



April 8, 2013

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue SW  
Washington, DC 20201

*Submitted electronically via [www.regulations.gov](http://www.regulations.gov)*

Re: Coverage of Certain Preventive Services Under the Affordable Care Act,  
CMS-9968-P, Docket ID: CMS-2012-0031-63161

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The American Civil Liberties Union (ACLU) submits the following in response to the Notice of Proposed Rulemaking (NPRM) on “Coverage of Certain Preventive Services Under the Affordable Care Act,” published in the Federal Register on February 6, 2013. The proposed rules would “amend the authorization to exempt group health plans established or maintained by certain religious employers with respect to the requirement to cover contraceptive services” and “establish accommodations for group health plans established or maintained by eligible organizations.” Because of the ACLU’s profound respect for and demonstrated commitment to both religious liberty and reproductive rights, the ACLU is particularly well-positioned to comment on the proposed rules.

The ACLU is a nationwide, nonpartisan public interest organization with more than a half-million members, countless additional activists and supporters, and 53 affiliates across the country, dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation’s civil rights laws. The ACLU has a long, proud history of vigorously defending religious liberty and reproductive freedom. For nearly a century, the ACLU has fought ardently for the rights of free exercise and religious liberty.<sup>1</sup> At the same time, we have participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care.

On August 1, 2011, the Department of Health and Human Services (HHS) issued interim final regulations implementing the Affordable Care Act’s (ACA) Women’s Health Amendment. The regulations provide that the women’s preventive health services to be covered in all new plans without

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<sup>1</sup> See, e.g., *ACLU Defense of Religious Practice and Expression*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/aclu-defense-religious-practice-and-expression> (last visited March 13, 2013).

cost-sharing are those delineated in guidelines adopted by the Health Resources and Services Administration (HRSA). Those guidelines include contraception and sterilization.<sup>2</sup> The regulation also included an exemption from the contraceptive coverage requirement for a narrow category of institutions, such as houses of worship.<sup>3</sup>

On February 10, 2012, President Obama announced that in addition to the narrow exemption, HHS would promulgate rules extending an accommodation to certain non-profit organizations with religious objections to contraception whereby the organization would not be required to contribute to insurance coverage for contraception, but “women will still have access to free preventive care that includes contraceptive services—no matter where they work.”<sup>4</sup> On March 15, 2012, HHS, along with the Departments of Treasury and Labor, issued an Advance Notice of Proposed Rulemaking asking for comment on how to craft this proposed accommodation.<sup>5</sup> The ACLU submitted comments to the agencies on June 19, 2012.<sup>6</sup>

On February 6, 2013, the Departments published proposed rules laying out the accommodation for non-profit organizations with religious objections to contraception, and modifying the exemption. We submit these comments to explain why the simple, narrow exemption for institutions such as houses of worship in the final rule issued on February 15, 2012,<sup>7</sup> with no accommodation for other non-profit organizations, does not violate religious liberty principles, and no changes are necessary as a legal or policy matter.

However, to the extent the Departments now seek to enact an accommodation for certain non-profit institutions, it is imperative that the proposed accommodation function such that employees at the affected institutions are ensured seamless coverage. Any other result would be an unacceptable imposition of religious beliefs on others, as well as a blow to gender equality and public health. Because of the unique circumstances surrounding this policy, such an accommodation may be possible if diligently implemented and enforced. However, any accommodation enacted here should not be seen as ready precedent elsewhere. We thank the Departments for their commitment to both the

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<sup>2</sup> See HEALTH RES. AND SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., WOMEN’S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES, <http://www.hrsa.gov/womensguidelines/>. To implement the Affordable Care Act’s preventive services provision, the non-partisan Institute of Medicine (IOM) “review[ed] what preventive services are necessary for women’s health and well-being” and developed recommendations for comprehensive guidelines. After an extensive science-based process, the IOM published *Clinical Preventive Services for Women: Closing the Gaps*, a report of its analysis and recommendations, on July 19, 2011. Among other things, the report recommended that the HRSA guidelines include “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.” INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109-10 (2011) [hereinafter CLOSING THE GAPS]. The HRSA guidelines reflect those recommendations.

<sup>3</sup> The rule provided a narrow exemption for institutions that meet the following four criteria: (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130). A final rule maintaining this exemption was adopted on February 15, 2012.

<sup>4</sup> President Barack Obama, Remarks on Preventive Care at James S. Brady Press Briefing Room (Feb. 10, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>).

<sup>5</sup> Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) [hereinafter ANPRM].

<sup>6</sup> See Comments from the ACLU on Certain Preventive Services Under the Affordable Care Act to Ctrs. for Medicare & Medicaid Servs. Dep’t of Health and Human Servs. (June 19, 2012) available at [http://www.aclu.org/files/assets/aclu\\_comments\\_cms-9968-anprm\\_6-19-12.pdf](http://www.aclu.org/files/assets/aclu_comments_cms-9968-anprm_6-19-12.pdf).

<sup>7</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727-29 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130) [hereinafter Final Rule].

mentioned principles: ensuring seamless coverage and affirming that the accommodation should not be considered precedent.<sup>8</sup>

## I. The original rule is consistent with religious liberty protections

Since the contraceptive coverage rule was first announced, opponents of contraception have contended that the rule—which ensures affordable access to birth control for millions of women—threatens religious liberty, and have urged the Departments to rescind it.<sup>9</sup> These arguments are specious.

Requiring coverage of contraception in insurance plans does not infringe on religious liberty. The federal rule—like the contraceptive coverage laws that have come before it and a host of generally applicable anti-discrimination and labor laws across the country—is unremarkable from a religious freedom perspective.

### A. Putting this into context: Historical objections in the name of religion

Opposition to neutral laws in the name of religion is not unique to contraception. Similar claims about infringements on religious liberty have arisen in other contexts to resist efforts to achieve equality. For example, individuals and institutions have claimed religious objections to integration as well as equal pay laws:

In 1964, three African-American residents of South Carolina brought a suit against Piggie Park restaurants and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964’s public accommodations provision violated his religious freedom “since his religious beliefs compel[ed] him to oppose any integration of the races whatever.”<sup>10</sup>

In 1976, Roanoke Valley Christian Schools added a “head of household” supplement to their teachers’ salaries—but only to heads of household as determined by their interpretation of Scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, “[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”<sup>11</sup> When sued under the Equal Pay Act, Roanoke

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<sup>8</sup> See CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., FACT SHEET: WOMEN’S PREVENTIVE SERVICES COVERAGE AND RELIGIOUS ORGANIZATIONS, available at <http://ccio.cms.gov/resources/factsheets/womens-preven-02012013.html> (stating that coverage should be seamless); ANPRM, *supra* note 5, at 16,502 (stating that this should not be precedent for other issues).

<sup>9</sup> See, e.g., Comments from Office of the Gen. Counsel, United States Conference of Catholic Bishops on Notice of Proposed Rulemaking on Preventive Services to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health and Human Servs. at 4 (Mar. 20, 2013), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf> [hereinafter USCCB NPRM Comments]; Comments from Office of the Gen. Counsel, United States Conference of Catholic Bishops on Advance Notice of Proposed Rulemaking on Preventive Services to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health and Human Servs. at 3 (May 15, 2012), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf> [hereinafter USCCB ANPRM Comments]; Comments from Legal Counsel, Alliance Def. Fund on Advance Notice of Proposed Rule Making to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health and Human Servs. at 24 (May 30, 2012), available at <http://www.adfmedia.org/files/CardinalNewmanHHScomments.pdf>.

<sup>10</sup> *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

<sup>11</sup> *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

Valley claimed a right to an exemption from equal pay laws because its “head-of-household practice was based on a sincerely-held belief derived from the Bible.”<sup>12</sup>

In the 1980s, Bob Jones University, a religiously affiliated college in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The “sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage,” and school policy prohibited interracial relationships or advocacy thereof. Bob Jones’s lesser known co-plaintiff, Goldsboro Christian Schools, even opposed integration of the classroom. According to their interpretation of the Bible, “[c]ultural or biological mixing of the races is regarded as a violation of God’s command.”<sup>13</sup>

In each of these cases institutions tried to opt out of laws advancing equality, and each time their claims were rejected. Just as it was not a violation of religious freedom to require segregated institutions to integrate,<sup>14</sup> or schools to pay their employees equally despite their gender,<sup>15</sup> in the face of religious objections, it is not a violation of religious freedom to require that women have access to contraceptive coverage.

## B. The contraceptive coverage rule does not violate the Religious Freedom Restoration Act

Opponents of contraception have argued that the contraceptive coverage rule violates the Religious Freedom Restoration Act (RFRA). It does not for two independent reasons: (1) compliance with a law providing an insurance plan to workers that includes contraception does not impose a substantial burden on the employer’s religion; and (2) even if it did, the law furthers a compelling interest in promoting gender equality, reproductive autonomy, and religious liberty.

### 1. *The rule does not impose a substantial burden*

Under RFRA, a “substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]’”<sup>16</sup> But the fact that government action “is offensive to [an individual’s] religious sensibilities” does not automatically render the action a substantial burden.<sup>17</sup> Such is the case here.

The connection between the contraceptive coverage rule and any impact on religious exercise is simply too attenuated to rise to the level of a “substantial burden.” The law does not require anyone to use contraception themselves, to physically provide contraception to employees, or to endorse the use of contraception. The contraceptive coverage rule creates no more infringement on an employer’s religious exercise than many other actions that organizations readily undertake, such as paying an employee’s salary, which that employee could then use to purchase contraception. Furthermore,

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<sup>12</sup> *Id.* at 1397.

<sup>13</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983).

<sup>14</sup> *Piggie Park Enters., Inc.*, 256 F. Supp. at 945.

<sup>15</sup> *Shenandoah Baptist Church*, 899 F.2d at 1389 (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be “heads of households” could be held liable under equal pay laws); see also *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the “heads of households” violated Title VII).

<sup>16</sup> *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); accord *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (explaining that since RFRA does not create a new test to determine what constitutes a “substantial burden,” courts look to pre-*Smith* free exercise cases for that analysis).

<sup>17</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

RFRA does not permit employers to impose their religious beliefs on their employees. As one court noted in upholding the contraceptive coverage rule, RFRA “is a shield, not a sword.”<sup>18</sup> The decision about whether or not to use contraception belongs to the individual.<sup>19</sup>

Courts have routinely rejected claims for exemptions from paying fees that eventually go toward services that conflict with religious doctrine. Indeed, the Eighth Circuit has held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury.<sup>20</sup> Furthermore, in *Goehring v. Brophy*, public university students objected to paying a registration fee on the ground that the fee was used to subsidize the school’s health insurance program, which covered abortion care.<sup>21</sup> The court rejected the plaintiffs’ RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs’ religious beliefs, but at most placed a “minimal limitation” on their free exercise rights.<sup>22</sup> The court noted that the plaintiffs are not “required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services.”<sup>23</sup>

Moreover, the D.C. Circuit recently upheld the Affordable Care Act’s requirement that individuals have health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed the district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs’ religious beliefs.<sup>24</sup> The district court held that inconsequential burdens on religious practice, like the requirement to have health insurance, “do[] not rise to the level of a substantial burden.”<sup>25</sup>

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school’s religious practice was not substantially burdened by compliance with the Fair Labor Standards Act (FLSA).<sup>26</sup> The school paid married male, but not married female, teachers a “salary supplement” based on the school’s religious belief that the husband is the head of the household. This “head of the household” supplement resulted in a wage disparity between male and female teachers, and accordingly, a violation of the FLSA. The Fourth Circuit rejected the school’s claim that compliance with FLSA burdened its religious beliefs, holding that compliance with the FLSA imposed, “at most, a limited burden” on the school’s free exercise rights.<sup>27</sup> “The fact that [the school]

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<sup>18</sup> O’Brien v. Dep’t of Health & Human Servs., 2012 WL 4481208, at \*6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012).

<sup>19</sup> Senator Barbara Mikulski, the author of the Women’s Health Amendment, clearly explained that the provision is intended to ensure that decisions over which health care services to use rest with the individual: “[W]e do not mandate that you have the service; we mandate that you have *access* to the service. The decision as to whether you should get it will be a private one, unique to you.” 155 CONG. REC. S12,265, S12,277 (daily ed. Dec 3, 2009) (statement of Sen. Mikulski) (emphasis added).

<sup>20</sup> *Tarsney v. O’Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women).

<sup>21</sup> *Goehring v. Brophy*, 94 F.3d 1294, 1297 (9th Cir. 1996).

<sup>22</sup> *Id.* at 1300.

<sup>23</sup> *Id.*

<sup>24</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), affirming *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), *cert. denied*, 133 S. Ct. 63 (2012).

<sup>25</sup> *Mead*, 766 F. Supp. 2d at 42. The court district court further noted that the plaintiffs “routinely contribute to other forms of insurance” via their taxes such as Medicaid. Those programs cover contraceptive services and “present the same conflict with their [religious] beliefs.” *Id.* But the connection between these programs and plaintiffs’ religious beliefs is too attenuated to amount to a substantial burden.

<sup>26</sup> 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990).

<sup>27</sup> *Id.* at 1398.

must incur increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim.”<sup>28</sup>

Here, just as in the above-mentioned cases, a requirement that employers provide comprehensive, equal benefits to their female employees is not the sort of burden that triggers religious liberty protections.

The rule only requires employers to provide a comprehensive health insurance plan. While that health insurance plan might be used by a third party to obtain health care that is inconsistent with the employer’s faith, such indirect financial support of a practice from which one wishes to abstain according to religious principles does not constitute a substantial burden on religious exercise. As the New York Court of Appeals explained in upholding that state’s contraceptive equity law, there is no “absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings.”<sup>29</sup> What is more, any entity covered by this provision remains free to relate its teachings about contraception to its adherents, its employees, and the general public, and attempt to persuade them not to use birth control.

The argument that the Affordable Care Act cannot require insurance coverage of contraception because some oppose birth control on religious grounds knows no limit. In a “cosmopolitan nation made up of people of almost every conceivable religious preference,”<sup>30</sup> innumerable medical procedures will be disfavored by adherents of one religion or another—from blood transfusions to vaccinations. Indeed, legislation that would allow any insurer or employer to refuse to cover *any* health service required by the Affordable Care Act to which they object continues to be promoted by the same groups opposing the contraceptive coverage requirement.<sup>31</sup> Applying this approach to the ACA would undermine one of its most fundamental purposes: ensuring that all health insurance plans cover basic health services.

Offering or contributing to insurance coverage that provides numerous health services, including one to which you object, simply is not a substantial burden cognizable under RFRA.<sup>32</sup> Any claim to the contrary could turn RFRA into a blanket religious exemption that would threaten a number of health,

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<sup>28</sup> *Id.*; see also *Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot “possibly have any direct impact on appellants’ freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers.”), *aff’d*, 471 U.S. 290, 303 (1985).

<sup>29</sup> *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006) (rejecting a challenge to New York’s contraceptive equity law). See also *U.S. Dep’t of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff’d sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

<sup>30</sup> *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

<sup>31</sup> The Respect for Rights of Conscience Act, H.R. 1179/S. 1467, 112th Cong. (2011), was introduced in the 112<sup>th</sup> Congress. It was voted on and defeated in the Senate as the Blunt Amendment. See 158 CONG. REC. S1,162, S1,172 (daily ed. Mar. 1, 2012). The USCCB endorsed this legislation in its response to the contraceptive coverage rule and continues to promote it. See Press Release, USCCB, HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights (Aug. 1, 2011), <http://www.usccb.org/news/2011/11-154.cfm>; see also Press Release, USCCB, Senate Vote to Set Aside Conscience Act Marks Chance to Build Bipartisan Support, Seek Judicial Remedies for Religious Freedom (Mar. 1, 2012), <http://www.usccb.org/news/2012/12-035.cfm>. Similar legislation has been introduced in the 113<sup>th</sup> Congress, and has also been endorsed by the USCCB. See Letter from Archbishop William Lori, Chairman, Ad Hoc Committee for Religious Liberty, USCCB, to Members of the U.S. House of Representatives, Feb. 15, 2013 (available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf>) (endorsing the Health Care Conscience Rights Act); USCCB NPRM Comments *supra* note 9 at 3 (endorsing the Health Care Conscience Rights Act).

<sup>32</sup> See *Goehring v. Brophy*, 94 F.3d 1294, 1297, 1300 (9th Cir. 1996), *overruled on other grounds by City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997) (rejecting students’ objections to a university registration fee that was used to subsidize the school’s health program which covered abortion care, reasoning that the payments did not impose a substantial burden on the plaintiffs’ religious exercise because “the plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services.”).

welfare, and civil rights protections. Thus, any RFRA argument fails at the threshold. Even if it did not, however, the contraceptive coverage requirement survives RFRA review intact.

## 2. *The contraceptive coverage rule serves a compelling government interest*

Even if the contraceptive coverage rule imposed a substantial burden on religion—which it does not—the rule still survives RFRA review. That is because it furthers three fundamental rights: gender equality, reproductive autonomy, and religious liberty.

### a. Gender Equality

The ACA was designed to redress gender discrimination in health benefits. As Senator Barbara Mikulski, author of the provision on women’s preventive services, noted: “Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . .”<sup>33</sup>

Omitting contraceptive coverage from a comprehensive benefit package is gender discrimination; it means men receive comprehensive health care coverage while women do not. Prescription contraceptives are a form of health care available only to women. Moreover, the consequences of the failure to be able to access and use contraception fall primarily on women. The Equal Employment Opportunity Commission pointed this out over a decade ago. It explained that prohibitions on sex discrimination require employers to include contraceptive coverage when they offer coverage for comparable drugs and devices.<sup>34</sup> As one court explained, “carv[ing] out benefits uniquely designed for women” discriminates against them.<sup>35</sup>

In addition, without comprehensive coverage, women of childbearing age routinely pay more than men in health care costs. These costs are not insignificant, are a true barrier to women’s access to effective birth control, and the financial barriers are aggravated by the fact that women typically earn less than men. The cost of contraceptive methods can cause women to have gaps in their use, or to use less effective methods with lower upfront costs like condoms, as opposed to more effective long-acting reversible methods like the IUD.<sup>36</sup> The contraceptive coverage rule helps to eliminate those disparities and their negative consequences. Indeed, a recent study shows that no-cost contraception is likely to significantly decrease unintended pregnancy rates by making long-acting methods more accessible.<sup>37</sup>

What is more, access to affordable and effective contraception, and thus control of childbearing, plays an important role in facilitating women’s participation in all parts of society. When asked how birth control impacts their lives, women report that it has allowed them “to support [themselves]

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<sup>33</sup> 155 CONG. REC. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

<sup>34</sup> Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), *available at* <http://www.eeoc.gov/policy/docs/decision-contraception.html> (“Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.”); *see also* *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). *But see* *In re Union Pac. R.R. Emp’t Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

<sup>35</sup> *Erickson*, 141 F. Supp. 2d at 1271.

<sup>36</sup> Guttmacher Inst., Testimony before the Committee on Preventive Services for Women, Institute of Medicine 8 (Jan. 12, 2011), *available at* <http://www.guttmacher.org/pubs/CPSW-testimony.pdf> [hereinafter Guttmacher Testimony].

<sup>37</sup> Jeffrey F. Peipert, et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, *OBSTETRICS & GYNECOLOGY* (Dec. 2012).

financially,” “to stay in school,” and “to get or keep [a] job or have a career.”<sup>38</sup> Researchers have found that the availability of oral contraception has played a significant role in allowing women to attend college and choose post-graduate paths, including law, medicine, dentistry, and business administration.<sup>39</sup> Indeed, the ability to advance in the workplace through education or on-the-job training, because of the ability to control whether and when to have children, has narrowed the wage gap between men and women. One study shows that the birth control pill led to “roughly one-third of the total wage gains for women in their forties born in the mid-1940s to early 1950s.”<sup>40</sup> In short, contraception helps women take control over their lives; inconsistent access undermines that.

The U.S. Supreme Court said it well: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>41</sup> Ensuring insurance coverage for contraception promotes equality on multiple, intersecting fronts. These are exactly the kinds of interests that are considered “compelling.”<sup>42</sup>

## b. Reproductive Autonomy

At the core of the right to privacy is every person’s right to make the profound, life-altering decision of whether to become a parent. The “realm of personal liberty” includes a woman’s right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>43</sup> Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.<sup>44</sup> Protecting access to reproductive health services is a compelling interest.<sup>45</sup>

Virtually all women of reproductive age have used birth control at some point.<sup>46</sup> Denial of contraceptive coverage causes some women to forgo birth control or use cheaper and less effective methods of birth control, resulting in unintended pregnancies.<sup>47</sup> Further, cost-sharing requirements pose substantial barriers to accessing this important care.<sup>48</sup> The contraceptive coverage requirement promotes women’s interest in planning their families.<sup>49</sup>

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<sup>38</sup> Jennifer Frost & Laura Duberstein Lindberg, Guttmacher Inst., *Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics*, 87 *CONTRACEPTION* 465, 467 (Apr. 2013).

<sup>39</sup> See Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 *J. POL. ECON.*, 730, 764 (2002), available at [http://dash.harvard.edu/bitstream/handle/1/2624453/Goldin\\_PowerPill.pdf?sequence=4](http://dash.harvard.edu/bitstream/handle/1/2624453/Goldin_PowerPill.pdf?sequence=4).

<sup>40</sup> Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, *AM. ECON. J.: APPLIED ECON.* 26-27 (2012), available at [http://www-personal.umich.edu/~baileymj/Opt\\_In\\_Revolution.pdf](http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf).

<sup>41</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>42</sup> See, e.g., *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1369 (9th Cir. 1986) (quoting *E.E.O.C. v. Pac. Press Publ’g Assoc.*, 676 F.2d 1272, 1280 (9th Cir. 1982) (ending sex discrimination in employment is “equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions”); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (ensuring equal benefits to men and women promotes “interests of the highest order”); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (equality is a compelling government interest).

<sup>43</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>44</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>45</sup> *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (4th Cir. 1995); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994).

<sup>46</sup> Guttmacher Testimony, *supra* note 36, at 7.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> *CLOSING THE GAPS*, *supra* note 2, at 109.

<sup>49</sup> See, e.g., 155 *CONG. REC.* at S12,025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) (“These health care services include . . . family planning services.”); *id.* at S12,027 (statement of Sen. Gillibrand) (“With [the WHA], even more preventive screening will be covered, including . . . family planning.”); 155 *CONG. REC.* at S12,271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) (“Under [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as . . . family planning.”); *id.* at S12,274 (statement of Sen. Murray) (“We have to make sure we cover preventive services, and [the WHA] takes into account the unique needs of women. . . . Women will have improved access to . . . family planning services.”).



### c. Religious Liberty

Some religious doctrines oppose the use of contraception. Just as those religious tenets are entitled to respect, so too are contrary religious traditions, which hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. In our constitutional system, the government is supposed to be a neutral actor, allowing individuals to follow their own religious or moral consciences. Ensuring contraceptive coverage in health insurance plans does just that—it allows every woman to decide for herself whether and when to use birth control.

## **II. If the Departments adopt the proposed accommodation in this context, it should not be considered precedential**

As an initial matter, we reiterate that as both a legal and policy matter, no special rules are warranted here for additional non-profits. Provision of insurance coverage, by organizations that operate in the public sphere and employ individuals with diverse backgrounds, is a secular activity.<sup>50</sup>

We welcome and underscore the Departments' recognition that the definition of organizations eligible for the accommodation is not "intended to set a precedent for any other purpose."<sup>51</sup> We appreciate the Departments' position that the definition will not be used to interpret any other statute or regulation, and urge the Departments to repeat the statement in the actual rule.

Any accommodation must be viewed with caution; all the more so where, as here, there is no actual infringement on religious liberty. Accommodations should generally not be granted to institutions that operate in the public sphere—including non-profits that hold themselves out to be religious—for the following reasons:

- The majority of these institutions partner or contract with the government, or otherwise receive significant government financial support. It is a basic principle of our civil rights laws that federal funds should not go to institutions that discriminate against others. It is hard to overstate the importance of our national commitment to this principle.<sup>52</sup> Not only should we be free from discrimination by the government itself, but we should also have the assurance that our government is not providing federal dollars to institutions that discriminate. Bypassing equality-advancing laws, like the contraceptive coverage rule, is using religion to discriminate.
- The jobs at these institutions are generally open to all, and as such, these institutions should not be allowed to impose their beliefs on their employees.<sup>53</sup>

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<sup>50</sup> The same holds true for student health plans arranged by institutions of higher education.

<sup>51</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8468 (Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, 156) [hereinafter NPRM].

<sup>52</sup> See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-d-7 (2012) (banning discrimination on the basis of race where institutions receive federal financial assistance); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88 (2012) (prohibiting entities that receive federal financial assistance from discrimination against individuals on the basis of sex in education programs or activities); 42 U.S.C. § 18116 (2012) (banning discrimination on the basis of race, color, national origin, sex, age and disability where an entity receives federal financial assistance under the Affordable Care Act).

<sup>53</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006).

- These institutions open their doors and their services to the public. In doing so, they are—and should be—subject to laws prohibiting discrimination.

Excepting institutions that operate in the public sphere from laws designed to protect and promote the general welfare therefore necessarily privileges the beliefs of some at the expense of harm to others.<sup>54</sup> The set of organizations that qualify for an accommodation in this unique context should not be granted special rights elsewhere.

### **III. If the Departments adopt the accommodation, it must be implemented in a manner that provides women with seamless coverage**

The proposed rule states that to be eligible for the accommodation, an organization must meet all of the following criteria:

- (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.
- (2) The organization is organized and operates as a nonprofit entity.
- (3) The organization holds itself out as a religious organization.
- (4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services, for each plan year to which the accommodation is to apply, executed by a person authorized to make the certification on behalf of the organization, indicating that the organization satisfies the criteria in paragraphs (a)(1) through (3) of this section, and, specifying those contraceptive services for which the organization will not establish, maintain, administer, or fund coverage, and makes such certification available for examination upon request.<sup>55</sup>

In the following sections we outline the implementation and enforcement steps that the Departments should take to ensure that employees and dependents receive adequate coverage under this scheme. We maintain our position that the accommodation is unnecessary as both a legal and policy matter and that contraception should not be segregated from other health care.

#### **A. Eligibility criteria and implementation should facilitate transparency and ensure that women will get the coverage they are guaranteed**

First, the proposed rule indicates that employers seeking the accommodation may object to “some or all” contraceptive services. We urge the Departments to reconsider because bifurcation has the potential to create unnecessary administrative complexity. If the Departments do allow employers that object to some contraception to be eligible for the accommodation, we strongly urge the Departments to work with issuers to determine the most efficient way to provide this coverage so that women who are covered are able to access it with no additional barriers.

Second, we strongly support the Departments’ decision not to extend the accommodation to for-profit enterprises. For-profit businesses exist to make money through commercial activity. Their purpose is

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<sup>54</sup> The proposed accommodation is unique in that it may be possible for the government to mitigate much of the harm of the organizations’ refusal to provide coverage of contraception through proper implementation and enforcement of the requirement that insurers instead provide the coverage without disruption. There remains, of course, the dignitary harm in singling out health care that only women need for inferior treatment.

<sup>55</sup> NPRM, *supra* note 51, at 8473.

profit, not religious exercise. Accordingly, to the extent that exceptions are granted to organizations in other contexts, tax-exempt status is commonly dispositive.<sup>56</sup> Indeed, the Supreme Court has held that entering into commercial activity means accepting that your faith cannot be imposed on those in your employ.<sup>57</sup> We urge the Departments to stand by this decision and ensure that the accommodation is limited to non-profit institutions.

Third, an organization qualifies for the accommodation only if it “holds itself out” as religious. Whether an organization holds itself out as religious is a fact-dependent inquiry that requires an organization to consistently identify itself as religious to the public and to its current and prospective employees and students in multiple ways. This inquiry considers what the organization has done to publicly characterize itself, including how regularly and how often it characterizes itself this way, how conspicuously it has done so, and whether it has done so in its mission statement, publications, signage and other locations that the public commonly use to understand the nature of an organization. In other contexts, courts have looked at physical manifestations of religiosity (e.g., prominently displayed crosses, mezuzahs, biblical or religious writings), whether the religious character of the institution was evident to prospective and current employees or students (e.g., prominent religious statements in employee handbooks and course catalogues, on the institution’s website, in its external communications and public documents), and the prominent presence of religious statements in the organization’s mission statement and articles of incorporation.<sup>58</sup> The Departments should ensure that only organizations that consistently hold themselves out as religious may take advantage of the accommodation.

Last, the proposed rule provides that an eligible organization will self-certify that it meets the necessary criteria for the accommodation, and will maintain the self-certification in its records. The Departments suggest that this will allow for examination upon request “while avoiding any inquiry into the organization’s character, mission, or practices.”<sup>59</sup> Self-maintenance of records, however, would be an insufficient enforcement mechanism. Under such a scheme, the Departments would not be positioned to adequately ensure that employees are receiving the coverage they are guaranteed under the rule. Accordingly, we recommend that the Departments require an eligible organization seeking to take advantage of the accommodation to file the appropriate form with Departments to allow for appropriate oversight and enforcement.

This mechanism is fully in line with the Departments’ goals of ensuring coverage requirements are met without undue inquiries into an organization’s character. Asking an authorized organizational representative to sign a form that simply states the organization meets the eligibility definition and to file this form with the Departments in no way is an “inquiry into the organization’s character, mission, or practices.” Filing the form with the Departments merely facilitates routine enforcement and

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<sup>56</sup> The Departments rightly note that “[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations.” NPRM, *supra* note 51, at 8462. *See also, e.g.*, 26 U.S.C. § 3121w(3)(B) (2012); 29 U.S.C. § 1002(33)(C)(iii) (2012); HAW. REV. STAT. § 431:10A-116.7(a)(4) (2010).

<sup>57</sup> *See Lee*, 455 U.S. at 261 (“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.”).

<sup>58</sup> *See, e.g., World Vision v. Spencer*, 633 F.3d 723, 738-39 (9th Cir. 2011) (O’Scannlain, J. concurring); *Leboon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226-29 (3d Cir. 2007); *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1345 (D.C. Cir. 2002); *Carroll Coll., Inc. v. N.L.R.B.*, 558 F.3d 568, 572-74 (D.C. Cir. 2009).

<sup>59</sup> NPRM, *supra* note 51, at 8462.

transparency, and is in no way intrusive.<sup>60</sup> This is common practice when organizations seek an exemption for religious reasons.<sup>61</sup>

The Departments should maintain these records such that the public can review them and the agency, if it has good reason to question the certifications, can take action to verify them. Such verification is routine.<sup>62</sup> Nor would it lead to any impermissible inquiries into beliefs or practices.<sup>63</sup>

**B. Organizations should be required to provide their employees with notice that the organization is using the accommodation or exemption**

The Departments should ensure that employees are provided notice by the employer that the employer is opting to use the accommodation. Notice from the insurer to the employee, as the proposed rule contemplates, is necessary but not sufficient. Without notice from the employer organization utilizing the accommodation, employees may not timely know the status of their coverage.

Employers are regularly required to provide employees notice of their rights and opportunities under the law,<sup>64</sup> including when they withhold contraceptive coverage from their employees.<sup>65</sup> Indeed, this is

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<sup>60</sup> See PRESIDENTIAL ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, A NEW ERA OF PARTNERSHIPS: REPORT OF RECOMMENDATIONS TO THE PRESIDENT 137, n.52 (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf> (noting that the Supreme Court has held constitutional requirements for religiously affiliated institutions to submit written applications, signed assurances, and written reports, and that even government site visits, including unannounced monthly visits, of religiously affiliated institutions receiving government aid is constitutional). See also *Mitchell v. Helms*, 530 U.S. 793, 861-63 (2000) (O'Connor, J., concurring and controlling opinion); *Agostini v. Felton*, 521 U.S. 203, 234 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 742-43 (1976).

<sup>61</sup> See, e.g., DEP'T OF LABOR, OFFICE OF THE ASSISTANT SEC'Y FOR ADMIN. AND MGMT., RELIGIOUS FREEDOM RESTORATION ACT GUIDANCE, <http://www.dol.gov/oasam/grants/RFRA-Guidance.htm> (last visited Mar. 13, 2013) [hereinafter DEP'T OF LABOR GUIDANCE] (requiring an organization seeking a religious exemption to submit "a request for exemption to the Assistant Secretary charged with issuing or administering the grant . . ."); DEP'T OF JUSTICE, CERTIFICATE OF EXEMPTION FOR HIRING PRACTICES ON THE BASIS OF RELIGION, available at <http://www.ojp.usdoj.gov/recovery/pdfs/arrasampleform.pdf> (last visited Mar. 13, 2013) [hereinafter DEP'T OF JUSTICE CERTIFICATE]; see also DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 4361: APPLICATION FOR EXEMPTION FROM SELF-EMPLOYMENT TAX FOR USE BY MINISTERS, MEMBERS OF RELIGIOUS ORDERS AND CHRISTIAN SCIENCE PRACTITIONERS, available at <http://www.irs.gov/pub/irs-pdf/f4361.pdf> (requiring ministers with religious objections to accepting public insurance to certify with the government (1) that the minister is opposed to acceptance of insurance, (2) that the minister has informed the licensing body of the church that he is conscientiously or religiously opposed to acceptance of such insurance, (3) that they have never filed Form 2031 to revoke a previous exemption from social security coverage on earnings as a minister, and (4) request to be exempted from paying self-employment tax on earnings from services as a minister under section 1402(e) of the Internal Revenue Code. The minister must make these declarations "under penalties of perjury.").

<sup>62</sup> See, e.g., DEP'T OF LABOR GUIDANCE, *supra* note 61 (exemption can be revoked if self-certification was untruthful or if there has been a material change of circumstances); DEP'T OF JUSTICE CERTIFICATE, *supra* note 61 (exemption can be revoked if there is "good reason to question the [organization's] truthfulness in completing" self-certification).

<sup>63</sup> The eligibility criteria for the accommodation are objective criteria that the government can verify without approaching intrusive inquiries. See, e.g., *World Vision v. Spencer*, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring) (whether an organization "holds itself out as religious" is a "neutral factor[]"); *Carroll Coll., Inc. v. N.L.R.B.*, 558 F.3d 568, 574 (D.C. Cir. 2009) (whether an organization "holds itself out" as religious is one element of a "bright-line test" which can be "easily answered with objective criteria"). Furthermore, the government "violates no constitutional rights by merely investigating the circumstances" of a claim. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986). Determining whether an organization's objection is religious and sincerely held is a well-established and routine inquiry. "[T]he 'truth' of a belief is not open to question"; rather, the "question [is] whether it is 'truly held' and this 'threshold question . . . must be resolved in every case.'" *United States v. Seeger*, 380 U.S. 163, 185 (1965). See also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 726 (1981); *E.E.O.C. v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 56-57 (1st Cir. 2002); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998).

<sup>64</sup> See, e.g., U.S. DEP'T OF LABOR, COMPLIANCE ASSISTANCE MATERIALS, available at <http://www.dol.gov/compliance/topics/posters.htm> (employers are required to display posters explaining workers' rights and protections); 42 U.S.C. § 2000e-10 (2013) (requiring employers covered by Title VII to post and keep posted in conspicuous places upon the premises, a notice stating the pertinent information of the Act as well as information on how to file a complaint under the Act); 42 U.S.C. § 12115 (2013) (requiring employers covered by the ADA to post a notice in an accessible format to applicants, employees, and members of labor organizations, describing the provisions of

similar to the requirement that the Departments put in place for organizations seeking to utilize the safe harbor.<sup>66</sup> Providing factual information about the process the Departments have set up to accommodate these employers cannot be considered objectionable.

Furthermore, we urge the Departments to provide a standard notice form that employers, insurance issuers, plan sponsors, and Third Party Administrators (TPA) must use when advising employees of their rights and opportunities. Without standard language, there is a risk that information may be inaccurate or incomplete.

The Departments included a notice form with standard language with the proposed rule.<sup>67</sup> We urge the Departments to amend this language to more clearly reflect that the participants and beneficiaries will receive coverage, but that coverage will not be through the group health plan or student health insurance.<sup>68</sup> New language in italics, language to delete in strikethrough:

The organization that establishes and maintains, or arranges, your health coverage [“the organization”] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. ***As a result, you and any covered dependents will be enrolled in a separate individual health insurance policy that provides contraceptive coverage at no additional cost to you.*** *The separate policy will be arranged by [if fully insured insert name of issuer; if self-insured insert name of TPA].* ~~This means that your health coverage provided by the organization will not cover the following contraceptive services: [contraceptive services specified in self-certification]. Instead, these contraceptive services will be covered through a the separate individual health insurance policy, which is not administered or funded by, or connected in any way to, your health coverage provided by the organization. You and any covered dependents will be enrolled in this separate individual health insurance policy at no additional cost to you.~~ If you have any questions about this notice, contact [contact information for health insurance issuer] or *visit our website at www.\_\_\_\_.com.*

In addition, the Departments should not allow employers to use language “substantially similar” to the model language, as the form currently allows. Allowing modification will simply make the omission of relevant information more likely.

The Departments should require that “eligible organizations” provide notice of the accommodation to their employees whenever and however they provide other insurance information to them, including

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the Act); 29 C.F.R. § 1903.2 (2013) (requiring employers covered by the Occupational Safety and Health Act to display posters for employees).

<sup>65</sup> See, e.g., HAW. REV. STAT. § 431:10A-116.7(c)(1), (2) (requiring employers utilizing the contraceptive equity law’s religious exemption to provide notice to their employees and “written information describing how an enrollee may directly access contraceptive services and supplies in an expeditious manner”).

<sup>66</sup> See CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS. GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING UNDER SECTION 2713 OF THE PUBLIC HEALTH SERVICE ACT, SECTION 715(A)(1) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND SECTION 9815(A)(1) OF THE INTERNAL REVENUE CODE (2012), available at <http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf>.

<sup>67</sup> CTRS. FOR MEDICARE & MEDICAID, CMS FORM NUMBER: CMS-10459, available at <http://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing-Items/CMS-10459.html>.

<sup>68</sup> *Id.*

both when they first become enrolled in the plan at the start of their employment and prior to each plan year.

### C. The Departments should maintain an oversight and enforcement entity

The Departments should maintain an oversight and enforcement entity specifically for the contraceptive coverage rule, including its exemption and accommodation. While we disagree with the Departments' decision to treat contraceptive coverage differently, this exceptional treatment of contraceptive coverage necessitates that the Departments create an exceptional system of oversight and enforcement to ensure that this scheme functions properly. It is also important that women who believe that their employer has wrongly claimed eligibility for the exemption or the accommodation have a place to file a complaint. The Departments must ensure that they provide adequate oversight and enforcement of all the requirements that are part of the exemption or accommodation, from an organization's certification that it is eligible to the issuer's implementation of a contraceptive coverage plan.

Creating an oversight and enforcement entity dedicated to the contraceptive coverage rule is particularly important because enforcement of § 2713 of the Public Health Service Act, which includes the contraceptive coverage requirement, will differ based on the source of insurance coverage.<sup>69</sup> This fragmented system is not well-equipped to deal with the oversight and enforcement needs the proposed rule creates. As we discussed above, the oversight and enforcement entity should maintain a file of all institutions invoking the exemption or accommodation and make that information available to the public. These procedural requirements would formalize the process and provide transparency to the public about which entities have invoked the exemption or accommodation.

A centralized oversight and enforcement entity for the contraceptive coverage rule will help ensure that women get coverage, and will enable the Departments to more easily see and address any systemic implementation problems.

### D. Treatment of multiple employer group health plans

We strongly support the Departments' clarification that where several employers provide a single health insurance plan, each employer must "independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption . . . ."<sup>70</sup> This approach is necessary to ensure that employees and dependents of ineligible employers are not wrongly denied contraceptive coverage through back-door means.<sup>71</sup> Any other approach would be contrary to the Departments' purposes of ensuring seamless coverage for women at accommodated organizations, and ensuring coverage for as many women as possible.<sup>72</sup>

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<sup>69</sup> Depending on whether a health plan is self-insured or fully-insured, it may be governed by ERISA or both ERISA and state insurance regulations. Although states are responsible for enforcing the PHSA, HHS has authority to enforce the PHSA where a state is not substantially enforcing the law. In some cases, plans will be regulated by the Department of Labor, HHS, and/or state insurance regulators. Moreover, the Internal Revenue Service also has authority to penalize plans not complying with the ACA.

<sup>70</sup> NPRM, *supra* note 51, at 8467.

<sup>71</sup> As the Departments note, this will help prevent "a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization." *Id.* at 8467.

<sup>72</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130) (stating that it is the Departments' goal to extend "coverage of contraceptive services under the HRSA Guidelines to as many women as possible . . .").

- E. We strongly support the Departments’ affirmation that states may enforce stronger protections; the Departments should clarify that other existing legal obligations protecting coverage of contraception continue to apply

We strongly support the Departments’ statement that:

“the provisions of these proposed rules would not prevent states from enacting stronger consumer protections than these minimum standards. Federal health insurance regulation generally establishes a federal floor to ensure that individuals in every state have certain basic protections. State health insurance laws requiring coverage for contraceptive services that provide more access to contraceptive coverage than the federal standards would therefore continue under the proposed rules.”<sup>73</sup>

Twenty-eight states already require coverage of contraception in health insurance plans. Some have exemptions that are similar to the religious employer exemption in the proposed rule; others draw different lines, including some that have no exemption at all. As the Departments have recognized, state laws that do more to ensure coverage remain in force.

By contrast, the Affordable Care Act requires that a state insurance law that “prevent[s] the application of the [ACA] requirements” is preempted.<sup>74</sup> We strongly support the Departments’ recognition that broader exemptions in state laws must be “narrowed to align with that in the final regulations.”<sup>75</sup> By exempting additional employers, leaving women without coverage, those state laws prevent the application of the federal contraceptive coverage rule and are therefore preempted by it. Indeed, a federal district court recently confirmed this principle.<sup>76</sup>

Similarly, additional independent obligations exist regarding the inclusion of contraception in health insurance plans. As the Departments have stated, neither the exemption nor the proposed accommodation is intended to apply outside the context of the contraceptive coverage requirement pursuant to § 2713 of the Public Health Services Act.<sup>77</sup> The Departments should clarify that neither the exemption nor the accommodation alters any obligation requiring contraceptive coverage under other federal laws, including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

#### **IV. The Departments should ensure that employees of “religious employers” receive access to contraceptive coverage**

The Departments put the exemption in place to account for certain interests of churches and their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities

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<sup>73</sup> NPRM, *supra* note 51, at 8468.

<sup>74</sup> Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,739 (July 19, 2010) (codified at 45 C.F.R. § 147.130) [hereinafter Interim Final Rules].

<sup>75</sup> ANPRM, *supra* note 5, at 16,508.

<sup>76</sup> *Missouri Ins. Coalit. v. Huff*, No. 4:12-CV-2354-AGF, 2013 WL 1038756 (E.D. Mo. Mar. 14, 2013) (holding that Missouri’s broad refusal clause in its law that requires employers to provide contraceptive coverage is preempted by the federal contraceptive coverage rule).

<sup>77</sup> See ANPRM, *supra* note 5, at 16,502; NPRM, *supra* note 51 at 8468.

of religious orders that oppose the use of contraception to control fertility.<sup>78</sup> The exemption's goal was not to punish the employees of those organizations by denying them health care coverage or forcing them to pay more for their health care. In insulating those institutions, however, their employees may suffer harm: women who follow their own conscience and seek to use contraception are denied equal health care coverage. Thus, employees should be entitled to alternative means of acquiring coverage for these essential health care services. A ready solution now exists: the Departments should apply the accommodation to churches and their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of religious orders in lieu of the exemption.

In the event that the Departments do not extend the protections of the accommodation to employees of institutions that are eligible for the religious employer exemption, the following safeguards should be put in place:

First, the religious employer exemption should not apply to contraception when it is prescribed for a non-contraceptive purpose. Contraception has an important role in women's preventive care beyond preventing unintended pregnancies. As the Institute of Medicine noted in its recommendations to HHS, "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases."<sup>79</sup> Contraception can also decrease the risk of ovarian cancer and eliminate menopause symptoms.<sup>80</sup> The Departments should clarify that the coverage exemption is limited to when contraception is used for contraceptive purposes, and that coverage may not be excluded from any plan for contraceptives prescribed by a health care provider for reasons other than contraceptive purposes, or when necessary to preserve the life or health of the individual. This protection for women's health is common in state contraceptive coverage laws.<sup>81</sup>

Second, the Departments should ensure that employees of institutions utilizing the religious employer exemption are provided with information on how they can otherwise obtain contraceptive coverage. Employees should also be given timely notice that their health plan will exclude contraceptive coverage, including the specific list of services, drugs, and devices excluded, and for what purpose. Such requirements are standard in this context.<sup>82</sup>

Third, the Departments should require an institution seeking the religious employer exemption to certify with the Departments that the institution qualifies for the exemption.<sup>83</sup>

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<sup>78</sup> The proposed rule modifies the religious employer exemption in the February 15, 2012, final rule by eliminating the first three prongs of the test and relying solely on the fourth factor: whether an institution is a church, integrated auxiliary, convention or association of churches, or the exclusively religious activity of any religious order.

<sup>79</sup> CLOSING THE GAPS, *supra* note 2, at 92.

<sup>80</sup> Guttmacher Testimony, *supra* note 36, at 6; Dep't of Health & Human Servs., *Menopause Symptom Relief and Treatments* (Sept. 29, 2010), <http://www.womenshealth.gov/menopause/symptom-relief-treatment/>.

<sup>81</sup> See, e.g., CAL. INS. CODE § 10123.196(e) ("Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an insured."); see also ARIZ. REV. STAT. ANN. § 20-1402 (M) (2011); CONN. GEN. STAT. ANN. § 38a-530e(d) (West 2009); HAW. REV. STAT. § 431:10A-116.7(d) (2010); ME. REV. STAT. ANN. tit. 24, § 2847-G(2) (2010); N.J. STAT. ANN. § 17B:27-46.1ee (West 2011); N.Y. INS. § 3221(1)(16)(C); N.C. GEN. STAT. ANN. § 58-3-178(e) (West 2010); W. VA. CODE ANN. § 33-16E-7(b) (2010).

<sup>82</sup> See ARIZ. REV. STAT. ANN. § 20-1402 (M); CAL. INS. CODE § 10123.196(d)(2); CONN. GEN. STAT. ANN. § 38a-530e(c); DEL. CODE ANN. tit. 18, § 3559(d) (2010); HAW. REV. STAT. § 431:10A-116.7(c)(1); ME. REV. STAT. ANN. tit. 24, § 2847-G(2); MD. CODE ANN., Ins. § 15-826(c)(2) (West 2010); NEV. REV. STAT. ANN. § 689B.0376(5) (West 2010); N.J. STAT. ANN. § 17B:27-46.1ee; N.Y. INS. LAW § 3221(1)(16)(A)(2); N.C. GEN. STAT. ANN. § 58-3-178(e); R.I. GEN. LAWS § 27-18-57(e) (2009); W. VA. CODE ANN. § 33-16E-7(c) (2010).

<sup>83</sup> Churches regularly file routine paperwork with government agencies. See, e.g., DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM SS-4: APPLICATION FOR EMPLOYER IDENTIFICATION NUMBER (application for an employer identification number for use by



Last, because every exception to the contraceptive coverage requirement “increases the number of women affected by discrimination in the provision of health care benefits,”<sup>84</sup> all requests for a broader exemption should be swiftly rejected.

## V. Conclusion

Contraception is a critical component of basic preventive care for women. Women need meaningful access to contraceptives to prevent unintended pregnancies, plan the size of their families, plan their lives, and protect their health.

The final rule previously issued on February 15, 2012, promotes the twin values of reproductive health and true religious liberty; it required no further modifications. The accommodation outlined in the proposed rule for non-profit organizations that hold themselves out as religious must ensure that all employees and dependents receive no-cost-sharing contraceptive coverage seamlessly, as they would with no accommodation in place. Neither the accommodation nor the exemption should be broadened any further. Anything less sacrifices women’s health, women’s equality, and true religious liberty—where no set of religious beliefs is privileged, imposed on others, or used as a license to discriminate.

Sincerely,



Laura W. Murphy  
Director



Sarah Lipton-Lubet  
Policy Counsel

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churches, among other institutions), *available at* <http://www.irs.gov/pub/irs-pdf/fss4.pdf>; INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 18, *available at* <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (explaining that generally, “churches and religious organizations are required to withhold, report, and pay income and Federal Insurance Contributions Act (FICA) taxes for their employees”); DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 5578: ANNUAL CERTIFICATION OF RACIAL NONDISCRIMINATION FOR A PRIVATE SCHOOL EXEMPT FROM FEDERAL INCOME TAX, *available at* <http://www.irs.gov/pub/irs-pdf/f5578.pdf> (a church that operates a private school that teaches secular subjects must file this form to certify that it does not discriminate on the basis of race or ethnic origin). *See also* DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 8274: CERTIFICATION BY CHURCHES AND QUALIFIED CHURCH-CONTROLLED ORGANIZATIONS ELECTING EXEMPTION FROM EMPLOYER SOCIAL SECURITY AND MEDICARE TAXES, *available at* <http://www.irs.gov/pub/irs-pdf/f8274.pdf> (certification by churches electing exemption from employer Social Security and Medicare taxes under 26 U.S.C. § 3121(w)). *See also* Section III.A. *supra* (discussing filing certifications with the agencies).

<sup>84</sup> Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 94 (Cal. 2004).