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Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Hubert H. Humphrey Building  
Room 445-G  
200 Independence Avenue, SW  
Washington, DC 20201  
*Submitted via Regulations.gov*

Re: Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, CMS-9940-IFC

To whom it may concern:

Americans United for Separation of Church and State submits the following comments to the Departments of Health and Human Services, Labor, and Treasury's (the Departments) Interim Final Rules, "Religious Exemptions and Accommodations for Coverage for Certain Preventive Services under the Affordable Care Act" and "Moral Exemptions and Accommodations for Coverage for Certain Preventive Services under the Affordable Care Act" (IFRs), which were published in the Federal Register on October 13, 2017.

Americans United is a nonpartisan advocacy organization dedicated to preserving the constitutional principle of church-state separation, the foundation of religious freedom for everyone. We support religious exemptions where they relieve real and substantial burdens on religious exercise and do not cause harm to others.

The exemptions created by these IFRs, however, will harm women's health and well-being by allowing virtually any employer or university to deprive women of critical insurance coverage for contraception. Under these IFRs, women across the country will be left without seamless access to medical coverage, and the costs and burdens of universities' and employers' religious beliefs would be shifted onto employees and students. The IFRs discriminate against women and violate the Constitution. They also violate the Administrative Procedure Act and the Affordable Care Act. Accordingly, we urge the Departments to rescind the IFRs.

### **Birth Control Is Vital to Women's Health and Equality**

Women clearly benefit from increased access to contraception.<sup>1</sup> In addition to reducing unintended pregnancies and the need for abortion, access to contraception reduces adverse health outcomes and allows women to best make decisions that affect everything from their education and livelihoods to their family and relationships.

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<sup>1</sup> These comments use the term "women" because women are targeted by the IFRs. We recognize, however, that denying reproductive health care and insurance coverage for such care also affects people who do not identify as women, including some gender non-conforming people and some transgender men.

By allowing a woman to plan her pregnancies, contraception protects against the higher health risks that accompany unintended pregnancy for both her and her child.<sup>2</sup> Contraception also allows women to space their children, reducing risks such as birth defects and premature birth associated with multiple pregnancies within 18 months.<sup>3</sup> Access to contraception is especially critical for women with underlying physical or psychological conditions—such as diabetes, heart disease, or depression—for whom pregnancy may be dangerous.<sup>4</sup> For example, one of the 240 women we represented in an amicus brief we filed before the Supreme Court in *Zubik v. Burwell*<sup>5</sup> explained, “When I had cancer, my oncologists reminded me at regular intervals—as I underwent four months of chemotherapy and two months of radiation—of the importance of using a reliable form of contraception and avoiding pregnancy.”<sup>6</sup>

But delaying or avoiding pregnancy is not the only health benefit of contraception. Studies show that contraception reduces the risk of pelvic inflammatory disease and certain cancers.<sup>7</sup> And birth control is often prescribed to treat many common ailments—nearly 30% of women use contraception at least in part to manage a medical condition.<sup>8</sup> Amici in *Zubik* told the Court that they used contraception to treat endometriosis, ovarian cysts, chronic migraines, and menstrual disorders.<sup>9</sup>

A large and growing body of research also links contraception to women’s improved economic and social standing—it helps them to be equal participants in the social, political, and economic life of the nation. There is strong evidence that access to contraception increases the chance that women will achieve their educational and career goals, earn more money, and maintain more stable, satisfying marriages.<sup>10</sup>

For many women, access to contraception is crucial on many levels for their health, their lives, and their careers. For example, Mary Shiraef, a student at the University of Notre Dame, explained that contraception allows her to “focus on the quality of my relationship, without fear of unplanned pregnancy,” ensures she can “focus on my task at hand—working toward a Ph.D.—in equitable measure to my male colleagues,” and has “improved my overall health.”<sup>11</sup> Another woman, Alicia Baker is married and looks forward to having children in the future, but

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<sup>2</sup> Inst. of Med., *Clinical Preventive Services for Women, Closing the Gaps*, at 102-09 (July 19, 2011).

<sup>3</sup> *Id.* at 103.

<sup>4</sup> *Id.*

<sup>5</sup> Brief of 240 Students, Faculty, & Staff at Religiously Affiliated Universities as Amici Curiae in Support of Respondents at 13-24, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*hereinafter* “Brief of 240 Students, Faculty, & Staff”), <http://bit.ly/2A6EioP>.

<sup>6</sup> *Id.* at 21.

<sup>7</sup> Adolf Schindler, *Non-Contraceptive Benefits of Oral Hormonal Contraceptives*, *Int. J. Endocrinol Metabolism* 41-47 (2013).

<sup>8</sup> A. Salganikoff, et al., Kaiser Family Found., *Women and Health Care in the Early Years of the Affordable Care Act* 35 (May 2014), <http://bit.ly/2xZuNXM>.

<sup>9</sup> Brief of 240 Students, Faculty, and Staff at 13-24.

<sup>10</sup> Adam Sonfield et al., Guttmacher Inst., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children* (2013), <http://bit.ly/1Tyjfcu>.

<sup>11</sup> Kimberly Larson, *After ‘Egregious Attack’ on Birth Control, Five Women Sue Trump Administration*, *Broadly* (Nov. 1, 2017), <http://bit.ly/2knITfy>. Americans United, along with the National Women’s Law Center, represents Shiraef in a lawsuit challenging the IFRs. Complaint, *Shiraef v. Hargan*, Case 3:17-cv-00817 (N.D. Ind. Oct. 31, 2017), <http://bit.ly/2jV74Ou>.

she and her husband are not ready yet. They recently bought their first home and Alicia still has loans to pay from receiving a graduate degree from seminary. She explained, “We’re so excited to have kids one day, but right now it would be irresponsible for us to try to pursue that.”<sup>12</sup>

These benefits are among the reasons why the Affordable Care Act (ACA) ensures most insurance plans cover contraceptives without cost-sharing. Indeed, contraception is critical healthcare to nearly all women—99% of women of reproductive age who have had sexual intercourse report using at least one form of contraception at some point in their lives.<sup>13</sup> Cost, however, impedes women from choosing the most effective but most expensive methods (such as an intrauterine device (IUD), which can cost up to \$1,000) or from accessing contraception at all. Studies show that the costs associated with contraception, even when small, lead women to forgo it completely, to choose less effective methods, or to use it inconsistently.<sup>14</sup> Cost barriers to contraception not only threaten the health of women and their families, but also jeopardize women’s financial security, workforce participation, and educational attainment.<sup>15</sup> If women who need contraception cannot afford it, they will be deprived of its health, economic, and social benefits, and will suffer the ensuing harms.

Because of the ACA, over 62 million women currently have coverage for all FDA-approved contraceptive methods and related education and counseling without out-of-pocket costs.<sup>16</sup> The IFRs put this access at risk for countless women.

### **The IFRs Violate the Establishment Clause of the First Amendment**

Religious freedom is a fundamental right, protected by our Constitution and federal law. It guarantees us all the right to believe (or not) as we see fit. But it doesn’t give anyone the right to use religion as an excuse to harm others. The IFRs will harm countless women and their families and thus, violate the Establishment Clause of the First Amendment.

The IFRs allow employers and universities to cite religious or moral objections to contraceptives as an excuse to violate the ACA requirement that they provide their employees or students insurance coverage for birth control. As explained above, contraception is critical to women’s health and economic and social equality. It is also critical to the health of women’s families. When women are denied coverage for this basic and essential health care, they suffer from discrimination and economic harm.

Allowing employers and universities to use religious and moral beliefs to harm others is not just bad policy. It also violates the Constitution.

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<sup>12</sup> Jordan Smith, *Trump Administration Set to Defend Birth Control Rules that Pit Religion Against Women’s Health*, Intercept (Nov. 21, 2017), <http://bit.ly/2kn2Xib>. Baker is also a plaintiff in *Shiraef v. Hargen*.

<sup>13</sup> Kimberly Daniels et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, National Health Statistics Reports, No. 62 (Feb. 14, 2013), <http://bit.ly/2lxZEDc>.

<sup>14</sup> Guttmacher Inst., *A Real-Time Look at the Impact of the Recession on Women’s Family Planning and Pregnancy Decisions* 5 (Sept. 2009), <http://bit.ly/1bGLNzX>.

<sup>15</sup> Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *Contraception* 465, 467 (2013).

<sup>16</sup> See Nat’l Women’s Law Center, *New Data Estimate 62.4 Million Women Have Coverage of Birth Control without Out-of-Pocket Costs* (Sept. 2017), <http://bit.ly/2iUgDRd>.

The Establishment Clause prohibits granting religious and moral exemptions that would detrimentally affect any third party.<sup>17</sup> When crafting such an exemption, the Departments “must take adequate account of the burdens” that it “may impose on nonbeneficiaries” and must ensure that any exemption is “measured so that it does not override other significant interests.”<sup>18</sup>

For example, in *Estate of Thornton v. Caldor, Inc.*, the Supreme Court invalidated a statute that gave employees an unqualified right to take time off on the Sabbath day of their choosing.<sup>19</sup> The statute violated the Establishment Clause because it “would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.”<sup>20</sup>

The Court acknowledged the limitations imposed by the Establishment Clause yet again in *Burwell v. Hobby Lobby Stores, Inc.*<sup>21</sup> In holding that the Religious Freedom Restoration Act (RFRA)<sup>22</sup> afforded certain employers an accommodation from the ACA’s contraceptive coverage requirement, the Court concluded that the accommodation’s effect on women who work at those companies “would be precisely zero.”<sup>23</sup> And Justice Kennedy emphasized that an accommodation must not “unduly restrict other persons, such as employees, in protecting their own interests.”<sup>24</sup>

The exemption in the IFRs clearly imposes burdens on others: it takes away seamless, no-cost insurance coverage for contraception from employees and students and compels them to pay the substantial costs for the healthcare themselves if they are able (and many are unable), or else to forgo that essential healthcare. Thus, the IFRs run afoul of the clear mandates of the Establishment Clause.

#### *There Are No Exceptions to this Rule that Are Relevant to the IFRs*

There have been only two cases in which the Supreme Court has upheld religious exemptions that had the effect of burdening third parties in any meaningful way—in both cases the Free Exercise Clause required the exemptions to protect the autonomy and ecclesiastical authority of religious institutions, such as a church’s selection of clergy. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>25</sup> the Court held that the Americans with Disabilities Act could not be enforced against a church in a way that would interfere with the church’s selection of its ministers. And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>26</sup> the Court upheld under Title VII’s limited religious exemption a

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<sup>17</sup> *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”).

<sup>18</sup> *Cutter*, 544 U.S. at 720, 722; *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985).

<sup>19</sup> *Caldor*, 472 U.S. at 705–08.

<sup>20</sup> *Id.* at 710.

<sup>21</sup> 134 S. Ct. 2751 (2014).

<sup>22</sup> 42 U.S.C. §§ 2000bb–2000bb-4

<sup>23</sup> *Hobby Lobby*, 134 S. Ct. at 2760. Prior to these IFRs, the Departments did this by ensuring employees continued to receive no-cost contraception coverage seamlessly and directly from their regular insurance plan, even if their employer objected to providing coverage.

<sup>24</sup> *Id.* at 2786-87 (Kennedy, J., concurring).

<sup>25</sup> 565 U.S. 171, 196 (2012).

<sup>26</sup> 483 U.S. 327, 337-39 (1987).

church's firing of an employee who was not in religious good standing. The Court allowed exemptions because they were designed to avoid interference in how churches select their employees.

The Supreme Court has occasionally permitted accommodations when the potential consequences for third parties would be so diffuse and amorphous as to have no meaningful effect on any particular individual. For example, in *Walz v. Tax Commission*,<sup>27</sup> the Court held that the government may exempt houses of worship from property taxes as part of a broad exemption for nonprofit entities, because the public as a whole bore the incidence of the forgone tax revenues—and did so only in the most abstract way—while also sharing in the social benefits of a system that encouraged all nonprofits to flourish.

Neither of these exceptions are applicable here. Employee and student health insurance provided by for-profit corporations or nonprofit institutions has nothing to do with how a church selects its minister, for example. Moreover, allowing institutions to avoid providing contraception coverage will concretely harm the countless employees and students of entities that might avail themselves of the exemptions.

#### *Establishment Clause Limitations Apply to RFRA*

The Departments cannot rely on RFRA to skirt the requirements of the Constitution. The Supreme Court has ruled that the Establishment Clause prohibits both RFRA and its sister statute, RLUIPA<sup>28</sup> from being used to allow exemptions that harm third parties. Thus, in *Cutter v. Wilkinson*, the Supreme Court explained that “[p]roperly applying RLUIPA”—and necessarily, therefore, RFRA as well<sup>29</sup>—includes taking adequate account of the burdens that an exemption may impose on others.<sup>30</sup> A religious exemption must not “impose unjustified burdens on other[s],”<sup>31</sup> because that would have the effect of preferring and supporting the religious views of the party requesting the exemption while compelling nonbeneficiaries to pay the price.<sup>32</sup>

The Supreme Court reiterated this rule in *Hobby Lobby*, applying the test from *Cutter* to a RFRA claim. The Court held that an accommodation was constitutionally permissible because it could

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<sup>27</sup> 397 U.S. 664, 673 (1970).

<sup>28</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–cc-5.

<sup>29</sup> RFRA and RLUIPA employ virtually identical language and serve the same congressional purposes. Compare 42 U.S.C. § 2000bb-1 with 42 U.S.C. § 2000cc-1. See generally *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006). Accordingly, courts rely on RFRA and RLUIPA cases interchangeably in interpreting and applying the statutes. *Id.*; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004).

<sup>30</sup> 544 U.S. at 720.

<sup>31</sup> *Id.* at 726.

<sup>32</sup> Moreover, it is clear that Congress intended that RFRA would be limited by the well-understood confines of the Establishment Clause (see 42 U.S.C. § 2000bb-4) and never contemplated that RFRA would afford exemptions or accommodations that impose material harms on third parties. See, e.g., 139 Cong. Rec. S14,350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy (“The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the Smith decision.”)); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (RFRA “does not require the Government to justify every action that has some effect on religious exercise”).

be provided without “any detrimental effect on any third party.”<sup>33</sup> Indeed, every member of the Court reaffirmed that the burdens on third parties must be considered.<sup>34</sup>

### *The Exemption for Moral Beliefs Also Violates the Establishment Clause*

That the IFRs contain an exemption for moral beliefs does not change the Establishment Clause analysis. It is clear from the IFRs that the moral exemption is effectively just a religious exemption by another name.

First, according to the IFRs, the scope of the exemption for moral convictions is based on *Welsh v. United States*.<sup>35</sup> In *Welsh*,<sup>36</sup> the Supreme Court held that a religious exemption must be provided equally to those who hold moral beliefs that are akin to religious beliefs. In addition, the IFRs go on to explain that “moral convictions” are those

(1) That the “individual deeply and sincerely holds”; (2) “that are purely ethical or moral in source and content”; (3) “but that nevertheless impose upon him a duty”; (4) and that “certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons,” such that one could say “his beliefs function as a religion in his life.”<sup>37</sup>

Thus, for purposes of the constitutional analysis, and as defined in the IFRs, moral beliefs are the functional equivalent of religious beliefs and therefore must be treated as such. In other words, legally, they *are* religious beliefs.

As explained above, the Constitution does not permit exemptions for religious or moral beliefs that result in discrimination or harm to others. The IFRs run afoul of the Establishment Clause.

### **The IFRs Violate Other Constitutional and Statutory Protections**

By creating these exemptions to the ACA’s birth control benefit, which has expanded access to contraception for millions of women, the IFRs single out health insurance primarily used by women and that is essential for women’s health and equality. Like Title VII and other civil rights laws, the ACA’s women’s preventive services provision, which includes contraceptive coverage, was intended to address longstanding discrimination and ensure women equal access to the healthcare services that allow them to be full participants in society.

For example, the preventive care provision addresses the fact that historically women tended to pay more for insurance coverage than did men.<sup>38</sup> Since the implementation of the ACA, out-of-pocket spending on prescription drugs has decreased dramatically, with an almost 65% decrease

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<sup>33</sup> 134 S. Ct. at 2781 n.37 (citing *Cutter*, 544 U.S. at 720).

<sup>34</sup> See *id.*; *id.* at 2786-87 (Kennedy, J., concurring); *id.* at 2790 & n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

<sup>35</sup> Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,846 (published Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

<sup>36</sup> *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>37</sup> 82 Fed. Reg. at 47,846 (citing *Welsh*, 398 U.S. at 339-40).

<sup>38</sup> See 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130 (2013)(a)(1)(iv).

directly attributed to oral contraception costs newly covered by the contraceptive coverage provision.<sup>39</sup> It is estimated that the ACA resulted in an out-of-pocket savings of approximately \$1.4 billion for newly covered women, and ensured that a majority of women had no out-of-pocket costs for their healthcare.<sup>40</sup>

By permitting objecting institutions to deny coverage for contraceptives, the IFRs effectively target women for adverse treatment, resulting in health insurance that covers preventive care that men need, but not care that women need. Thus, the IFRs discriminate based on sex in violation of the Due Process Clause of the Fifth Amendment, which guarantees equal protection of the laws. They also violate Section 1557 of the ACA, which prohibits discrimination on the basis of sex in “any health program or activity, any part of which is receiving Federal financial assistance . . . or under any program or activity that is administered by an Executive Agency.”<sup>41</sup>

### **The IFRs Violate the Administrative Procedure Act**

The IFRs, effective immediately upon publication, violate the safeguards of the Administrative Procedure Act (APA) both procedurally and substantively.

First, when an agency is “formulating, amending or repealing” a rule, it must follow proper procedure. The agency must (a) follow notice-and-comment procedures in advance of promulgation, and (b) provide a 30-day waiting period between publication of a rule and its effective date,<sup>42</sup> unless the agency establishes “good cause” why it should not.

The Departments ignored these procedural requirements and have failed to offer a good cause. The Departments attempt to justify their haste in issuing the IFRs in part by arguing that the public previously commented on related regulations, and therefore has had an opportunity to engage. But these IFRs are starkly different from prior regulations and far exceed the very limited religious exemption provided by the Departments in prior rules. The IFRs dramatically expand the exemption and could leave countless women without insurance coverage for contraception based on their employer’s or university’s religious or moral objections. In contrast, under prior regulations, the Departments ensured all but a small number of employees continued to receive seamless, no-cost contraception coverage, even if their employer objected to providing coverage.<sup>43</sup> Relying on comments submitted during prior comment periods on the regulations significantly amended by the IFRs does not absolve the Departments of the APA’s statutory requirements. Good cause is narrowly construed, and the Departments have not met this standard.

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<sup>39</sup> Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease in Out-Of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 *Health Affairs* 1204–11 (2015), <http://bit.ly/2jfYhXF>.

<sup>40</sup> *Id.*

<sup>41</sup> 42 U.S.C. § 18116.

<sup>42</sup> 5 U.S.C. § 553(b), (d).

<sup>43</sup> Under the prior rules, the Departments created an accommodation for religiously affiliated nonprofits and closely held corporations that had religious objections to providing contraception coverage in their employees’ and students’ insurance plans. They could refuse to provide their students and employees with insurance coverage for contraception so long as they stated their objection in writing. The government would then work with the employer’s insurance company or plan administrator to ensure that employees received seamless contraceptive coverage without additional charge.

Second, the APA contains several substantive rulemaking requirements: An agency may not adopt a rule that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”<sup>44</sup> “contrary to a constitutional right,”<sup>45</sup> or “in excess of statutory jurisdiction.”<sup>46</sup> The rules run afoul of the APA’s substantive requirement because, as explained above, they violate the Constitution and the ACA’s bar on discrimination.<sup>47</sup> The IFRs cannot overcome the substantive constraints of the APA.

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These IFRs ignore the Supreme Court’s directive in *Zubik v. Burwell* to “ensur[e] that women covered by [these] health plans receive full and equal health coverage, including contraceptive coverage.”<sup>48</sup> Employers and universities should not be able to use religion as an excuse to dictate their employees’ or students’ health care choices. Taking away access to contraception—a core part of women’s health care—is discrimination, plain and simple.

Religious freedom is a fundamental American value. So is a woman’s right to make her own decisions about healthcare. These IFRs betray both. For all these reasons, we urge the Departments to rescind the IFRs.

Thank you for the opportunity to provide comments. If you should have further questions, please contact Dena Sher, (202) 466-3234 or [sher@au.org](mailto:sher@au.org).

Sincerely,



Dena Sher  
Assistant Legislative Director



Maggie Garrett  
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<sup>44</sup> 5 U.S.C. § 706(2)(A).

<sup>45</sup> 5 U.S.C. § 706(2)(B).

<sup>46</sup> 5 U.S.C. § 706(2)(C).

<sup>47</sup> Neither are the IFRs in accordance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, because they discriminate on the basis of sex.

Additionally, the IFRs violate Section 1554 of the ACA, 42 U.S.C. § 18114(1), which prohibits the Secretary of Health and Human Services from promulgating any regulation that “creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care.” As noted earlier, some women have historically been unable to obtain contraception because of cost barriers. By permitting objecting institutions to deny no-cost contraceptive coverage, the IFRs erect unreasonable barriers to medical care and impede timely access to contraception.

<sup>48</sup> 136 S. Ct. 1557, 1560 (2016) (internal quotation marks omitted).