WASHINGTON
LEGISLATIVE OFFICE

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Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: CMS-9992-IFC2, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act"

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The American Civil Liberties Union ("ACLU") submits these comments on the Interim Final Rule amendments (the "IFR") published at 76 Fed. Reg. 46,621 (Aug. 3, 2011) that create an exception to the Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines") for certain religious employers with respect to contraceptive coverage in order to "provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." Because of the ACLU's profound respect for both religious liberty and for reproductive rights, the ACLU is particularly well-positioned to comment on the IFR.

The ACLU is a nationwide, nonpartisan public interest organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws. The ACLU has a long, proud history of vigorously defending religious liberty and reproductive freedom. In Congress and in the courts, we have supported legislation providing stronger protection for religious exercise. At the same time, we have participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care.

The ACLU applauds the Department of Health and Human Services ("HHS") for including contraception in the HRSA Guidelines. Sexually active individuals should have safe, affordable access to the full range of contraceptive options. Women need access to contraceptives to prevent unintended pregnancies, plan the size of their families, plan their lives, and protect their health. Meaningful access to contraception is integral to a world in which people are free to express their sexuality, to form intimate relationships, to lead healthy sexual lives, to flourish, and to decide when and whether to have children.

Although some have expressed concern about the impact on institutions and individuals that oppose the use of contraception on religious grounds, religious liberty is not infringed by requiring the purchase of insurance that covers contraceptives. The religious beliefs of those who employ and serve diverse populations no more justify denying employees contraceptive coverage than they did denying African-Americans service at restaurants owned by those whose religious beliefs opposed desegregation.

Religious liberty does not come with the right to impose one's faith on others. Indeed, the contraceptive coverage provision serves the nation's interest in gender equality, reproductive autonomy, and religious freedom by making contraception accessible and affordable, and therefore allowing women – using their own consciences – to choose for themselves whether, when, and how to use birth control.

Each time more entities are allowed to deny women contraceptive coverage, the religious beliefs of some are imposed on the lives of others, and gender equality is undermined. Indeed, while the ACLU understands and shares HHS's interest in protecting the special relationship between a church and its ministers, the exception in the IFR applies more broadly, sweeping in the lay employees of sectarian organizations, and therefore reaching farther than HHS's stated intent.

For the reasons set forth below, the ACLU urges HHS – in the name of religious liberty and gender equality – to reject all requests to expand the proposed exception to the contraceptive coverage provision.

I. Background

The Patient Protection and Affordable Care Act ("ACA") provides that certain preventive services must be provided in health insurance plans without cost-sharing.[1] The preventive services provision is designed to ensure that health insurance provides real access to vital health care. Because existing preventive care guidelines otherwise incorporated into the ACA have significant gaps when it comes to women's health, Congress included the Women's Health Amendment ("WHA"), which requires health insurance plans to cover additional preventive services for women,[2] as described in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).[3]

[1] Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 131 (2010).

[2] *See, e.g.*, 155 CONG. REC. S12019, 12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("The underlying bill introduced by Senator Reid already requires that preventive services recommended by the U.S. Preventive Services Task Force be covered at little to no cost. . . . But [those recommendations] do not include certain recommendations that many women's health advocates and medical professionals believe are critically important . . . ."); *see also* 155 CONG. REC. S12261, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The current bill relies solely on the U.S. Preventive Services Task Force to determine which services will be covered at no cost. The problem is, several crucial women's health services are omitted. [The Women's Health] amendment closes the gap.").

[3] ACA, Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 131.

To implement the WHA, the Institute of Medicine ("IOM") "review[ed] what preventive services are necessary for women's health and well-being"[4] and developed recommendations for comprehensive guidelines. After an extensive science-based process, the IOM published *Clinical Preventive Services for Women: Closing the Gaps*, a report of its analysis and recommendations, on July 19, 2011. Among other things, the report recommended that the HRSA guidelines include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[5] On August 1, 2011, HRSA adopted the IOM's recommendations, including the recommendation on contraceptive services.[6]

Also on August 1, HHS promulgated amendments to the interim final regulation implementing the preventive services provision, creating an exception to the HRSA Guidelines' contraceptive coverage requirement. The IFR allows HRSA to "establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines."[7] HHS explained that its purpose in creating this exception was to "provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions," while extending contraceptive coverage to "as many women as possible."[8]

The IFR defines a "religious employer" that qualifies for an exemption as an organization that meets all of the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.[9]

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[4] INSTITUTE OF MEDICINE ("IOM"), CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (prepublication ed.) (2011) [hereinafter CLOSING THE GAPS].
[5] *Id.* at 94.
[6] Health Resources and Services Administration, U.S. Dep't of Health & Human Services, *Women's Preventive Services: Required Health Plan Coverage Guidelines* http://www.hrsa.gov/womensguidelines/.
[7] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).
[8] *Id*. at 46,623.
[9] *Id*. at 46,626.

HHS requested comments on this definition, which tracks the definition of the exempted entities in contraceptive equity laws in California and New York, each of which has been upheld against challenges arguing for expansion.[10]

II. Contraceptive Coverage Is Essential for Women's Health and Equality

The ACLU commends HHS for adopting comprehensive guidelines for women's preventive care, so as to promote women's health and well-being. Contraception is an integral part of this package.

Access to safe and effective contraception is a critical component of basic health care for women. Virtually all sexually active women use contraception over the course of their lives.[11] Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception,[12] maternal and infant mortality rates have declined.[13] Without contraception, women have more unplanned pregnancies and are less likely to obtain adequate prenatal care in a timely manner.[14] Controlling pregnancy spacing affects birth outcomes such as low birth-weight and premature birth. Pregnancy planning can also help women control a number of conditions that negatively impact their health, such as gestational diabetes and high blood pressure.[15]

Access to contraception gives women control of their fertility, enabling them to decide whether and when to become a parent. Contraception not only furthers the health of women and their children but equality as well, allowing women to make educational and employment choices that benefit themselves and their families. It is imperative that the benefits of access to birth control reach all women.

The HRSA Guidelines' contraceptive coverage requirement is based on decades of experience with the benefits of family planning, recognized by the Centers for Disease Control and Prevention as one of the ten most significant public health achievements of the 20th century.[16] In addition to the IOM, "[n]umerous health care professional associations and other

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[10] *See Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (NY 2006).

[11] Guttmacher Institute, Testimony before the Committee on Preventive Services for Women, Institute of Medicine 7 (Jan. 12, 2011) [hereinafter Guttmacher Institute Testimony].

[12] *Griswold v. Conn.*, 381 U.S. 479 (1965).

[13] *See* Centers for Disease Control and Prevention ("CDC"), *Ten Greatest Public Health Achievements – United States, 1990-1999, Family Planning*, MORBIDITY AND MORTALITY WEEKLY REPORT 242 (April 2, 1999), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf (access to family planning has led to "fewer infant, child, and maternal deaths"); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, at 222 (2006); U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS: TRENDS IN INFANT MORTALITY BY CAUSE OF DEATH AND OTHER CHARACTERISTICS, 1960-88, at 3 (1993).

[14] Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7-8 (Winter 2011), *available at* http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf.

[15] *See, e.g.*, March of Dimes, *Pregnancy After 35* (May 2009), http://www.marchofdimes.com/trying_after35.html.

[16] CDC, *supra* note 13, at 241.

organizations recommend the use of family planning services as part of preventive care for women."[17] Multiple federal programs promote contraception access.[18]

The Women's Health Amendment, through the HRSA Guidelines, also builds on a network of state contraceptive coverage laws. Twenty-eight states require health plans that include prescription drug coverage to cover contraception. These laws were passed in response to decades of gender discrimination in the provision of health insurance; without contraceptive coverage mandates, women routinely pay more than men for their health care. Similarly, the Equal Employment Opportunity Commission has made clear that Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, requires employers to provide contraceptive coverage when they offer coverage for comparable drugs and devices.[19]

The IOM found, however, that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years."[20] Contraceptive copays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all.[21] These high costs have posed a substantial barrier to access and effective use. The cost of contraceptive methods can cause women to have gaps in their use of birth control, or to employ less effective methods with lower upfront costs like condoms, as opposed to long-acting reversible methods like the IUD. Eliminating cost-sharing increases use of these more effective methods.[22]

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[17] CLOSING THE GAPS, *supra* note 4, at 93 (including "the American College of Obstetricians and Gynecologists, the American Academy of Family Physicians, the American Academy of Pediatrics, the Society of Adolescent Medicine, the American Medical Association, the American Public Health Association, the Association of Women's Health, Obstetric and Neonatal Nurses, and the March of Dimes").

[18] *See, e.g.*, Susan. A. Cohen, *The Numbers Tell the Story: The Reach and Impact of Title X*, 14 GUTTMACHER POL'Y REV. 1 (2011), *available at* http://www.guttmacher.org/pubs/gpr/14/2/gpr140220.pdf; Rachel Benson Gold & Adam Sonfield, *Block Grants Are Key Sources of Support for Family Planning*, 2 GUTTMACHER REPORT ON PUB. POL'Y (1999), *available at* http://www.guttmacher.org/pubs/tgr/02/4/gr020406.pdf.

[19] Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html ("Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices."); *see also Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). *But see In re Union Pacific Railroad Employment Practices Litigation*¸479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

[20] CLOSING THE GAPS, *supra* note 4, at 94.

[21] *See* Guttmacher Institute Testimony, *supra* note 11, at 7-8; Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 CONTRACEPTION 491, 531 (June 2010).

[22] Sonfield, *The Case for Insurance Coverage of Contraceptive Services*, *supra* note 14.

The WHA, and the HRSA Guidelines developed pursuant to it, close the gap, facilitating affordable coverage for this essential health care service.[23]

III. Requiring Insurance Coverage of Contraception Does Not Infringe on Religious Liberty

Opponents of family planning have urged HHS to eliminate contraceptive services from the HRSA Guidelines altogether, in furtherance of their agenda to prevent all women from having this benefit. Indeed, some go as far as to say that contraception "is not properly seen as basic health care."[24] Such arguments contravene congressional intent,[25] and basic medical science.[26]

Short of removing the requirement, family planning opponents want HHS to expand the exception to give *any* individual or entity a veto over the coverage available in *any* health plan. They seek a rule under which individuals, insurers, secular employers, and organizations that self-identify as religious but employ diverse workforces – such as hospitals, social service agencies, and universities – would be able to deny others contraceptive coverage, despite the IOM's conclusion that contraception is indicated preventive care for *all* women, without regard to whom they happen to work for, be insured by, or share enrollment in a health plan with. This, and all, proposals to expand the exception in the IFR must be rejected.

Requiring coverage of contraception in insurance plans does not infringe on religious liberty. The HRSA Guidelines – like the contraceptive coverage laws that have come before them[27] and a host of generally applicable anti-discrimination and labor laws across the country – are constitutionally unremarkable. Opposition to neutral laws from religious organizations is not unique to contraception. For example, individuals and institutions have claimed religious objections to desegregation[28] and to equal pay laws.[29] But just as it was not a violation of

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[23] *See, e.g.*, 155 CONG. REC. at S12026-7 (daily ed. Dec 1, 2009) (statement of Sen. Mikulski) ("We want to either eliminate or shrink those deductibles and eliminate that high barrier, that overwhelming hurdle that prevents women from having access to" preventive care.).

[24] United States Conference of Catholic Bishops (USCCB), Comments on Interim Final Rules on Preventive Services, 3 (Aug. 31, 2011).

[25] The Women's Health Amendment was intended to cover family planning services. *See, e.g.*, 155 CONG. REC. at S12025 (daily ed. Dec 1, 2009) (statement of Sen. Boxer); 155 CONG. REC. S12261, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken); 155 CONG. REC. S12093, S12114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein).

[26] Contraception is preventive care. *See* CLOSING THE GAPS, *supra* note 4, at 91. Despite baseless claims to the contrary, the HRSA Guidelines, which require coverage of all FDA-approved *contraceptives*, do *not* require coverage of medical abortion. Any arguments, therefore, that by including all FDA-approved contraceptives the HRSA Guidelines violate restrictions on abortion in the ACA or other federal laws is pure misdirection.

[27] First Amendment claims brought against the California and New York contraceptive equity laws were rejected by the high court of each state. *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 74; *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 461. Those courts did not address the Religious Freedom Restoration Act ("RFRA") because it is inapplicable to state laws.

[28] Not long ago, a restaurant owner in South Carolina argued that his religious beliefs prevented him from complying with civil rights laws requiring him to serve African-American customers. Although the First Amendment protected his right to hold those beliefs, it did not allow him to trump the Civil Rights Act. *Newman v.*

religious freedom to require segregated restaurants to integrate in the face of longstanding and sincerely held religious objections, it is not a violation of religious freedom to require that women have access to contraceptive coverage. HHS should reject all requests to allow additional entities to deny contraceptive coverage to women and weaken the Women's Health Amendment.

A. The First Amendment

The United States Supreme Court has rejected the notion that the Free Exercise Clause of the First Amendment requires exemptions from generally applicable and neutral laws like the WHA.[30] As the Court noted in *Employment Division v. Smith*, to do otherwise would be to create a system "in which each conscience is a law unto itself."[31] The WHA requires all new insurance plans to include coverage of the preventive services listed in the HRSA Guidelines. It applies to plans held by secular and religiously affiliated employers alike. Such a neutral law does not violate the First Amendment, despite certain theological doctrines opposing contraception.

In its comments on this IFR, the United States Conference of Catholic Bishops ("USCCB") attempts to skirt the *Smith* standard in two ways. First, it argues that the contraceptive coverage requirement was somehow targeted at the Catholic Church. Although contraception and support for contraceptive coverage is overwhelmingly popular, objection to it is in no way limited to Catholic institutions.[32] Regardless, the HRSA Guidelines are not aimed at any religious objector. Rather, the Guidelines "target" *all* insurance plans toward the goal of bettering women's health and well-being by requiring coverage of preventive services at no cost-sharing.

Second, the USCCB invokes the "hybrid rights" exception to *Smith*, claiming that the IFR violates freedom of speech and association. In *Smith*, the Supreme Court explained its prior precedents, which did require exemptions from neutral laws, as implicating both religious liberty and a separate constitutional right. The lower federal courts have disagreed about whether the Court created a new "hybrid rights" exception to the *Smith* doctrine, and if so, what showing it

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Piggie Park Enters., Inc., 256 F. Supp. 941, 944-45 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

[29] *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be "heads of households" could be held liable under equal pay laws); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of households" violated Title VII).

[30] *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

[31] *Id*. at 890.

[32] *See, e.g.*, Press Release, Family Research Council, FRC Opposes HHS Mandated Coverage of Abortifacients Under Obamacare (Aug 1, 2011); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 463 (plaintiffs challenging New York's contraceptive equity law included several Baptist groups).

demands of a religious adherent.[33] But even the most expansive view of the hybrid rights exception could not call into question the WHA. It is well established that one does not make out a hybrid rights claim "merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right."[34] The WHA implicates neither speech nor association.

Like other contraceptive coverage laws, the WHA does not "compel [anyone] to associate, or prohibit [anyone] from associating, with anyone."[35] Compliance with a health insurance law does not implicate expressive association. Similarly, compliance with the WHA is not an endorsement of birth control; adherence to a law does not violate the speech rights of someone who disagrees with it. As the California Supreme Court held in this context, "for purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition."[36] Employers and insurance issuers remain free to oppose birth control, to attempt to persuade others not to use contraception, and to convey their moral messages. What they may not do is impose their religious beliefs on third parties by choosing which essential health services third parties are able to access.

B. <u>Religious Freedom Restoration Act</u>

Congress enacted the Religious Freedom Restoration Act ("RFRA") to restore the strict scrutiny standard that protected religious exercise from substantial burdens imposed by neutral laws prior to *Smith*.[37] Despite claims to the contrary, RFRA is not implicated here for the simple reason that the WHA does not impose a substantial burden on religion. And even if the statute did impose such a burden, it furthers a compelling state interest in promoting gender equality, reproductive autonomy, and religious liberty.

1. *Substantial Burden*

Under RFRA, a "substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]'"[38] But the fact that

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[33] *See McTernan v. City of York*, 564 F.3d 636, 647 n.5 (3d Cir. 2009) (listing the circuits that have rejected the notion of a special hybrid rights rule); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir. 2008) (declining to adopt doctrine after noting widespread scholarly criticism); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (describing hybrid rights theory as non-binding dicta); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (describing doctrine as "completely illogical").

[34] *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999).

[35] *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465.

[36] *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 89; *see also Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 20-21 (D.C. 1987) (holding that provision of benefits to a student group would amount to neither "an abstract expression of the University's moral philosophy" nor an expression of support for the group or its views).

[37] The ACLU advocated for the passage of RFRA.

[38] *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *accord Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (explaining that

government action "is offensive to [an individual's] religious sensibilities" does not render the action a substantial burden.[39] The link between the contraceptive coverage requirement and the religiously prohibited behavior is too attenuated to amount to a substantial burden.

The WHA simply requires employers to pay money, which purchases insurance, which covers a range of health care, which ultimately may subsidize an employee's use of birth control in her private life. The same, or greater, attenuation applies to insurers and individual purchasers. The long journey between a devout person's paying money, and *someone else's* use of that money to engage in behavior that the devout person considers sinful does not compel the government to excuse a religious adherent from a general law.[40]

Courts have routinely rejected similar claims for exemption from paying taxes or providing benefits which conflict with its religious doctrine. In *United States v. Lee*, an Amish taxpayer objected to participating in the Social Security system on religious grounds. The Supreme Court unanimously rejected that free exercise claim, explaining:

> [I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs . . . . If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.[41]

Importantly, nothing in the HRSA Guidelines requires any person to *use* contraception. The requirement is merely that contraceptive services be covered in insurance plans at no cost-sharing, such that individuals may choose whether or not to access those services. Senator Barbara Mikulski, the author of the Women's Health Amendment, put it well when explaining the purpose of the provision on the Senate floor: "[W]e do not mandate that you have the service; we mandate that you have *access* to the service. The decision as to whether you should get it will be a private one, unique to you."[42]

Any entity covered by this provision remains free to relate its teachings about contraception to its adherents, its employees, and the general public, and attempt to persuade them not to use birth control. Indeed, when Wisconsin enacted a contraceptive equity provision with no religious refusal, a spokesman for the Diocese of Madison explained "Our employees

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since RFRA does not create a new test to determine what constitutes a "substantial burden," courts look to pre-*Smith* free exercise cases for that analysis).

[39] *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

[40] *See, e.g.*, *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (paying taxes that subsidize Medicaid abortion coverage cannot even support standing to assert a free exercise claim because the injury it inflicts on a taxpayer religiously opposed to abortion is too attenuated).

[41] *United States v. Lee*, 455 U.S. 252, 259-60 (1982) (citations omitted); *see also United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999).

[42] 155 CONG. REC. at S12277 (daily ed. Dec 3, 2009) (statement of Sen. Mikulski) (emphasis added).

know what church teaching is. And we trust them to use their conscience and do the right thing."[43]

Insurance typically provides a broad range of benefits, some of which individual insureds will never use. Because Jehovah's Witnesses believe that accepting blood transfusions is a sin, devout Jehovah's Witnesses presumably do not use transfusion coverage. But this is a long way from asserting that a Jehovah's Witness employer should be entitled to purchase customized health plans that exclude coverage for blood transfusions for all its employees. As the New York Court of Appeals explained in a similar context, there is no "absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings."[44]

The argument that the WHA cannot require contraception coverage because some oppose it on religious grounds knows no limit. In a "cosmopolitan nation made up of people of almost every conceivable religious preference,"[45] innumerable medical procedures will be disfavored by adherents of one religion or another. Indeed, legislation designed to undermine health care reform – allowing *any* insurer, employer, or individual to refuse to cover *any* health service to which they object – has already been introduced, and is being promoted by the same groups opposing the contraceptive coverage requirement.[46] Applying this approach to the ACA would undermine one of its most fundamental purposes: ensuring that all health insurance plans cover basic health services.

Offering or contributing to insurance coverage that provides numerous health services, including one to which you object, simply is not a substantial burden cognizable under RFRA.[47] Any claim to the contrary would turn RFRA into a blanket religious exemption that would threaten health, welfare, and civil rights protections. Thus, any RFRA claim fails at the threshold. Even if it did not, the contraceptive coverage requirement survives RFRA review intact.

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[43] Annysa Johnson, *Catholic Church, Contraception Coverage Collide*, MILWAUKEE JOURNAL-SENTINEL, Aug. 12, 2010, *available at* http://www.jsonline.com/features/religion/100504294.html.

[44] *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465 (rejecting a challenge to New York's contraceptive equity law). *See also U.S. Dep't. of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff'd sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

[45] *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

[46] *See* The Respect for Rights of Conscience Act, H.R. 1179/S. 1467, 112th Cong. (2011). The USCCB endorsed this legislation in their response to the HRSA Guidelines and IFR. *See* Press Release, USCCB, HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights (Aug. 1, 2011), http://www.usccb.org/news/2011/11-154.cfm.

[47] *See Goehring v. Brophy*, 94 F.3d 1294, 1297, 1300 (9th Cir. 1996), *overruled on other grounds by City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997) (rejecting students' objections to a university registration fee that was used to subsidize the schools' health program which covered abortion care, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious exercise because "the plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services.").

2. *Compelling Interest*

Allowing organizations to ignore the contraceptive coverage requirement would directly harm their employees' rights. The Supreme Court has recognized that granting an exemption to a religious employer "operates to impose the employer's religious faith on the employees."[48] Exempting employers from the contraceptive coverage requirement injures three fundamental rights of the women affected: gender equality, reproductive autonomy, and religious liberty. Those interests should not be sacrificed here.

a. Gender Equality

Omitting contraceptive coverage from a comprehensive benefit package is gender discrimination.[49] Prescription contraceptives are, for the most part, a form of health care available *only* to women. The consequences of the failure to be able to access and use contraception fall primarily on women. Denying contraceptive coverage undermines women's control over childbearing, which directly affects women's ability to participate equally in society. The Supreme Court has recognized as much: "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."[50]

Equality is unquestionably a compelling government interest.[51] Ending sex discrimination in employment benefits is "equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."[52] Ensuring equal benefits to men and women promotes "interests of the highest order."[53]

The WHA was designed to improve women's health and redress sex discrimination in health benefits. "[T]his legislation . . . offers free preventive services to millions of women who

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[48] *Lee*, 455 U.S. at 261. This is all the more true for an insurer that would impose its beliefs on the employees of a range of different organizations.

[49] *See* Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html ("Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices."); *Erickson v. Bartell Drug Company*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

[50] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

[51] *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

[52] *Fremont Christian Sch.*, 781 F.2d at 1369 (quoting *E.E.O.C. v. Pac. Press Publ'g Assoc.*, 676 F.2d 1272, 1280 (9th Cir. 1982)).

[53] *Shenandoah Baptist Church*, 899 F.2d at 1398 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). The high courts of California and New York each reached this conclusion when considering their respective contraceptive coverage laws. *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92 ("The [contraceptive requirement] serves the compelling state interest of eliminating gender discrimination."); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 (describing the "State's substantial interest in fostering equality between the sexes, and in providing women with better health care").

are being discriminated against . . . ."[54] As Senator Mikulski noted: "Often those things *unique to women* have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ."[55] In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stems from reproductive health care:

> Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.[56]

Creating exceptions to the contraceptive coverage requirement would perpetuate the fundamental inequity that the WHA was designed to erase.

b. Reproductive Autonomy

At the core of the right to privacy is every person's right to make the profound, life-altering decision of whether to become a parent. The "realm of personal liberty" includes a woman's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[57] Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.[58] Protecting access to reproductive health services is a compelling public interest.[59]

Virtually all women of reproductive age have used birth control at some point.[60] Denial of contraceptive coverage causes some women to forgo birth control or use less expensive and less effective methods of birth control, resulting in unintended pregnancies.[61] Further, cost-sharing requirements pose substantial barriers to accessing this preventive care.[62] The contraceptive coverage requirement promotes women's interest in planning their families.[63]

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[54] 155 CONG. REC. at S12020 (daily ed. Dec 1, 2009) (statement of Sen. Reid); *see also* 155 CONG. REC. S11979, S11987 (daily ed. Nov. 30, 2009) (Statement of Sen. Mikulski).

[55] 155 CONG. REC. at S11988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (emphasis added).

[56] *See* 155 CONG. REC. at S 12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand)*; see also* 155 CONG. REC. at S12272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) ("Women of childbearing age pay on average 68 percent more for their health care than men do.").

[57] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[58] *Griswold*, 381 U.S. 479.

[59] *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (4th Cir. 1995); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994).

[60] CLOSING THE GAPS, *supra* note 4, at 92.

[61] Guttmacher Institute Testimony, *supra* note 11, at 8.

[62] CLOSING THE GAPS, *supra* note 4, at 94.

[63] *See, e.g.*, 155 CONG. REC. at S12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("These health care services include . . . family planning services."); *id*. at S12027 (statement of Sen. Gillibrand) ("With [the WHA],

c. Religious Liberty

Some religious doctrines oppose the use of contraception. Just as those religious tenets are entitled to respect, so too are contrary religious traditions, which hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. In our constitutional system, the government is supposed to be a neutral actor, allowing individuals to follow their own religious or moral consciences. Requiring contraceptive coverage in health plans does just that – it allows every woman to decide for herself what is right for her and her family.[64]

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Every exception to the contraceptive coverage requirement "increases the number of women affected by discrimination in the provision of health care benefits."[65]

IV. The IFR Addresses a Legitimate Religious Liberty Concern, But Sweeps Broadly

HHS promulgated the religious employer exception to "provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions."[66] The ACLU recognizes the importance of the special relationship between a church and its ministers, and has long supported appropriate protections.[67] However, the exception in the IFR applies more broadly than would an exception for ministerial employees alone.

A church's relationship with its ministers is a manifestation of the church's religious mission. Religion Clause principles caution that the government may not decide who speaks for the church, nor what the church teaches. The court-created doctrine of the ministerial exception – which courts use to refrain from deciding certain disputes between ministers and religious bodies – is designed to allow churches to practice their faith and convey their religious message without government interference. Religious bodies have the right to hire ministerial employees whose beliefs and conduct are consistent with those bodies' beliefs and practices. "The relationship between an organized church and its ministers is its lifeblood. The minister is the

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even more preventive screening will be covered, including . . . family planning."); 155 CONG. REC. at S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("Under [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as . . . family planning"); *id.* at 12274 (statement of Sen. Murray) ("We have to make sure we cover preventive services, and [the WHA] takes into account the unique needs of women. . . . Women will have improved access to . . . family planning services.").

[64] As the California Supreme Court has recognized, "[o]nly those who join a church impliedly consent to its religious governance on matters of faith and discipline." *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 77.

[65] *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 94 (concluding that California's contraceptive coverage law was narrowly tailored).

[66] 76 Fed. Reg. at 46,623.

[67] *See, e.g.*, Brief of Amici Curiae Americans United et al., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, No. 10-553 (S. Ct. Aug. 9, 2011).

chief instrument by which the church seeks to fulfill its purpose."[68] The government should not interfere in ecclesiastical disputes between a church and its clergy.

As its name suggests, the ministerial exception should apply *only* to ministerial employees – those engaged in sensitive theological matters such as worship and teaching the faith – and only to employment decisions that are religiously motivated or address matters of religious doctrine. It does not apply to lay employees of a church, for whom there is no unique Religion Clause concern.[69] In general, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship," he or she is considered clergy for this purpose.[70] Although the characteristics describing religious employers in the IFR largely echo the judicial test for defining ministerial functions, by exempting the entire health plan sponsored by a religious employer, the IFR does more than "respect[] the unique relationship between a house of worship and its employees in ministerial positions." Allowing employers to refuse contraception coverage in their health plans denies that coverage to lay employees such as administrative or custodial staff.

In light of the fact that the exception in the IFR already reaches farther than HHS's legitimate goal of accounting for the ministerial relationship, all requests for a still broader exception should be swiftly rejected.

V. HHS Must Not Expand the Definition of Religious Employer in the IFR by Choosing a New Internal Revenue Code Reference

The fourth element of the definition of religious employer in the IFR provides that an organization must be a nonprofit organization as described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986. In soliciting comments on the IFR, HHS asked for feedback on alternative definitions of religious entities found in the Internal Revenue Code. The definition of religious employer in the IFR properly limits the exemption to pervasively sectarian institutions engaged in religious practice. Sections 6033(a)(3)(i) and (iii) best capture those institutions: "churches, their integrated auxiliaries, and conventions or associations of churches," and the "the exclusively religious activities of any religious order." No other section of Title 26 is appropriately narrow. Replacing sections 6033(a)(3)(i) and (iii) with any other section of Title 26 would therefore be contrary to HHS's stated goal – respecting "the unique relationship between a house of worship and its employees in ministerial positions" while at the same time extending "coverage of contraceptive services under the HRSA Guidelines to as many women as possible"[71] – and would undermine gender equality, reproductive autonomy, and religious liberty, as discussed above. In the inadvisable event that HHS would replace the requirement that a religious employer be a nonprofit organization as described in sections 6033(a)(3)(A)(i) or

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[68] *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).
[69] *See, e.g.*, *Bollard v. Calif. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (1999) (stating that the ministerial exception does not extend to "lay employees of a religious institution if they are not serving the function of ministers").
[70] *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).
[71] 76 Fed. Reg. at 46,623.

(iii) with a different definition from Title 26,[72] the first three elements of the definition of religious employer must continue to apply.

VI. HHS Must Add Missing Safeguards and Clarify the Enforcement Mechanism It Will Use in Implementing the Rule

In the event that the final rule provides an exception for religious employers, the following safeguards must be put in place.

The religious employer exception should not apply to contraception when it is prescribed for a non-contraceptive purpose.

Contraception has an important role in women's preventive care beyond preventing unintended pregnancies. As the IOM noted in its report, "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases."[73] Contraception can also decrease the risk of ovarian cancer and eliminate menopause symptoms.[74] HHS should clarify that the coverage exception in the IFR is limited to only when contraception is used for contraceptive purposes, and that coverage may not be excluded from any plan for contraceptives prescribed by a health care provider for reasons other than contraceptive purposes, or when necessary to preserve the life or health of the individual. This protection for women's health is common in state contraceptive coverage laws.[75]

The religious employer exception should not impede a woman's ability to acquire contraception coverage.

The exception in the proposed rule was put in place to account for the religious liberty interests of churches, synagogues, mosques, religious orders, and other pervasively sectarian

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[72] The USCCB points to the misleadingly titled "church plan," as defined in 26 U.S.C. § 414(e), as a replacement for sections 6033(a)(3)(A)(i) and (iii). *See* USCCB, *supra* note 24, at 21-22. The Catholic Health Association also encourages the use of this very broad category of entities. *See* Catholic Health Association, Comments on Interim Final Rule defining Religious Employer Exception (Sept. 22, 2011). So-called church plans encompass many more types of institutions than houses of worship, including agencies that operate primarily in the secular world, serve the public, and employ a diverse workforce. Exempting all "church plans" would drastically expand this element of the religious employer definition.

[73] CLOSING THE GAPS, *supra* note 4, at 92.

[74] Guttmacher Institute Testimony at 6; Dep't of Health & Human Servs., *Menopause Symptom Relief and Treatments*, Sept 29. 2010, http://www.womenshealth.gov/menopause/symptom-relief-treatment/.

[75] *See, e.g.*, CAL. INS. CODE § 10123.196(e) ("Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an insured."); *see also* ARIZ. REV. STAT. ANN. § 20-1402 (M) (2011); CONN. GEN STAT. ANN. § 38a-530e(d) (West 2009); HAW. REV. STAT. § 431:10A-116.7(d) (2010); ME. REV. STAT. ANN. tit. 24, § 2847-G(2) (2010); N.J. STAT. ANN. § 17B:27-46.1ee (West 2011); N.Y. INS. § 3221(1)(16)(C); N.C. GEN. STAT. ANN. § 58-3-178(e) (West 2010); W. VA. CODE ANN. § 33-16E-7(b) (2010).

institutions engaged in religious practice that oppose the use of contraception to control fertility. Its goal is not to punish the employees of those organizations by denying them health care coverage or forcing them to pay more for their health care. In protecting these religious bodies, however, employees of those organizations may suffer harm: women who follow their own conscience and seek to use contraception in order to plan the size of their families are denied health care coverage or forced to pay more for their health care. Thus, employees should be entitled to alternative means of acquiring coverage for these essential health care services. Where an employer takes advantage of the religious exception, the organization's employees should have the ability to otherwise obtain contraceptive coverage.[76] HHS should guarantee that women do not suffer adverse consequences because their employer seeks an exception.

Employees of organizations seeking an exception must receive proper notice.

HHS should ensure that employees of organizations utilizing the religious employer exception are provided notice that their health plan will exclude contraceptive coverage, including the specific list of services, drugs, and devices excluded, and for what purpose. Individuals should also be given information on how they can otherwise obtain contraceptive coverage. Notice requirements are standard in this context.[77]

HHS should ensure that only employers who qualify for the special religious exception obtain it.

By its terms, the exception in the IFR is designed to capture only a certain set of institutions; its goal is to protect the "unique relationship between a house of worship and its ministers" while extending coverage to "as many women as possible." The IFR is clear in specifying the types of employers who may decide to deny contraceptive coverage to their workers, and accordingly the group of employees who will lose the benefits of contraceptive coverage. Only churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order, may qualify for an exception from the HRSA Guidelines with respect to contraception, and only when their primary purpose is the inculcation of religious values, and they primarily serve and employ those who share their religious tenets.

In practice, however, employees of one organization sometimes acquire their health insurance coverage by enrolling in the group health plan of a larger, affiliated organization. For example, employees of a religiously affiliated school or charity might obtain their health insurance through a diocese's, association of churches', or a religious denomination's health plan. If that school or charity would not qualify for the religious employer exception in its own right, their employees must not be denied contraceptive coverage.

[76] A number of state laws provide similar consumer protections. *See, e.g.*, HAW. REV. STAT. § 431:10A-116.7(e); N.Y. INS. 3221§ (1)(16)(B); WASH. REV. CODE ANN. § 48.43.065 (West 2010); W. VA. CODE ANN. § 33-16E-7(c).
[77] *See* ARIZ. REV. STAT. ANN. § 20-1402 (M); CAL. INS. CODE § 10123.196(d)(2); CONN. GEN STAT. ANN. § 38a-530e(c); DEL. CODE ANN. tit 18, § 3559(d) (2010); HAW. REV. STAT. § 431:10A-116.7(c)(1); ME. REV. STAT. ANN. tit. 24, § 2847-G(2); MD. CODE ANN., Ins. § 15-826(c)(2) (West 2010); NEV. REV. STAT. ANN. § 689B.0376(5) (West 2010); N.J. STAT. ANN. § 17B:27-46.1ee; N.Y. INS. LAW § 3221(1)(16)(A)(2); N.C. GEN. STAT. ANN. § 58-3-178(e); R.I. GEN. LAWS § 27-18-57(e) (2009); W. VA. CODE ANN. § 33-16E-7(c).

HHS must ensure the integrity of the exception and guard it from abuse, inadvertent or otherwise. The exemption from contraceptive coverage properly reaches only as far as the health benefits of the actual employees of organizations that meet the definition of “religious employer.” Other organizations must not be permitted to deny their employees contraceptive coverage by enrolling them in a qualified religious employers’ health plan.

HHS should require an employer seeking a religious employer exception to certify compliance with the rule. The employer should certify that it meets the definition of religious employer, and that the plan does not cover employees of affiliated organizations that do not independently satisfy each of the four elements of the exception. An appropriate body should maintain these records such that the public can review them and the agency, if it has good reason to question the certifications, can take action to verify them.

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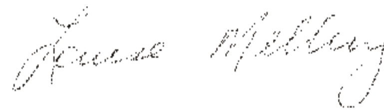
For all the forgoing reasons, HHS must not expand the religious employer exception, which is already broader than necessary to account for ministerial employees. HHS must also add the safeguards and enforcement measures described in these comments.

Sincerely,

Laura W. Murphy
Director
Washington Legislative Office



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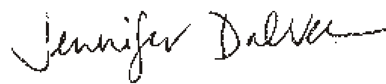

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