Self-Evident Truths

September 1, 2023

Via Electronic Mail

Ms. Katie Merritt, Director of Policy and Planning
Office of the Insurance Commissioner
1326 Strawberry Square
Harrisburg, PA 17120
RA-IN-PolicyOffice@pa.gov

Re: Commonwealth Essential Health Benefits Benchmark Plan – Public Comment Period; Notice 2023-14

Dear Ms. Merritt,

The Independence Law Center files this comment to caution the Department not to include as *essential health benefits* in the *benchmark plans* coverage for services that would result in conscience violations for countless Pennsylvanians – namely abortion, abortifacients, contraception, or gender transition treatments.

Our firm represented Conestoga Wood Specialties in its challenge to HHS's contraception mandate that arose out of the Affordable Care Act. This case went to the United States Supreme Court, where it was consolidated with Hobby Lobby's nearly identical challenge. That case resulted in a win for religious liberty and rights of conscience with regards to mandating contraception as part of an employer healthcare plan, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and that journey provides insights to the inclusion of certain benefits coverage the Department may seek to implement.

The story of Conestoga Wood Specialties and its owners from the Supreme Court opinion helps to illustrate this point.

> Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it."

> Fifty years ago, Norman Hahn started a woodworking business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. . . .
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> The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." To that end, the company's mission . . . is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." The company's "Vision and Values Statements" affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage."
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> As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.
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> The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception commonly called "morning after" pills and two types of intrauterine devices.
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> In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs."

Id. at 700-02 (internal citations omitted).

In siding with the Hahns and Conestoga Wood, the Court explained as follows:

> [W]e must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners

> comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price.

Id. at 691.

The principles at play apply equally to religious objections that some Pennsylvania business owners have to funding any form of contraception. While some in social media circles demanded that business owners *keep out of their bedrooms* – an obviously compelling demand – the mandate did the opposite by requiring business owners to fund those activities that we can all agree should be kept private.

It is worth grappling with the place of religious liberty in society. Within the past decades, we have seen many view the value of religious liberty going no further than whether or not they agree with the religious principle being raised. But that is not the value of religious liberty to society any more than freedom of speech depends on whether we agree with the proposition being raised by the speaker. Instead, religious freedom is fundamental not only because of its prominent place in both our U.S. and Pennsylvania constitutions, but because if the government can force us to violate our most deeply held convictions, there is no firewall protecting any of our other fundamental rights.

Moreover, we must recognize that a desire to bring others into conformity with what we may believe to be the best government policy is often impossible when it comes to religious liberty. These are the issues that those of religious convictions cannot compromise. Consider our Commonwealth's founder, William Penn, who ran afoul of British law by refusing to take off his hat in the presence of a judge due to his Quaker religious convictions concerning the equality of mankind. That is not to say that religious observers should unnecessarily ignore laws. But in continuing the example of Penn, he chose, despite custom, to wear no hat at all when going to court to avoid the issue. But one of his opponents put a hat on his head at the moment that the judge approached the bench. Ultimately, Penn was jailed because of his beliefs.

Early colonial history was full of examples of a callousness to religious liberty that characterized the old world. Quakers and Mennonites in many colonies could not defend themselves in court, because of Quaker and Mennonite religious convictions against taking oaths. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1467 (May 1990). Over time, we recognized ways to accommodate those beliefs. Likewise, Quakers and Mennonites were not able to take up arms and were punished for their conscientious objection to warfare. *Id*. at 1468. But when the Continental Congress asked the colonists to take up arms, they explicitly asked those with conscientious objections to serve their country in ways they could, not in ways they could not. *See Resolution of*

July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo, reprint 1968).

Perhaps most memorably, forced church taxes in many colonies violated the religious beliefs of religious objectors. It was in that context that James Madison, who drafted the Bill of Rights, wrote the *Memorial and Remonstrance against Religious Assessments*. He explained what is often misunderstood by modern observers of religious liberty. Modern observers often think that those seeking religious accommodation are simply trying to game the system and be a law unto themselves. Madison, instead, explains that far from that, religious observers have an allegiance to two sovereigns and should not lightly be asked by the civil magistrate to violate the homage that they owe to the sovereign of the universe.[1]

Applying this to the Department's consideration of what *essential health benefits* should be added to *benchmark plans*, please understand that there are no exceptions that are built into or even possible under the structure. Therefore, there is no way to provide religious accommodations should the Department mandate benefits that will create religious liberty and religious conscience dilemmas for countless Pennsylvania employers. The only way to avoid the religious liberty dilemma is to avoid the inclusion of certain *essential health benefits*, namely abortion, abortifacients, contraception, or gender transition treatments. Otherwise, the requirements will force countless employers in both the for-profit and nonprofit settings to choose between violating their conscience and maintaining their place in the marketplace or non-profit world. When government tries to force its citizens to violate their most deeply held convictions, it moves that society from one characterized by freedom to one characterized by oppression.

When HHS first mandated contraception to be covered as part of employer healthcare plans, our firm was surprised both because we knew it would be impossible for many religious employers to navigate, and because from a policy

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[1] "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. . . . And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign."

Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785, ¶ 1.

standpoint it was completely avoidable because of all the other ways that contraception could be provided.

We fear that gender transition treatments will be next, as the federal government has been trying to do for years under § 1557 of the Affordable Care Act. But to be clear, it is one thing to refuse treatments because of someone's sex, sexual orientation, gender identity, or any other class. For that reason, a person should be able to get a double mastectomy to fight cancer regardless of class status. That obviously is a priority of the Department. It is quite another thing to mandate treatments for another purpose, such as removing healthy breasts in order to make a person present in a more masculine manner. That not only is a conscience issue for medical providers, but as was the case with contraception for the Hahn Family and Conestoga Wood in the *Hobby Lobby* case, it is a massive religious liberty issue for religious employers in Pennsylvania.

Finally, since many of these issues track recent debates concerning § 1557 on the federal lever, we are attaching the Ethics and Public Policy Center Scholars' Comment Opposing Proposed Rule "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023," RIN 0938-AU65, January 27, 2022. Of particular note are the dangers and harms associated with gender transition treatments. This is a highly dynamic issue within the medical world, with changing standards in Europe and in various states in recognition that these issues are much more complex than previously believed – often with significant negative outcomes both physically and emotionally.

In conclusion, we respectfully request that the Department not include abortion, abortifacients, contraception, or gender transition treatments among *essential health benefits*.

Respectfully submitted,

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Chief Counsel