Congress of the United States
House of Representatives
Washington, DC 20515

December 5, 2017

The Honorable Eric Hargan
Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: *Interim Final Rule on Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act & Interim Final Rule on Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act* [CMS-9940-IFC/CMS-9925-IFC]

Dear Acting Secretary Hargan, Secretary Acosta, and Secretary Mnuchin:

We write to share our comments on the Interim Final Rules (IFRs) regarding coverage of certain preventive services for women.

As the Ranking Members of the Committees of jurisdiction, we are gravely concerned that the IFRs will undo the progress made by the Affordable Care Act (ACA), which ensures that women have coverage for a comprehensive set of preventive health services without any out-of-pocket costs. These sweeping new rules represent an unacceptable and unjustified attack on a basic health care service on which millions of women across the country rely.

Before the ACA's enactment, basic preventive services were often not fully covered by most insurance plans.[1] Women in particular struggled to access needed preventive services and were more likely than men to forego preventive care due to costs.[2] Recognizing this inequity, the ACA guaranteed that women have access to all necessary "preventive care and screenings," including the full range of Food and Drug Administration (FDA)-approved contraceptive methods, without copayments or any other any cost sharing requirements.[3]

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[1] Amanda Cassidy, "Preventive Services Without Cost Sharing," *Health Affairs* (Dec. 28, 2011) available at: http://www.healthaffairs.org/do/10.1377/hpb20101228.861785/full/.
[2] National Women's Law Center, *Women's Preventive Services in the Affordable Care Act* (Dec. 2013), available at: https://nwlc.org/wp-content/uploads/2015/08/womens_prev_services_in_aca_12-4-2013.pdf.
[3] 42 U.S.C. § 300gg-13(a)(4).

The women's preventive services guarantee was a dramatic step forward for women's health. As a result, more than 62 million women now have coverage for contraception and other preventive services, without having to pay a deductible, co-payment, or coinsurance.[4] Some women now have coverage for contraception for the first time, and women are increasingly likely to choose long-acting, more effective methods of birth control that may have prohibitively higher upfront costs without coverage.[5] The importance of coverage for contraception in narrowing the coverage gap for women has been repeatedly affirmed, including when these preventive services were first identified by the Institute of Medicine (IOM), and most recently in December 2016 by the Women's Preventive Services Initiative. The recommendations of each of these expert panels were adopted by the Health Resources and Services Administration (HRSA) within the Department of Health and Human Services (HHS).[6]

Contraceptive coverage is essential for women to not only avoid unintended pregnancy and space pregnancies effectively for optimal birth outcomes and maternal health, but also as a critical preventive health tool that should be treated like any other preventive health service. Women have a fundamental right to determine the number, timing, and spacing of their pregnancies. Contraceptive coverage and access is essential to women's equality, and treating this care differently from other preventive services is unjustified and discriminatory.

We are dismayed that the administration is now attempting to roll back the advances made to women's health under the guise of religious liberty by providing broad exemptions for employers or institutions of higher learning that claim to have a religious or moral objection. The IFRs state that the Departments are seeking to issue these rules "to better balance the Government's interest in ensuring coverage for contraceptive and sterilization services in relation to the Government's interests…to provide conscience protections for individuals and entities with sincerely held religious beliefs in certain health care contexts."[7] However, there is no doubt that the IFRs are dramatically imbalanced in their approach, by giving employers and institutions of higher education carte blanche to use their religious or moral beliefs to deny fundamental health services to women.

In creating these sweeping exemptions that block contraceptive coverage for women and discriminate against them, the IFRs violate a number of constitutional and statutory provisions, including the Administrative Procedure Act, the Establishment Clause as well as the equal protection and due process guarantees of the U.S. Constitution, and the nondiscrimination provision of the ACA (Section 1557).

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[4] National Women's Law Center. *New Data Estimate 62.4 Million Women Have Coverage of Birth Control without Out-of-Pocket Costs,* (Sept. 25, 2017) available at: https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/.

[5] Kaiser Family Foundation, *The Future of Contraceptive Coverage,* (Jan. 2017) available at: http://files.kff.org/attachment/Issue-Brief-The-Future-of-Contraceptive-Coverage.

[6] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps,* (2011) available at: http://www.nationalacademies.org/hmd/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx; Women's Preventive Services Initiative, *Recommendations for Preventive Services for Women Final Report to the U.S. Department of Health and Human Services, Health Resources & Services Administration,* (Dec. 2016).

[7] 82 F.R. 47792, 47793 (Oct. 13, 2017); 82 F.R. 47838, 47839 (Oct. 13, 2017).

The Establishment Clause of the First Amendment limits the government's ability to create an exemption from generally applicable laws for religious or moral beliefs. The constitutional requirement is straightforward: "an accommodation must be measured so that it does not override other significant interests,"[8] "impose unjustified burdens on other[s],"[9] or have a "detrimental effect on any third party."[10] The exemptions in the IFRs clearly impose burdens on others: it compels employees and students who need coverage for contraceptives to pay the substantial costs themselves (if they are able) or else to forego that essential health care altogether.

The IFR that specifically contains an exemption for *moral* beliefs does not change this Establishment Clause analysis. It is clear from the IFRs that the moral exemption is effectively just a religious exemption by another name. According to the moral exemption IFR, the scope of the exemption for moral convictions is based on *Welsh v. United States*.[11] In *Welsh*,[12] the Supreme Court held that a religious exemption must be provided equally to those who hold moral beliefs that are akin to religious beliefs. Again, the Constitution does not permit exemptions for religious or moral beliefs that result in discrimination or harm to others. Therefore, both IFRs fail the constitutional do-no-harm test.

Further, the Departments' invocation of the Religious Freedom Restoration Act (RFRA) in defense of the IFRs is misguided. Under RFRA, Congress required that government action may only substantially burden a person's exercise of religion if it is in the furtherance of a compelling government interest, and is the least restrictive means to achieve that interest.[13] It is clear that the government indeed has a compelling interest in ensuring that patients have unencumbered access to the health care they need and that women are not discriminated against in health care by being forced to pay more than men. Indeed, in *Burwell v. Hobby Lobby Stores, Inc.*, five Supreme Court justices found that the government has this compelling interest.[14] As Justice Kennedy made clear in his concurring opinion, requiring health plans to provide contraceptive coverage "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly costlier than for a male employee."[15] However, the IFRs would shift this cost back to women by allowing virtually any employer, along with institutions of higher education, to claim a religious or moral objection to providing contraceptive coverage.

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[8] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).
[9] *Cutter*, 544 U.S. at 726; *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).
[10] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. *See id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).
[11] 82 Fed. Reg. 47838, 47846 (Oct. 13, 2017).
[12] *Welsh v. United States*, 398 U.S. 333 (1970).
[13] The provision of contraceptive coverage does not cause substantial burden on religious exercise. See brief of 91 Members of the United States House of Representatives in *Sebelius v. Hobby Lobby Stores, Inc.*, available at: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_ushr.authcheckdam.pdf.
[14] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
[15] *Id.* at 2785-86.

RFRA was never intended to allow religion to supersede rights or legal obligations; RFRA was intended to provide heightened—but not unlimited—protection for religious exercise. The misapplication of RFRA improperly dilutes its original, solemn purpose to protect sincerely-held religious beliefs and opens the door to further erosion of civil rights, under the guise of religious freedom.

Additionally, we remind the Departments that most recently in *Zubik v. Burwell*, the Supreme Court explicitly instructed the federal government and the parties to the case to find a solution that would ensure women have access to seamless contraceptive coverage.[16] Not only do the IFRs fail to do this, they completely run afoul of the Court's instructed approach that would "ensur[e] that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[17]

Finally, and perhaps most importantly, as Members of Congress who served during the passage of the ACA, we can provide clarity on the Congressional intent behind the preventive services requirement. While the IFRs list other statutes that include a religious or moral exemption, we note that Congress did not include such an exemption in the ACA.[18] In fact, the inclusion of the women's preventive services provision, often referred to as the Women's Health Amendment, signals that Congress considered coverage for the preventive health services unique to women as paramount. In crafting the ACA, a core tenant was the belief that access to comprehensive care, including preventive care services and essential health benefits, would improve the lives and health of the American people. Proponents of the ACA recognized that expanding access to preventive care could result in lower costs and better health outcomes. Contraception coverage was then, and continues to be, a critical aspect of this overarching goal. Eviscerating this guarantee by giving employers and institutions of higher education carte blanche to opt out is contrary to the intent of Congress.

It is our responsibility to uphold the delicate balance between freedom of religion and civil rights. The IFRs as published do not accomplish this goal, and we urge the administration to rescind these harmful rules.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member
Committee on Education and the Workforce

FRANK PALLONE, JR.
Ranking Member
Committee on Energy and Commerce

RICHARD E. NEAL
Ranking Member
Committee on Ways and Means

[16] *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).
[17] *Id.* at 1560 (2016).
[18] While the IFRs point to the grandfathering provision of the ACA as justification for its sweeping exemptions, the grandfathering provision of the ACA is solely a temporary means for transitioning employers to full compliance, not an exemption.