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Department of Health and Human Services
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Re: Request for Information, Coverage for Contraceptive Services, CMS-9931-NC

The American Civil Liberties Union (ACLU) submits the following to the Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) in response to the request for information (RFI) published in the Federal Register on July 22, 2016, in light of the Supreme Court's opinion in *Zubik v. Burwell*. The request seeks to determine whether there are alternative ways (other than those offered in current regulations) for eligible organizations that object to providing contraceptive coverage on religious grounds to obtain an accommodation, while still ensuring that women enrolled in the organizations' health plans have access to seamless cost sharing.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has a long, proud history of vigorously defending religious liberty and reproductive freedom.

I. No modification to the current accommodation is necessary because it does not violate the Religious Freedom Restoration Act (RFRA)

The Departments seek information about whether there are possible alternatives to the current accommodation for organizations with religious objections to providing contraceptive coverage that would still ensure seamless coverage for the women enrolled in the organizations' health plans. We appreciate the opportunity to provide input, and support the Departments' continued efforts to implement the accommodation in a way that guarantees seamless coverage of contraception. We also note that while we reference women throughout the comments, we recognize that the need for contraceptive coverage extends to transgender men, gender nonconforming individuals, and anyone who needs access to birth control. We will address certain specific questions posed by the

Departments in Part II of the RFI, but state at the outset that no alternatives are necessary or required because the accommodation, like the contraceptive coverage benefit itself, is consistent with the Religious Freedom Restoration Act (RFRA).

Currently, entities that object to covering contraception can invoke the accommodation by simply filling out a form saying they won't provide coverage and sending it to their insurance providers or administrators, or alternately by providing written notice to HHS. This accommodation does not violate RFRA for the following reasons: First, it does not substantially burden the religious exercise of the entities with religious objections to providing contraceptive coverage. Rather, it allows these entities to opt out of providing that coverage simply by informing third parties of those objections. Second, the accommodation clearly furthers a compelling government interest in ensuring access to birth control, which promotes gender equality, reproductive autonomy, and religious liberty. Birth control coverage helps to eliminate the health care cost disparities between women and men, to facilitate women's participation in all parts of society, and to allow every woman to follow her own religious or moral conscience in deciding whether and when to use birth control. Finally, the accommodation achieves this compelling interest using the least restrictive means necessary. Indeed, Justice Kennedy, in his *Burwell v. Hobby Lobby Stores, Inc.* concurrence, said that the least restrictive alternative available to requiring closely held for-profit employers with religious objections to birth control to provide coverage directly was the accommodation available to religiously affiliated non-profit organizations.¹

Eight of the nine Courts of Appeals that heard these cases prior to the Supreme Court's order in *Zubik* upheld the accommodation. These courts are free to uphold it once again as they reconsider the cases on remand, since the Supreme Court explicitly declined to rule on the merits of the cases.² All eight of the courts agreed that the current process does not substantially burden the employers' exercise of religion. In fact, the U.S. Court of Appeals for the Seventh Circuit called the accommodation "the opposite of cumbersome,"³ and said that it is "paradoxical and virtually unprecedented" for beneficiaries of an accommodation to claim that the accommodation itself imposes a substantial burden.⁴ The U.S. Court of Appeals for the D.C. Circuit explained, "[r]eligious 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."⁵

¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring). The *Hobby Lobby* case marks the first time that the Court has ever allowed for-profit companies to use their religious beliefs to take away their employees' benefits guaranteed to them by law. In our view, the case was wrongly decided: the Court should have concluded that the contraceptive coverage rule does not impose a substantial burden on employers in the first place, and even if it did, it the rule was narrowly tailored to serve compelling government interests in women's health and equality.

² *Zubik v. Burwell*, 136 S.Ct. 1557 (May 16, 2016).

³ *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014).

⁴ *Id.* at 557.

⁵ *Priests for Life, et al. v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014).

II. Additional modifications to the accommodation would enable discrimination and threaten religious liberty

Religious liberty means that everyone has the right to their religious beliefs, but it does not give anyone the right to discriminate by imposing those beliefs on others who do not share them. The objecting entities have continued to oppose the accommodation, despite its minimal requirements and in the face of the Departments' repeated attempts to address their concerns even though RFRA does not require it. In doing so, they have demonstrated that they will oppose any accommodation process which results in women enrolled in their health plans receiving the truly seamless coverage guaranteed to them by law. The entities objecting to accommodation are in effect asking for permission to impose religious restrictions on their employees and those covered by their health insurance. This is discrimination. Indeed, access to contraception is directly linked to advances in women's equality. For example, the oral contraceptive pill alone is associated with women's wage gains, an increase in women's enrollment in college, and a sharp increase in the number of women who chose to enter professions previously foreclosed to women such as law, medicine, and engineering.⁶ The ACA's contraceptive coverage benefit is designed to address the vestiges of gender discrimination.⁷ Women—not the employers or universities that provide their insurance—should be able to make important decisions about their health care based on their own personal beliefs.

Further, because the accommodation is already consistent with RFRA, any additional modification to the accommodation should be rejected because it would encourage entities with objections to any number of laws—including important non-discrimination protections—to demand similar exemptions. This would open the door to discrimination in other areas of law that could particularly impact women and LGBTQI people. The Departments should categorically reject this notion and underscore the principle that religion cannot be used to discriminate.

III. Responses to the Departments' Questions in Part II of the RFI

No modifications to the accommodation are necessary under RFRA, and we urge the Departments to reject any further adjustments to the accommodation process, including those proposed in the RFI. However, if the Departments do modify the accommodation, we reiterate that women's access to seamless coverage without cost-sharing or other barriers must remain the driving principle. The Departments should reject any modification that would create additional barriers, obstacles, or burdens for women seeking coverage—in short, any modification that would make it more difficult for women to obtain the coverage they are entitled to by law. Below, we elaborate on three of the questions posed in Part II of the RFI regarding how the proposed modifications would impact women.

A. Notification to Issuers Without Self-Certification- Question 4

In its supplemental briefing in *Zubik*, the Supreme Court asked parties to consider an alternate process that eliminates the written self-certification process, requiring only that employers

⁶ Br. of ACLU in Support of Respondents in *Zubik v. Burwell* at 29 (Feb. 2016), available at <https://www.aclu.org/legal-document/zubik-v-burwell-aclu-amicus-brief-support-respondents>.

⁷ *Id.* at 29.

inform insurance companies of their objections to covering contraception when they contract to provide insurance. The current request for comments solicits input on the impact of such an alternative procedure on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage.

The process posited by the Court should be rejected because it could interfere with women's access to seamless coverage. The current written self-certification process is an important step in facilitating the accommodation—it allows an objecting entity to communicate to its health insurance plan which birth control methods it objects to and thus need to be covered through the accommodation process. As the government noted in its supplemental brief, this notice provides “clarity and certainty for all parties whose rights and duties are affected by the accommodation.”⁸

Eliminating this straightforward process in favor of allowing objecting entities to provide verbal, informal requests to exclude contraceptive coverage would certainly complicate notice, making both administration and oversight of the accommodation more difficult. Without written documentation of an employer's objections, gaps in coverage could go unnoticed, and disputes could arise between employers and insurers. The Departments would also have more difficulty accessing the information needed to provide strong oversight and enforcement of the accommodation. All of these problems could lead to delays in arranging coverage for those insured by objecting entities, and women would suffer the consequences. As stated above, any adjustments to the accommodation must maintain truly seamless coverage for women. This arrangement, however, would interfere with seamless coverage by making implementation and oversight of the accommodation far more difficult.

Additionally, we question the assumption that this modification would resolve the concerns of objecting organizations. The plaintiffs in *Zubik* have opposed every version of the accommodation, even though the current written notification requires minimal involvement from them. There is reason to think that an informal notice process like the one contemplated by the Court would spur even more meritless litigation about the accommodation rather than end it.

B. Other Approaches With Respect to Insured Plans Described in the Supplemental Briefing- Question 2

The Departments also request information regarding how the modifications to the accommodation proposed by the *Zubik* plaintiffs in their supplemental briefings would impact women. These modifications would require that when an employer requests a plan that excludes contraceptive coverage, the insurance issuer provide that coverage separately by offering women the option to enroll in contraceptive-only policies rather than providing separate direct payments for services and by requiring women to take affirmative steps to enroll in contraceptive-only policies rather than being automatically eligible for payments for contraceptive services from their insurance issuer.

This scheme is totally unworkable. It would create a series of logistical and administrative hurdles that would render meaningless the ACA's guarantee of seamless coverage. First, it would put the burden on women to seek out a separate contraceptive-only plan, and to opt in to

⁸ Supp. Br. of Respondent Sylvia Burwell, Sec'y of U.S. Dep't of Health & Human Servs, et. al. in *Zubik v. Burwell* at 3 (Apr. 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/04/US-response-to-Zubik-order-4-12-16.pdf>.

coverage through a separate enrollment process, possibly through a third party. This would require women to navigate and manage two separate insurance policies, which would be onerous and time-consuming at best. At worst, it could act as a total barrier to coverage: for example, a young woman on her parents' plan might be unable to opt in to the separate policy without going through her parents. And all of that is assuming that women know the plan is available—which they very well may not if their employers refuse to tell them about it.

Further, continuity of care could suffer. If a woman's contraceptive-only policy is on a different network than the policy she holds through her employer, she would not be able to visit her regular doctor for birth control-related services. This is the very opposite of seamless. Birth control is essential preventive health care for women of childbearing age, and this approach singles it out and treats it differently from other health care in a way that forces women to jump through additional hoops in order to access coverage.

Moreover, it is important to note that no insurance product like the one proposed by plaintiffs exists, likely because of the many state and federal regulatory issues that a contraceptive-only policy would raise. In fact, a contraceptive-only policy was proposed by the Departments in 2013 and soundly rejected by commenters concerned that such policies would be extremely difficult to administer and prohibitively expensive.⁹ Ultimately, the Departments designed the current accommodation, which separates payments, to avoid those problems.¹⁰

C. Self-Insured Plans- Question 1

Finally, the Departments request comment on how a modified accommodation would work for self-insured plans, in which there is no insurer with a preexisting duty to provide coverage. We echo the concerns raised by the Departments—that the proposed process would eliminate the mechanism that allows the government to designate a plan administrator responsible for providing coverage. Without this critical step, no party would be responsible for ensuring that women insured by objecting organizations get coverage.

It is unclear how any alternative procedure or system could solve this problem in such a way that guarantees seamless access to women who receive their insurance through self-insured objecting organizations. It is, however, clear that RFRA does not require such an alternative. As we've reiterated throughout these comments and previous comments,¹¹ we strongly oppose any process that would create additional obstacles or barriers to coverage for those enrolled in the objecting entities' plans. The Departments must not unnecessarily modify the process when it risks undermining care for women in self-insured plans.

⁹ 78 Fed Reg. 39870, 39876 (Jul. 2, 2013).

¹⁰ *Id.*

¹¹ See, e.g. Comments from the ACLU re: Coverage of Certain Preventive Services Under the Affordable Care Act, CMS-9968-P to Ctrs. for Medicare & Medicaid Servs. Dep't of Health and Human Servs. (April 8, 2013), available at <https://www.aclu.org/aclu-comments-department-health-and-human-services-regarding-contraception-coverage-under-patient>; Comments from the ACLU re: Certain Preventive Services Under the Affordable Care Act, CMS-9968-ANPRM to Ctrs. for Medicare & Medicaid Servs. Dep't of Health and Human Servs. (June 19, 2012), available at <https://www.aclu.org/aclu-comments-department-health-and-human-services-regarding-contraception-coverage-under-affordable>.

III. Conclusion

The current accommodation is consistent with the law, and no changes are needed to address the objecting entities' concerns. If the Departments do choose to modify the accommodation, however, they must continue to ensure, above all else, that women have the seamless contraceptive coverage to which they are entitled by law without cost-sharing or other barriers. We appreciate the opportunity to submit these comments. If you have any questions please do not hesitate to contact Georgeanne Usova, Legislative Counsel, at (202) 675-2338 or gusova@aclu.org.

Sincerely,



Karin Johanson
Director



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