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September 20, 2016

VIA ELECTRONIC SUBMISSION

The Honorable Sylvia Burwell
Department of Health and Human Services
Centers for Medicare and Medicaid Services
Attention: CMS-9931-NC
P.O. Box 8010
Baltimore, MD 21244-1850

Re: CMS–9931–NC; Coverage for Contraceptive Services

Dear Secretary Burwell,

We respectfully submit the following comments in response to the Request for Information (RFI): Coverage for Contraceptive Services, published in the Federal Register on July 22, 2016 at 81 Fed. Reg. 47741 et seq. The mission of the Public Rights/Private Conscience Project (PRPCP) is to bring legal academic expertise to bear on the multiple contexts in which religious liberty rights conflict with or undermine other fundamental rights to equality and liberty. As such, we write to express our concern that any religious accommodation to the preventative services provision of the Affordable Care Act (ACA) that comes at the expense of employees' and their families' access to contraceptive health care risks violating the Establishment Clause of the First Amendment. PRPCP also houses a Racial Justice Project, which aims to explore the intersection between religious exemptions and racial justice and highlights the effects of overly-broad exemptions on communities of color. We would therefore additionally note that any alternative accommodation that limits seamless access to cost-free contraception would significantly affect women and families of color.

We begin by emphasizing that the existing religious accommodation to the contraceptive coverage provision fully satisfies the requirements of the Religious Freedom Restoration Act (RFRA), and therefore no further accommodation is necessary under law. RFRA prohibits the government from substantially burdening the exercise of religion unless doing so is the least restrictive means of furthering a compelling government interest. The current accommodation meets this standard for two reasons: first, it does not impose a burden, much less one that is substantial in nature, on religious exercise and second, it is the least restrictive means of furthering the government's compelling interests in ensuring access to contraceptives, a necessary part of basic preventative health care, and avoiding violations of the Establishment Clause.[1]

As all but one of the Courts of Appeals that have heard these challenges have held, the current accommodation does not impose a substantial burden on the objecting organizations' exercise of religion.[2] Rather, as one Court has explained, "[t]he acts that violate their faith are the acts of the

[1] Brief for Church-State Scholars as Amici Curae Supporting Respondents, Zubik v. Burwell, 793 F.3d 449 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191).

[2] Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 252–56 (D.C. Cir. 2014) *vacated and remanded by* Zubik v. Burwell, 136 S.Ct. 1557 (2016); Geneva College v. Secretary U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3rd Cir. 2015) *vacated and remanded by* Zubik v. Burwell, 136 S.Ct. 1557 (2016); East Baptist University v. Burwell, 793 F.3d 449 (5th Cir. 2015) *vacated and remanded by* Zubik v. Burwell, 136 S.Ct. 1557 (2016); Little Sisters of the Poor v. Burwell, 794 F.3d 1151 (10th Cir. 2015) *vacated and remanded by* Zubik v. Burwell, 136 S.Ct. 1557 (2016); Michigan Catholic Conference

government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree."[3] Put another way, "[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."[4] These holdings were not repudiated by the Supreme Court's ruling in *Zubik v. Burwell*, which explicitly did "not decide whether petitioners' religious exercise has been substantially burdened."[5]

Even if the nonprofits could demonstrate a burden on their free exercise, the current accommodation is nevertheless the least restrictive means of furthering at least two compelling interests: ensuring access to cost-free contraceptives and, as will be discussed in the subsequent section, avoiding possible violations of the Establishment Clause of the First Amendment. Both of the two alternate accommodations suggested in the RFI would impair employees' ability to receive seamless access to cost-free contraceptive coverage. One alternative would allow employers to request that they be exempted from providing contraceptive coverage verbally rather than through a written form. Such an accommodation leaves ample opportunity for miscommunications and disputes between employers, health plans, and the government, which could leave employees without adequate health coverage and impede enforcement of the preventative care mandate. Further, there is no reason to believe that those employers who have objected to providing a written notice of their need for an accommodation would be willing to do so orally.

The other proposed alternative would require health plans to create contraceptive-only policies, and require employees to affirmatively enroll in these policies. Such an alternative, as commentators have already noted, would raise a host of administrative and financial problems.[6] In addition, by requiring employees to affirmatively enroll in the contraceptive-only plans, this accommodation would eliminate the seamless access to contraceptive coverage that the preventive services provision was intended to guarantee.

Any Alternative Accommodation That Would Impose Harms on Employees and Their Families Risks Violating the Establishment Clause

As we have stated above, the existing accommodation does not violate the religious rights of objecting employers under RFRA. Furthermore, any new regulation that would shift the burden of a religious accommodation from employers onto employees and their families risks violating the First Amendment's Establishment Clause. A clear line of cases from the Supreme Court has held that where a religious accommodation created by the government imposes serious harms on other private individuals, it ceases to be a valid protection of personal faith and instead becomes

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& Catholic Family Services v. Burwell, 807 F.3d 738 (6th Cir. 2015) *vacated by* Michigan Catholic Conference, et. al. v. Burwell, 136 S.Ct. 2450 (2016); Grace Schools v. Burwell, 801 F.3d 788, 807-808 (7th Cir. 2015) *vacated by* Grace Schools v. Burwell, 136 S.Ct. 2011 (2016).

[3] East Baptist University v. Burwell, 793 F.3d 449, 461 (5th Cir. 2015) *vacated and remanded by* Zubik v. Burwell, 136 S.Ct. 1557 (2016).

[4] Priests for Life, et al. v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 246 (2014).

[5] Zubik v. Burwell, 136 S.Ct. 1557, 1560 (2016).

[6] 78 Fed Reg. 39870, 39876 (Jul. 2, 2013).

an unconstitutional establishment of religion.[7] This restriction on overly-broad religious accommodations, discussed more fully in the *Zubik* amicus brief submitted by church-state scholars, "prevents the government from accommodating the religious exercise of believers by exacting a significant price from a discrete group of third parties who do not share their beliefs."[8] In particular, exemptions from laws and policies that prohibit discrimination run the risk of First Amendment violations. As the U.S. Commission in Civil Rights recently found in a report examining conflicts between religious liberty and civil rights, "[o]verly-broad religious exemptions unduly burden nondiscrimination laws and policies" and as such "[t]he First Amendment's Establishment Clause constricts the ability of government actors to curtail private citizens' rights to the protections of non-discrimination laws and policies."[9]

Both of the alternative accommodations put forth in the RFI would impose a significant harm on non-beneficiaries, most notably employees and their families. The first alternative, by providing ample opportunity for confusion, misrepresentation, and further RFRA litigation, would make employees susceptible to extensive gaps in necessary contraceptive coverage. Further, by making enforcement of the contraceptive mandate significantly more difficult, it would impose costs on both employees and the government. The second alternative would impose significant burdens on third parties by requiring health plans to create, and employees to seek out and enroll in, contraceptive-only health plans. These plans would likely face substantial administrative and financial difficulties. Furthermore, they would result in fewer employees and families having adequate access to contraceptive health care.

Any alteration of the religious accommodation contained in current law must not shift the cost of the accommodation onto others or unduly burden their right to health care on a non-discriminatory basis, or it risks violating the constitutional ban on government establishment of religion. Both the accommodations outlined in the RFI would impose meaningful burdens on non-beneficiaries, and should be rejected.

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[7] Estate of Thornton v. Caldor, 472 U.S. 703, 709 (1985) (holding that a state statute that gave workers the absolute right to a Sabbath day of rest impermissibly advanced religion in violation of the Establishment Clause by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee"); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (holding that a state tax exemption for religious periodicals violated the Establishment Clause, as it had no secular purpose and forced non-religious publications to "become indirect and vicarious donors" to religious entities) (internal quotations omitted); Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (upholding a broad religious exemption law while noting that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); Burwell v. Hobby Lobby Stores, Inc. 134 S.Ct. 2751, 2759 (2014) (upholding a religious exemption to the Affordable Care Act's contraceptive mandate while repeatedly noting that the effect of the "accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing."). This aversion to cost-shifting was echoed in Justice Kennedy's *Hobby Lobby* concurrence. *See* 134 S.Ct. at 2786-7 (Kennedy, J., concurring) ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests…").

[8] Brief for Church-State Scholars as Amici Curae Supporting Respondents at 6, Zubik v. Burwell, 793 F.3d 449 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191).

[9] The United States Commission on Civil Rights Briefing Report, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, September 2016, at p. 25-26, available at: http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF.

Seamless Access to Cost-free Contraceptive Care is Especially Important for Women and Communities of Color

PRPCP's Racial Justice Project examines the effects of overly-broad religious exemptions and accommodations on communities of color. Our Racial Justice Project's work and research has found a high need for seamless access to cost-free contraceptive coverage in communities of color. Women of color have higher unintended pregnancy and abortion rates than their white counterparts. More than half (fifty-five percent) of all abortions in the United States are performed on women of color.[10] These women face increasing difficulties in accessing care, as abortion clinics across the country are closing due to the burdens imposed by oppressive ideological regulations that are not justified by concerns for health or safety. Such closings are making it harder for many low-income women and women of color to have an abortion, since many cannot afford to cover the costs associated with traveling long distances to obtain care. Moreover, some women have resorted to self-induced abortion,[11] which can have serious health and legal consequences.

Eliminating disparities in reproductive health care, including high rates of unintended pregnancy, involves increasing access to contraception and family planning resources. Access to contraception allows women of color to plan whether and when they will have a child, which research has shown provides them with greater financial stability and freedom.[12] Many women of color, who on average earn significantly less than white women, cannot afford to pay for quality contraception. For example, the IUD is considered the most effective form of contraception available on the market today and costs between $500.00 and $1,000.00 without insurance. Because of its high cost, among other factors, only six percent of Black women have used IUDs compared with seventy-eight percent who have used birth control pills,[13] which have higher user failure rates.[14] Providing women of color with access to contraceptive coverage at no additional cost will help to reduce the reproductive health disparities that we see in communities of color. This is an important first step in ameliorating the overall health disparities between women of color and white women in the United States.

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[10] Sistersong, National Latina Institute for Reproductive Health, Center for Reproductive Rights, *Reproductive Injustice, Racial and Gender Discrimination in U.S. Health Care,* 24 (2014) available at http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17560_E.pdf.

[11] Seth Stephens-Davidowitz, *The Return of the DIY Abortion*, The New York Times (March 5, 2016) http://www.nytimes.com/2016/03/06/opinion/sunday/the-return-of-the-diy-abortion.html?_r=0; Phoebe Zerwick, *The Rise of the DIY Abortion*, Glamor (May 31, 2016) http://www.glamour.com/story/the-rise-of-the-diy-abortion; Teddy Wilson, Oklahoma Prosecutors Decline to Charge Teen Who Allegedly Self-Induced Abortion, Rewire (June 6, 2014) https://rewire.news/article/2014/06/06/oklahoma-prosecutor-declines-charge-teen-allegedly-self-induced-abortion.

[12] Adam Sonfield, Kinsey Hasstedt, Megan L. Kavanaugh, Ragnar Anderson, *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children* (March 2013) available at https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children.

[13] Kimberly Daniels, Ph.D.,William D. Mosher, Ph.D., Jo Jones, Ph.D., Center for Disease Control, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010* 7 (2013) available at http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf.

[14] Effectiveness of Family Planning Methods, CDC, available at http://www.cdc.gov/reproductivehealth/unintendedpregnancy/pdf/family-planning-methods-2014.pdf (last visited Sept. 14, 2016)

We do not believe that there is any legal requirement to modify the existing religious accommodation of the contraceptive coverage provision. If, however, the Department chooses to do so, it must ensure that the new accommodation does not impose a significant cost or harm on third parties including employees, their families, or insurance providers. So too, the Department must tailor any accommodation in such a way as to avoid unduly burdening the right to health care on a non-discriminatory basis. This is necessary in order to avoid a violation of the Establishment Clause and to ensure that employees, and especially vulnerable populations, have adequate access to necessary and preventative health services.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to contact us at 212-854-0167.

Sincerely,

Katherine Franke	Elizabeth Reiner Platt	Kira Shepherd
Faculty Director	Director	Director of Racial Justice

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