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LEGISLATIVE OFFICE

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

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Re: Certain Preventive Services Under the Affordable Care Act, CMS–9968–ANPRM

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The American Civil Liberties Union (ACLU) submits the following in response to the Advance Notice of Proposed Rulemaking (ANPRM) on "Certain Preventive Services Under the Affordable Care Act," published in the Federal Register on March 21, 2012. The ANPRM addresses "alternative ways to fulfill the requirements of section 2713 of the Public Health Service Act and companion provisions under the Employee Retirement Income Security Act and the Internal Revenue Code when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons."[1] 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.

The ACLU is a nationwide, nonpartisan public interest organization with more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide, 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. In Congress and in the courts, we have supported legislation providing stronger protection for religious exercise.[2] 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.

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[1] Certain Preventive Services Under the Affordable Care Act, Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) [hereinafter ANPRM].
[2] *See, e.g.*, American Civil Liberties Union, ACLU Defense of Religious Practice and Expression, http://www.aclu.org/aclu-defense-religious-practice-and-expression (last visited June 19, 2012).

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 cost-sharing are those delineated in guidelines adopted by the Health Resources and Services Administration (HRSA). Those guidelines include contraception and sterilization.[3] The regulation also included an exemption for core religious institutions – essentially houses of worship – as applied to contraceptive services.[4]

On February 10, 2012, President Obama announced that in addition to the narrow exemption from the contraceptive coverage rule for houses of worship, HHS would promulgate rules extending an accommodation to certain organizations with religious objections to contraception wherein 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."[5] On March 15, 2012, HHS, along with the Departments of Treasury and Labor, issued an ANPRM asking for comment on how to craft this proposed accommodation.

We submit these comments to explain why the final rule issued on February 15, 2012,[6] with a simple, narrow exemption for core religious institutions, is plainly constitutional and does not violate principles of religious liberty. By exempting only those organizations that have a primary purpose of inculcating religion, and that serve and hire only those of the faith, the rule is targeted to prevent institutions from imposing their beliefs on those who do not share them. No changes are necessary as a legal or policy matter. However, to the extent the Departments now enact an accommodation for select non-profit institutions, it is imperative that the 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

[3] *See* Health Resources and Services Administration, U.S. Dep't of Health & Human Services, 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 all women with reproductive capacity." INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109 (2011). The HRSA guidelines reflect those recommendations.

[4] The rule provides 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, 2012) (codified at 45 C.F.R. § 147.130). A final rule maintaining this exemption was adopted on February 15, 2012.

[5] 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).

[6] 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, 8726-27 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130) [hereinafter Final Rule].

well as a blow to gender equality and public health. Because of the unique circumstances surrounding this policy, such an accommodation may be possible. That is, however, unlikely to be true in other contexts and therefore any accommodation enacted here should not be seen as ready precedent elsewhere.

I. The final rule does not infringe on religious liberty.

Since the contraceptive coverage rule was first announced, opponents of contraception have levied specious arguments against it, contending that this rule, which ensures affordable access to birth control for millions of women, threatens religious liberty. In pressing for reversal of the rule, they employ a theory of religious liberty in which religion becomes a license to discriminate. Even after the administration's announcement that it intends to craft a regulatory scheme to accommodate a broader swath of non-profit institutions, some contraception opponents continue to insist that they will be appeased only by complete rescission of the rule – eliminating no-cost-sharing coverage for all women no matter where they work.[7]

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 constitutionally unremarkable. Indeed, the high courts of California and New York have both rejected the notion that contraceptive coverage somehow runs afoul of religious freedom.[8]

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

Today's storm is about contraception. But 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."[9]

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[7] *See, e.g.*, Comments on Advance Notice of Proposed Rulemaking on Preventive Services from Office of the General Counsel, United States Conference of Catholic Bishops (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 Comments]; Comments on Advance Notice of Proposed Rule Making from Legal Counsel, Alliance Defense Fund (May 30, 2012), *available at* http://www.cardinalnewmansociety.org/LinkClick.aspx?fileticket=uuiNPQMXDvw%3d&tabid=36.

[8] First Amendment claims brought against the California and New York contraceptive equity laws were rejected by the high court of each state. *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 74 (Cal. 2004); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 461 (N.Y. 2006). Although those courts did not directly address the Religious Freedom Restoration Act ("RFRA") because it is inapplicable to state laws, the analysis those courts applied under state constitutional law is similar to the analysis courts conduct under RFRA.

[9] 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).

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 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."[10] When sued under the Equal Pay Act, Roanoke 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."[11]

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 it was school policy that students engaged in interracial relationships, or advocacy thereof, would be expelled. 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."[12]

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,[13] or schools to pay their employees equally despite their gender,[14] in the face of religious objections, it is not a violation of religious freedom to require that women have access to contraceptive coverage.

B. <u>The constitutional arguments against the rule are unfounded.</u>

Since promulgation of the contraceptive coverage rule, opponents of contraception have made several First Amendment arguments about the rule's constitutionality. Each is meritless.

The United States Supreme Court has ruled that the Free Exercise Clause of the First Amendment does not require exemptions from generally applicable and neutral laws like the Women's Health Amendment.[15] As the Court noted in *Employment Division v. Smith*, in an opinion authored by Justice Antonin Scalia, to do otherwise would be to create a system "in which each conscience is a law unto itself."[16] The Affordable Care Act requires all new insurance plans to include coverage of the preventive services listed in guidelines adopted by

[10] Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990).
[11] *Id*. at 1397.
[12] Bob Jones Univ. v. United States, 461 U.S. 574, 580, 583 n.6 (1983).
[13] *Piggie Park Enters., Inc.*, 256 F. Supp. at 945.
[14] *Shenandoah Baptist Church*, 899 F.2d 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 (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).
[15] Employment Div. v. Smith, 494 U.S. 872 (1990).
[16] *Id*. at 890.

HRSA. It applies to plans purchased by secular and religiously affiliated employers alike. Requiring compliance with a neutral law designed to protect workers' health does not violate the First Amendment rights of an employer holding theological opposition to its employees' use of contraception.

Nor does the contraceptive coverage rule implicate the association or speech clauses of the First Amendment. Like other contraceptive coverage laws, the rule does not "compel [anyone] to associate, or prohibit [anyone] from associating, with anyone."[17] Compliance with a health insurance law does not implicate expressive association. Similarly, compliance with the rule is not an endorsement of birth control; adherence to a law does not violate the speech rights of someone who disagrees with it. As the California Supreme Court held in this context, "for purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition."[18] Employers remain free to oppose birth control, to attempt to persuade others not to use contraception, and to convey their messages. What they should not be allowed to do is impose their religious beliefs on third parties by choosing which essential health services third parties are able to access.

C. <u>The contraceptive coverage rule does not violate the Religious Freedom Restoration Act.</u>

Similarly, opponents of contraception have argued that the contraceptive coverage rule violates the Religious Freedom Restoration Act (RFRA). Congress enacted RFRA to restore the strict scrutiny standard that had protected religious exercise from substantial burdens imposed by neutral laws prior to *Smith*.[19] The contraceptive coverage rule does not violate RFRA, 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[.]'"[20] But the fact that government action "is offensive to [an individual's] religious sensibilities" does not render the

[17] Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) (upholding New York's contraceptive equity law).
[18] Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 89 (Cal. 2004); *see also* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 20-21 (D.C. 1987) (holding that provision of benefits to a student group would amount to neither "an abstract expression of the University's moral philosophy" nor an expression of support for the group or its views).
[19] The ACLU joined a broad coalition in advocating for the passage of RFRA.
[20] 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).

action a substantial burden.[21] The link between the contraceptive coverage requirement and the religiously objectionable behavior is too attenuated to amount to a substantial burden.

The preventive services regulation simply requires employers to pay money, which contributes to insurance, which covers a range of health care, which an employee may ultimately use to access birth control in her private life. The same, or greater, attenuation applies to insurers and individual purchasers. The long journey between a devout person's paying money, and *someone else's* use of that money to engage in behavior that the devout person considers sinful does not compel the government to excuse a religious adherent from a general law.[22]

Courts have routinely rejected similar claims for exemption from paying taxes or providing benefits which conflict with religious doctrine. In *United States v. Lee*, an Amish taxpayer objected to participating in the Social Security system on religious grounds. The Supreme Court unanimously rejected that free exercise claim, explaining:

> [I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs . . . . If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.[23]

Lower courts have reached similar conclusions. Looking to *Lee*, the Eighth Circuit Court of Appeals has held that payment of taxes that may ultimately contribute to the insurance coverage of another individual's health care services is too remote an injury even to accord standing upon the plaintiffs to assert a religious liberty claim.[24] Similarly, the D.C. Circuit Court of Appeals recently rejected a RFRA challenge to the Affordable Care Act's minimum coverage provision, concluding that it imposed no substantial burden,[25] despite claims that the plaintiffs "believe[] in trusting in God to protect [them] from illness or injury" and did not "want to be forced to buy . . . health insurance coverage."[26]

Importantly, nothing in the rule requires any person to *use* contraception. The requirement is merely that contraceptive services be covered in insurance plans at no cost-sharing, such that individuals may choose whether or not to access those services. Senator Barbara Mikulski, the author of the Women's Health Amendment, put it well when explaining its purpose on the Senate floor: "[W]e do not mandate that you have the service; we mandate that

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[21] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).
[22] *See, e.g.*, Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000) (paying taxes that go to Medicaid abortion coverage cannot even support standing to assert a free exercise claim because the injury it inflicts on a taxpayer religiously opposed to abortion is too attenuated).
[23] United States v. Lee, 455 U.S. 252, 259-60 (1982) (citations omitted); *see also* United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000); Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999).
[24] *Tarsney*, 225 F.3d 929.
[25] Seven-Sky v. Holder, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011).
[26] Mead v. Holder, 766 F. Supp. 2d 16, 42 (D.D.C. 2011).

you have *access* to the service. The decision as to whether you should get it will be a private one, unique to you."[27]

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. Indeed, when Wisconsin enacted a contraceptive equity provision with no exemption for religious employers, a spokesman for the Diocese of Madison explained, "Our employees know what church teaching is. And we trust them to use their conscience and do the right thing."[28]

Insurance typically provides a broad range of benefits, some of which individual insureds will never use. Because Jehovah's Witnesses believe that accepting blood transfusions is a sin, devout Jehovah's Witnesses presumably do not *use* transfusion coverage. But this is a long way from asserting that a Jehovah's Witness employer should be entitled to purchase customized health plans that exclude coverage for blood transfusions for all its employees, in the face of government requirements to the contrary.[29] 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."[30]

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,"[31] innumerable medical procedures will be disfavored by adherents of one religion or another – from cancer screenings to vaccinations. Indeed, legislation designed to undermine health care reform – allowing any insurer or employer to refuse to cover any health service required by the Affordable Care Act to which they object – has already been introduced,[32] and rejected by the Senate,[33] but is still being promoted by the same groups opposing the contraceptive coverage requirement.[34] Applying this approach to the ACA would undermine one of its most fundamental purposes: ensuring that all health insurance plans cover basic health services.

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[27] 155 CONG. REC. S12,265, S12,277 (daily ed. Dec 3, 2009) (statement of Sen. Mikulski) (emphasis added).
[28] Annysa Johnson, *Catholic Church, Contraception Coverage Collide*, MILWAUKEE JOURNAL-SENTINEL, Aug. 12, 2010, *available at* http://www.jsonline.com/features/religion/100504294.html.
[29] Section 1302 of the Affordable Care Act requires that hospital care be covered as an essential health benefit. 42 U.S.C. § 18022 (2012).
[30] 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).
[31] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).
[32] *See* The Respect for Rights of Conscience Act, H.R. 1179/S. 1467, 112th Cong. (2011).
[33] 158 Cong. Rec. S1,162, S1,172 (daily ed. Mar. 1, 2012).
[34] The USCCB endorsed this legislation in their 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.

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.[35] Any claim to the contrary would turn RFRA into a blanket religious exemption that would threaten health, welfare, and civil rights protections. Thus, any RFRA claim fails at the threshold. Even if it did not, the contraceptive coverage requirement survives RFRA review intact.

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

As the high courts of California and New York have held, requiring contraceptive coverage serves a compelling government interest.[36] Allowing organizations to ignore the contraceptive coverage requirement would directly harm their employees' rights. The Supreme Court has recognized that granting an exemption to an employer "operates to impose the employer's religious faith on the employees."[37] Exempting additional employers from the contraceptive coverage requirement injures three fundamental rights of the women affected: gender equality, reproductive autonomy, and religious liberty.

a. Gender Equality

Omitting contraceptive coverage from a comprehensive benefit package is gender discrimination.[38] Prescription contraceptives are, for the most part, a form of health care available *only* to women. The consequences of the failure to be able to access and use contraception fall primarily on women. Denying contraceptive coverage undermines women's control over childbearing, which directly affects women's ability to participate equally in society. The Supreme Court has recognized as much: "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."[39]

Equality is unquestionably a compelling government interest.[40] Ending sex discrimination in employment benefits is "equally if not more compelling than other interests

[35] *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.").
[36] *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 92 (Cal. 2004) ("The [contraceptive coverage requirement] serves the compelling state interest of eliminating gender discrimination."); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 (describing the "State's substantial interest in fostering equality between the sexes, and in providing women with better health care").
[37] United States v. Lee, 455 U.S. 252, 261 (1982).
[38] *See* 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.").
[39] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992).
[40] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

that have been held to justify legislation that burdened the exercise of religious convictions."[41] Ensuring equal benefits to men and women promotes "interests of the highest order."[42]

The Women's Health Amendment was designed to improve women's health and redress sex discrimination in health benefits. "[T]his legislation . . . offers free preventive services to millions of women who are being discriminated against . . . ."[43] As Senator Mikulski 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 . . . ."[44] In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stems from reproductive health care:

> Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.[45]

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."[46] Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.[47] Protecting access to reproductive health services is a compelling public interest.[48]

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[41] 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)).

[42] Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). The high courts of California and New York each reached this conclusion when considering their respective contraceptive coverage laws. *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92 ("The [contraceptive requirement] serves the compelling state interest of eliminating gender discrimination."); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 (describing the "State's substantial interest in fostering equality between the sexes, and in providing women with better health care").

[43] 155 CONG. REC. S12,019, S12,020 (daily ed. Dec 1, 2009) (statement of Sen. Reid); *see also* 155 CONG. REC. S11,979, S11,987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

[44] 155 CONG. REC. at S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (emphasis added).

[45] *See* 155 CONG. REC. S12,019, S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand)*; see also* 155 CONG. REC. S12,265, S12,272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) ("Women of childbearing age pay on average 68 percent more for their health care than men do.").

[46] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[47] Griswold v. Connecticut, 381 U.S. 479 (1965).

[48] 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).

Virtually all women of reproductive age have used birth control at some point.[49] Denial of contraceptive coverage causes some women to forgo birth control or use less expensive and less effective methods of birth control, resulting in unintended pregnancies.[50] Further, cost-sharing requirements pose substantial barriers to accessing this preventive care.[51] The contraceptive coverage requirement promotes women's interest in planning their families.[52]

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. Requiring contraceptive coverage in health plans does just that – it allows every woman to decide for herself what is right for her and her family.[53]

II. The Departments should ensure that employees at accommodated organizations receive seamless coverage, that any accommodation is applied narrowly, and that it not be considered precedential.

As an initial matter, we reiterate that as both a legal and policy matter, no special rules are warranted here because the contraceptive coverage rule does not infringe on a core religious function. Provision of insurance coverage, by organizations that operate in the public sphere and employ individuals with diverse backgrounds, is a secular activity.[54]

It is therefore all the more important that, as the Departments consider "develop[ing] alternative ways of providing contraceptive coverage without cost sharing in order to accommodate" certain non-profit organizations "with religious objections to such coverage,"[55]

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[49] Guttmacher Institute, Testimony before the Committee on Preventive Services for Women, Institute of Medicine 7 (Jan. 12, 2011).
[50] *Id.* at 8.
[51] INSTITUTE OF MEDICINE, *supra* note 3, at 109.
[52] *See, e.g.*, 155 CONG. REC. S12,019, 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. S12,265, 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 12,274 (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.").
[53] As the California Supreme Court has recognized, "[o]nly those who join a church impliedly consent to its religious governance on matters of faith and discipline." Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 77 (Cal. 2004).
[54] The same holds true for student health plans that institutions of higher education arrange, which the ANPRM states the Departments intend to treat similarly. ANPRM at 16,505 ("the Departments would propose to treat student health insurance plans arranged by non-profit religious institutions of higher education that object to contraceptive coverage on religious grounds in a manner comparable to that in which insured group health plans sponsored by religion organizations eligible for the accommodation are treated").
[55] ANPRM, *supra* note 1, at 16,503.

the Departments ensure that employees at these institutions receive the same coverage they otherwise would, that any accommodation is applied narrowly, and that it not be considered precedential. We submit the following principles.

First, we applaud the Departments' commitment to ensuring that under this scheme, all women will have access to insurance coverage for contraception with no cost-sharing.[56] Anything less would turn the accommodation into a broadened exemption, with unacceptable consequences. As the California Supreme Court explained, every exception to a contraceptive coverage requirement "increases the number of women affected by discrimination in the provision of health care benefits."[57] Any new exception to the contraceptive coverage requirement would – by depriving women of coverage for preventive services they uniquely need – perpetuate the fundamental inequity that the Women's Health Amendment was designed to erase.[58]

Second, we welcome and underscore the Departments' recognition that "whatever definition of religious organization is adopted will not be applied with respect to any other provision of the PHS Act, ERISA, or the [Internal Revenue] Code, nor is it intended to set a precedent for any other purpose."[59] Any accommodation must be viewed with caution; all the more so where, as here, there is no actual infringement on a religious liberty interest. Accommodations should generally not be granted to institutions that operate in the public sphere – including non-profits with religious affiliations – for the following reasons:

- The majority of these institutions partner or contract with the government, or otherwise receive significant government support. It is a basic principle of our civil rights laws that 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.[60] Not only should all of us be free from discrimination by the government itself, but we also should have the assurance that our government is not providing federal dollars to programs that discriminate.

[56] ANPRM, *supra* note 1, at 16,503; *see also* Remarks of President Barack Obama, *supra* note 5.
[57] Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 94 (Cal. 2004).
[58] The final rule recognizes as much: "A broader exemption, as urged by some commenters, would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits [of contraceptive coverage, including a healthier population, reduced health care costs, medical benefits to women, health benefits to infants, cost savings to employers, and allowing women to be healthy and productive members of the workforce]." Final Rule, *supra* note 6, at 8,728. The exemption must not be expanded.
[59] ANPRM, *supra* note 1, at 16,504.
[60] *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 of 1972, 20 U.S.C. §§ 1681-88 (2012) (prohibiting entities that receive federal financial assistance from discriminating 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 received federal financial assistance under the Affordable Care Act).

- The hundreds of thousands of jobs at these institutions are generally open to all, and as such, those institutions should not be allowed to impose their beliefs on their employees.[61]

- 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 these institutions from laws designed to protect and promote the general welfare therefore necessarily privileges the beliefs of some at the expense of harm to others.

The situation presented with the proposed accommodation is unique in that it may be possible for the federal government to mitigate the primary harm of the organizations' refusal to provide coverage of contraception.[62] By requiring insurers and third party administrators to make employees whole, the administration may be able to ensure that women are provided contraceptive coverage without disruption, or the confidentiality concerns that arise with insurance riders. In other contexts, it will not be the case that the government is similarly situated to make sure that the harm is in fact mitigated. Whatever set of organizations may ultimately qualify for an accommodation in this unique context should not be granted special rights elsewhere.

Last, the ANPRM asks whether the Departments should consider extending the accommodation for certain non-profits with religious objections to for-profit enterprises. It should not. For-profit businesses exist to make money through commercial activity. Their purpose is profit, not religious exercise. As such, tax-exempt status is commonly dispositive as to whether an organization falls within an exception for religious institutions.[63] Indeed, for decades, the Supreme Court has held that entering into commercial activity means accepting that your faith cannot be superimposed on those in your employ.[64] Similarly, the accommodation should not extend to health insurance issuers or third party administrators.

III. The Departments should ensure that employees are not denied coverage through back-door maneuvering.

In explaining how the current exemption works, the ANPRM offers the example of a parochial school that meets all four factors of the religious employer exemption: (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. Such a school would be exempt from the

[61] *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).
[62] There is, of course, always harm in singling out health care that only women need for inferior treatment.
[63] *See, 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).
[64] *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.").

contraceptive coverage requirement in its own right. Alternatively, if "the same school" provides coverage for its employees through the health plan of another exempt religious employer, such as a Catholic diocese, the exemption would also apply.[65]

We ask the Departments to reiterate that this is only the case where both entities *independently* meet all four criteria for the religious employer exemption.[66] For example, employees of a religiously affiliated non-profit might obtain their health insurance through a diocese's, association of churches', or a religious denomination's health plan. If that non-profit would not qualify for the religious employer exemption in its own right, their employees must not be denied contraceptive coverage. Any other scheme would allow non-qualified employers to undermine the preventive services provision's purpose and discriminate against their employees by denying them coverage through back-door means.

Such a back-door denial is all the more inappropriate in the context of the proposed accommodation. Whereas the accommodation would allow a non-profit not to participate in the provision of contraceptive coverage while still ensuring that the non-profit's employees are afforded coverage, a back-door denial is just that – a denial of coverage. In either scenario, the non-profit is not providing coverage; but in a back-door denial, employees' health would be sacrificed, gender equality would be undermined, and the religious beliefs of some would be imposed on those who do not share them.

IV. The Departments should clarify that existing legal obligations protecting coverage of contraception continue to apply.

Multiple independent obligations already exist regarding the inclusion of contraception in health insurance plans. As the Departments state in the ANPRM, neither the religious employer exemption nor the proposed accommodation are intended to apply outside the context of the contraceptive coverage requirement pursuant to section 2713 of the Public Health Services Act.[67] The Departments should clarify that neither the religious employer exemption nor the proposed religious organization accommodation alters any obligation under other laws, including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, to provide contraceptive coverage.

Similarly, 28 states already require coverage of contraception in health insurance plans; some have exemptions that look like the religious employer exemption in the final rule, others draw different lines. The Affordable Care Act requires that a state insurance law that "prevent[s] the application of the [ACA] requirements" is preempted.[68] We strongly support the Departments' recognition that broader exemptions in state laws must be "narrowed to align with that in the final regulations"[69]; by exempting additional employers, leaving women without coverage, those state laws prevent the application of the federal contraceptive coverage rule and

[65] ANPRM, *supra* note 1, at 16,502.
[66] Other commenters have questioned the Departments' intent. *See* USCCB Comments, *supra* note 7, at 18-19.
[67] *See* ANPRM, *supra* note 1, at 16,502.
[68] 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) [hereinafter Interim Final Rules].
[69] ANPRM, *supra* note 1, at 16,508.

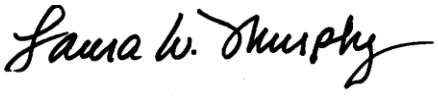
are therefore preempted by it. By the same token, we strongly support the Departments' recognition that state laws which do more to ensure coverage (i.e. laws with no exemption), are not preempted; those laws are "more stringent" and consumer-protective, and therefore do not prevent application of the ACA.[70]

V. Conclusion

Contraception is a critical component of basic preventive health care for women. Women need access to contraceptives to prevent unintended pregnancies, plan the size of their families, plan their lives, and protect their health. Meaningful access to contraception is integral to a world in which people are free to express their sexuality, to form intimate relationships, to lead healthy sexual lives, and to decide when and whether to have children.

The final rule issued on February 15, 2012, promotes the twin values of reproductive health and true religious liberty; it requires no further modifications. Any accommodation crafted for a narrow set of non-profits with religious objections that do not qualify for the house-of-worship exemption must ensure that all employees receive no-cost-sharing coverage seamlessly, as they would with no accommodation in place. Anything else 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,



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[70] Interim Final Rules, *supra* note 68, at 41,739; ANPRM, *supra* note 1, at 16,508 ("Generally, Federal health insurance coverage regulation creates a floor to which States may add consumer protections, but may not subtract.").