



July 18, 2017

Dear Representative:

On behalf of Americans United for Separation of Church and State, we strongly urge you to support two amendments, should they be offered, during the Appropriations Committee markup of the FY2018 Labor, Health and Human Services, and Education Appropriations Bill: The Wasserman Schultz amendment to strike the so-called Conscience Protection Act from the base bill and the Lowey amendment to prohibit use of funds to promulgate or enforce changes to the Affordable Care Act's birth control benefit.

Religious freedom is a fundamental American value. It guarantees us all the right to believe—or not—as we see fit. It does not, however, grant us a right to deny others' rights. Both amendments would uphold religious freedom by helping to ensure that religion is not used as an excuse to harm women and their families.

The Wasserman Schultz Amendment

The Wasserman Schultz amendment would strip Section 536 of the bill, which contains the dangerous and constitutionally suspect "Conscience Protection Act," from the bill. Under existing law, a healthcare entity can already refuse to provide, pay for, cover, or refer for abortions. This provision in the bill, however, would go far beyond existing law by granting a sweepingly broad range of entities, deemed "health care providers"—which would include insurance companies, employers, and others far beyond what we reasonably think would meet the definition—to refuse to engage in an extremely broad range of activities related to abortion care.

This provision would put the religious beliefs of employers and hospitals above women's health. The result—women would face serious harm.

Section 536 jeopardizes a women's ability to access comprehensive health insurance coverage for abortion, or even information about abortion as a treatment option in an emergency. Even under current law, women experiencing miscarriages have been refused treatment and left in the dark about their options, sometimes for several weeks. As a result, women have experienced grave medical problems such as sepsis, even resulting in stays in the ICU and acute kidney injury, and hemorrhaging requiring blood transfusions.¹ This provision could exacerbate these grave outcomes, because it would create more confusion about hospitals' obligations to women seeking emergency care

¹ American Civil Liberties Union, [Health Care Denied: Patients & Physicians Speak Out About Catholic Hospitals & the Threat to Women's Health & Lives](#) (2016).

for miscarriages and could embolden hospitals governed by religious directives to turn more women away.

The breadth of this provision also raises significant concerns under the First Amendment. The Constitution places limitations on the government's ability to create religious exemptions: "At some point, accommodation may devolve into [something] unlawful."² The constitutional requirements are straightforward: "an accommodation must be measured so that it does not override other significant interests"³ or "impose unjustified burdens on other[s]."⁴ So, for example, in *Estate of Thornton v. Caldor, Inc.*,⁵ the Supreme Court struck down a blanket exemption permitting employees to take off work for their Sabbath because it "unyielding[ly] weight[ed]" their religious interests "over all other interests," including the interests of co-workers.

Thus, it is clear that the more expansive the exemption and the greater the burden it places on others, the more likely it is to violate the First Amendment. This provision would dramatically expand an existing exemption to reach nearly all aspects of how women access healthcare. As a result, women could face serious, life-threatening harms as a result. Exemptions that create a significant, harmful, discriminatory impact on others, like the one created by this provision, are impermissible and must be barred.⁶

Thus we support the Wasserman Schultz amendment to strip the provision from the bill.

The Lowey Amendment

The Lowey Amendment would prohibit the use of federal funds to promulgate or enforce changes to the Affordable Care Act's (ACA) birth control benefit.

An ACA policy requires most health insurance plans to cover all FDA-approved methods of contraception with no co-pay. This policy was adopted to improve access to birth control, which is vital to women's health and equality. Nonetheless, some for-profit corporations and non-profit organizations have refused to provide this coverage and they have filed lawsuits claiming the policy violates their religious freedom.

² *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

³ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). Likewise, it must be calculated to lift an actual burden on religious exercise. *E.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (O'Connor, J., concurring) ("[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.'") (quoting *Corp. of Presiding Bishop*, 483 U.S. at 348; *Wallace v. Jaffree*, 472 U.S. 38, 57 n.45 (1985)).

⁴ *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (such accommodations may not impose "substantial burdens on nonbeneficiaries").

⁵ 472 U.S. 703, 709-10 (1985).

⁶ *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should "unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling"); *id.* at 2760 (religious accommodation would have "precisely zero" impact on third parties); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (Ginsburg, J. concurring) (accommodation "would not detrimentally affect others").

According to media reports, new Trump administration regulations will create a sweeping religious exemption to the ACA policy that would allow any corporation or university to use religion to deny their employees and students coverage for birth control.⁷ But, whether a woman uses birth control should be up to her, not her boss or university.

Under the draft Trump rules, women across the country would be left without access to crucial medical care, and the costs and burdens of employers' and universities' religious beliefs would be shifted onto their employees and students. Yet, the Supreme Court specifically called on the government to ensur[e] that women covered by [these] health plans 'receive full and equal health coverage, including contraceptive coverage.'⁸

Just like the "Conscience Protection Act" in the bill, the draft Trump administration regulations raise serious First Amendment concerns. The Constitution forbids religious exemptions that would have a "detrimental effect on any third party."⁹ In fact, every member of the Supreme Court that decided *Burwell v. Hobby Lobby Stores, Inc.* in 2014, whether in the majority or in dissent, reaffirmed that burdens on third parties must be considered.¹⁰ When women lose access to contraception, women's health and equality suffer and women will bear significant costs.

Thus we support the Lowey amendment to prohibit the use of funds to promulgate or enforce changes to the Affordable Care Act's birth control benefit.

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We urge you to stand up for religious freedom and for women and vote YES on the Wasserman Schultz and Lowey amendments.

Sincerely,



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⁷ Dylan Scott & Sarah Kliff, [Leaked Regulation: Trump Plans to Roll Back Obamacare Birth Control Mandate](#), Vox, May 31, 2017.

⁸ *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

⁹ *Hobby Lobby*, 134 S. Ct. at 2781 n.37; accord *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 720, 722 (courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton*, 472 U.S. at 709-10).

¹⁰ See *Hobby Lobby*, 134 S. Ct. at 2760; see also *id.* at 2781-82; *id.* at 2786-87 (Kennedy, J., concurring and controlling opinion); *id.* at 2790 & n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).