September 20, 2016

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independent Avenue, SW
Washington, DC 20201

RE: CMS-9931-NC—Request for Information re Coverage for Contraceptive Services

Dear Sir or Madam:

Americans United for Separation of Church and State submits the following comments to the Request for Information, “Coverage for Contraceptive Services,” (“RFI”) from the Department of the Treasury, Department of Labor, and Department of Health and Human Services (“Departments”), which was published in the Federal Register on July 22, 2016.

Americans United is a nonpartisan advocacy organization dedicated to preserving the constitutional principle of church-state separation, the foundation of true 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.

We have a particular interest in this RFI. First, we represent two student-intervenors in University of Notre Dame v. Burwell,¹ one of the cases challenging the accommodation, and have filed amicus briefs in all other cases challenging the accommodation. Likewise, we have submitted comments for every rule proposed by the Departments related to the accommodation. In addition, we were original supporters of the Religious Freedom Restoration Act (RFRA), and although we still believe that RFRA serves an important purpose, we are also deeply troubled that the law increasingly is being misused.

In light of the Supreme Court’s opinion in Zubik v. Burwell,² the Departments request comments from a variety of stakeholders on whether there is a feasible alternative to the existing accommodation for institutions that object to the contraception coverage requirement on religious grounds. We greatly appreciate the Departments’ sustained commitment to ensuring that women have access to seamless coverage of the full range of FDA-approved contraceptives without cost sharing. As our comments will explain, we believe the proposals described in the RFI are infeasible and would create barriers to seamless coverage, resulting in harm to women.

¹ 786 F.3d 606 (7th Cir. 2016).
² 136 S. Ct. 1557 (2016).
Background

In August 2011, the Departments issued regulations implementing the Affordable Care Act’s (ACA) Women’s Health Amendment. The regulations require that all new employee health insurance plans cover women’s preventative health services, including contraception, without cost sharing. The regulations also exempt certain religious employers from the contraception coverage requirement, primarily aimed at houses of worship.

Some religiously affiliated institutions argued that the exemption was too narrow and should be expanded to apply to more than just houses of worship. In response, the Departments created an accommodation for a broad category of religiously affiliated, nonprofit institutions that object to providing contraceptive coverage on religious grounds. Under the accommodation, qualifying entities are not required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. Instead, insurance companies provide employees with seamless coverage for contraception without cost sharing. To receive the accommodation, an eligible organization must simply fill out a form and file it with its insurer or, in the case of self-insured plans, with its third party administrator.

Following the Supreme Court decision in Wheaton College v. Burwell, the Departments modified the accommodation process to allow eligible institutions to receive the accommodation if they directly notify the Department of Health and Human Services of their objection to providing contraception coverage and provide HHS with some specific information.

Then, following the Supreme Court decision in Burwell v. Hobby Lobby Stores, Inc., the Departments expanded the eligibility for the accommodation to include “closely held” corporations.

Finally, in March 2016, the Supreme Court heard oral arguments in Zubik v. Burwell, in which several religiously affiliated nonprofit institutions claimed that the accommodation violates RFRA. The nonprofits insist that even the simple act of filling out a form violates their rights because it results in the government then arranging for their students and employees to receive contraceptive coverage. After oral arguments, the Court requested supplemental briefs addressing whether employees could obtain coverage through the nonprofits’ insurance companies “without any such notice.” Following the supplemental briefing, the Supreme Court remanded the case (and others) back to the lower courts, asking if the government and the objecting institutions could find a way to accommodate the objectors and ensure women “receive full and equal health coverage, including contraceptive coverage.” The Departments have now issued this RFI as part of this process.

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8 134 S. Ct. 2751 (2014).
11 Zubik, 136 S. Ct. at 1560-61 (citations omitted).
When it remanded the cases back to the lower courts, the Supreme Court did not address the merits of the claims, expressly leaving the Courts of Appeals—eight of the nine of which have already rejected the objectors’ claims under RFRA—to uphold the accommodation.12

The Current Accommodation Does Not Violate RFRA

RFRA asks whether a law places a “substantial burden” on religious exercise. If yes, the government regulation must “further a compelling government interest” by using the “least restrictive means.” Minimal or incidental burdens do not trigger RFRA protection13 and even substantial burdens on religious exercise must be permitted where the countervailing interest is significant. The accommodation satisfies RFRA’s requirements and no further modifications are necessary.

First, no institution is burdened either by affirmatively opting out of an obligation to which they object or by “the government’s imposition of an independent obligation on a third party.”14 Yet, it is clear, from their briefs and comments in the media, that the objecting institutions seek to nullify contraception coverage altogether.

“Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out.”15 An opt-out like the one afforded by the accommodation, for example, operates the same as a wartime conscientious objector filing his objection to the draft or a judge who provides a written recusal in a death penalty case because she objects to capital punishment. Neither the conscientious objector nor the judge could claim a right under RFRA to refuse to object in writing because such objection would initiate a process to find a replacement.

In the same way, these nonprofits may not claim a right under RFRA because those seeking insurance coverage for contraception will receive it from a third party.16 Indeed, religious freedom “does not afford an individual a right to dictate the conduct of others”17 and “RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based on religion.”18

Second, the government clearly has a compelling interest in ensuring employees have access to contraception. The coverage requirement ensures women’s equality and liberty to decide whether and when to become parents;19 eliminates significant disparities in healthcare costs between women and men; and reduces unintended pregnancies.20 Indeed, Justice Kennedy, in his concurring opinion

12 Id. at 1560.
13 See Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting parallel statute, RLUIPA); see also Goehring v. Brenny, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff’s beliefs “are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.”).
16 See Univ. of Notre Dame, 743 F.3d at 555.
19 “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.” Planned Parenthood of St. Penn. v. Casey, 505 U.S. 833, 856 (1992).
20 See Priests for Life, 772 F.3d at 259-64; see also Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs., 818 F.3d 1122, 1151-53 (11th Cir. 2016).
in *Hobby Lobby,* said it was “important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.”

Third, the contraceptive coverage rule with its accommodation is the least restrictive means to achieve this compelling interest. In his concurring opinion in *Hobby Lobby,* Justice Kennedy explained that the accommodation is “an existing, recognized, workable, and already-implemented framework to provide coverage” that “equally furthers the Government’s interest but does not impinge on the plaintiffs’ religious beliefs.” Similarly, the D.C. Circuit concluded that “providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government’s interest.”

Thus, the current accommodation is consistent with RFRA.

**Proposals in the Request for Information**

The RFI asks what the impact the proposals would “have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services.”

Any change to the current accommodation is going to necessarily effect coverage and would risk more delay, confusion, worry, and cost for women who need—and are legally entitled—to this coverage.

“Notification to Issuers Without Self-Certification”

The Supreme Court asked whether an objecting institution could contract for a health insurance plan that excludes coverage for some or all forms of contraception, and mention—rather than formally notify the insurer—that it objects to contraception on religious grounds. The insurance company would then have to infer that it must separately notify the objecting institution’s employees or students that it will provide coverage.

Without formal written notice, insurance companies and women would confront additional burdens, and objecting institutions may face increased involvement in the accommodation process. First, insurers would be forced to take additional steps to determine the scope of the coverage it must provide to the women, including inquiring what forms of contraception the institution objects to so the insurance company will know what to provide. This back-and-forth would also increase, rather than decrease, the involvement of the objecting organizations, undermining the very purpose of the

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21 We believe that *Hobby Lobby* was wrongly decided. Never before had the Supreme Court ruled that a for-profit organization may deny legal rights to its employees in the name of religion. In amicus briefs in this series of cases, we argued that any religious burden the contraception requirement might have caused the plaintiffs in the case was incidental and attenuated rather than substantial. Accordingly, the RFRA claim should have failed. *E.g.*, Brief for Americans United for Separation of Church and State, et al. as Amici Curiae Supporting Appellees at 4, *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013).

22 *Hobby Lobby,* 134 S. Ct. at 2786 (Kennedy, J., concurring).

23 *Id.*

24 *Priests for Life,* 772 F.3d at 265; see also *Eternal Word Television Network,* 818 F.3d at 1158-59.
proposal. And most troubling, this process would result in delay in making the coverage available to women. Under this proposal, nobody wins.

Moreover, lack of formal notice would undermine the ability to fund and oversee the accommodation. First, written notice is required for the financing structures of the accommodation. Second, it is essential to the Departments’ oversight and enforcement to ensure that women seamlessly receive coverage for the full range of contraception without cost sharing. Thus, the accommodation may not even work without written notice and the Departments would have no way to verify if women are receiving the coverage to which they are entitled.

“Other Approaches with Respect to Insured Plans Described in the Supplemental Briefing”
Under the second proposal in the RFI, insurance companies would have to offer women separate, contraception-only insurance policies and women would have to affirmatively enroll in the policy. This approach, suggested by objecting institutions that have raised RFRA claims to the accommodation, similarly relies on inferred “notice.” This proposal is also infeasible and would place serious burdens on women seeking coverage.

Indeed, the Departments have already considered and rejected this proposal for a host of financial, logistical, and administrative reasons. And it would undermine an important goal of the accommodation: to guarantee women have the same access to contraception services as they would if the accommodation did not exist.

Under this approach, coverage clearly would not be seamless. After requiring women to engage in a separate enrollment process (which could be confusing to navigate), women could face serious burdens accessing care. A contraception-only plan might use a different network of providers than the health insurance coverage used for all other care. As a result, a woman may have to obtain contraception care from someone other than her regular obstetrician/gynecologist. The obligation to investigate, enroll in, and then seek care under a separate plan will inevitably delay and complicate women’s ability to access this care. It may also interfere with care continuity and overall healthcare access.

The burdens this proposal would place on women make it infeasible.

These Proposals Would Result in Real Harm to Women

The Impact on Women
The current accommodation was designed to provide seamless access to contraception services, without logistical or cost barriers for women, while permitting objectors to opt out of providing coverage for contraception. Yet, women who work for or study at the objecting institutions have

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27 See, e.g., Eternal Word Television Network, 818 F.3d at 1153 (“This system was carefully designed to make contraceptive coverage accessible by not requiring women to research plans that offer contraceptive coverage, purchase separate contraceptive coverage, or even sign up with a different entity or program.”).
already experienced challenges, including confusion and delay. The experience of Americans United client Ann Doe\textsuperscript{28} is just one example.

Ann Doe attends the University of Notre Dame, one of the institutions challenging the accommodation under RFRA. Prior to enrolling as a student, she worked at the university. Several months after first inquiring about insurance coverage for contraception at the staff wellness center, Ann received an insurance card in the mail for contraception coverage. The card came without any explanation and she didn’t know how or where she could use it to obtain the coverage she needs. She enrolled in graduate school one year ago and transferred from the staff insurance plan to the student plan. She still doesn’t know if that same contraception-coverage insurance card is still valid, or if she needs to transfer it, renew it, or otherwise ensure that her contraception care is covered by insurance. The university (or anyone else for that matter) has not clarified her coverage status. This is particularly worrisome for Ann: because of medical issues, she can’t use hormonal contraception and one of her few options is the Paragard IUD, which is one of the most expensive (though long-acting and one of the most effective) forms of contraception.

The RFI proposals would compound any existing problems. Each would interfere with women’s seamless receipt of full and equal health coverage, creating unnecessary burdens and unreasonable delays for women seeking contraception care.

And without a doubt, these burdens and delays seriously impact women’s health and lives. We represented 240 women in the \textit{amicus brief} we filed with the Supreme Court in \textit{Zubik}.\textsuperscript{29} Here are the stories they shared with the Court about why seamless coverage of contraception was vital for them:

\begin{itemize}
\item 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.
\item I have chronic migraines and could not function without contraception.
\item Contraception allows me to control the symptoms from and spread of my endometriosis.
\item I use birth control in order to control my painful periods and heavy bleeding.
\item I have been prescribed oral contraceptives for over a year and a half to treat serious menstrual problems.
\item Without birth control, I experience menstrual cycles that make it hard to function in everyday life and do things like attend class.
\end{itemize}

\textsuperscript{28} Ann Doe has intervened in \textit{University of Notre Dame v. Burwell} anonymously. This is the only case challenging the accommodation in which women whose coverage is at risk are actual parties to the case. Ann’s story is taken from her Declaration in Support of Motion to join a Pseudonymous Intervenor, Intervenor-Appellees’ Mot. to Add Ann Doe as Pseudonymous Intervenor, \textit{Univ. of Notre Dame v. Burwell}, No. 13-3853, at *15 (7th Cir. July 8, 2016).

I have dysmenorrhea, a condition that makes menstruation debilitatingly painful. Before I started taking oral contraceptives, the pain from [the condition] caused me to miss up to two days of school per month. The pain could not be reduced by over-the-counter or prescription painkillers.

I personally suffered from multiple menstruation-related health issues that were either diminished or eliminated when I started taking oral contraceptives. The issues I suffered from, on multiple occasions, interfered with my presence in class and my focus during school. I have not had to miss a class due to female health issues since beginning a birth control regimen.

In the future, I would like to have a family. But right now, I am working towards a degree and I am not in a financial position to raise a child. I owe money for my undergraduate, graduate, and law-school degrees. Every cent I save counts. Contraception enables me to focus on my degree and puts me in control of my own reproductive health.

There are flaws with the implementation of the current accommodation, yet compared to these proposals, it is less complicated to implement, reduces administrative and financial barriers, and is more likely to provide seamless coverage.

Because They Would Harm Women, These Proposals Would Violate the Establishment Clause
If either of these proposals were adopted, women would face significant burdens to coverage. This would result in harm to women, and therefore would also violate the Establishment Clause of the First Amendment. The government’s ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion” that violates the Establishment Clause. Thus, a requested religious accommodation demands “careful scrutiny” because it “must be measured so that it does not override other significant interests” and may not “impose unjustified burdens on other[s].” In Estate of Thornton v. Caldor, Inc., for example, the Supreme Court struck down a law that guaranteed employees the day off on the Sabbath day of their choosing because it “unyieldingly weight[ed]” the religious interest “over all other interests,” burdening others, including co-workers.

These Proposals Are Unlikely to Satisfy Objecting Institutions
The Departments have made numerous attempts over the last several years to address concerns of objecting institutions. Yet, these institutions continue to oppose any process that would provide

30 Furthermore, these proposals may breach provisions of the ACA and other federal laws prohibiting discrimination in benefits as well. See §§ 1554 and 1557 of the ACA (42 U.S.C. §§ 18114, 18116); Title VII (codified in 2 U.S.C., 28 U.S.C, & 42 U.S.C.); and Title IX (20 U.S.C. 1681).
women with contraception coverage that they can obtain easily and use with their existing network of providers. These institutions have made essentially the same arguments since the enactment of the contraception coverage rule and they will not be satisfied until rule is entirely gutted. Such a result, however, would be unacceptable.

Furthermore, if the Departments were to make any of these changes to the accommodation, it would empower individuals and institutions that seek to misuse RFRA to demand exemptions from other laws that protect against discrimination. Any exemption from nondiscrimination laws causes harm, and would especially impact religious minorities, women, and LGBTQ people. Religion is no excuse to harm others and the Departments must not set a precedent that could invite further misuse of RFRA.

**Additional Comments on Modifications to the Accommodation**

Finally, while the Departments should not modify the mechanics of the accommodation, if they do so, we strongly urge the Departments to maintain the other existing components of the accommodation. In particular, we ask that any future regulations maintain the notice requirements that ensure health plans notify individuals enrolled in the objecting institution’s plan about the separate contraception coverage/payments at no cost and reiterate the policy that states may enact contraception coverage laws that are more protective of consumer access to this coverage. We also request the Departments create a centralized enforcement entity that can streamline the fragmented enforcement system that is currently based in different areas of the law and levels of government, conduct any audits necessary to ensure that processes are operating as intended under the law, serve as a repository for consumer complaints, and ultimately ensure women receive the birth control services they are entitled to without barrier or delay.

* * *

Thank you for your consideration of our comments and the Departments’ continued commitment to ensuring that women have access to seamless coverage of the full range of FDA-approved contraceptives without cost sharing. Please contact Dena Sher, (202) 466-3234 x. 281, sher@au.org, or Maggie Garrett, (202) 466-3234 x. 226, garrett@au.org, if you should have questions or want more information on this issue.

Sincerely,

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