The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

The Leadership Conference

December 5, 2017

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-IFC
P.O. Box 8016
Baltimore, Maryland 21244-8016

Re: Religious and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services (RIN 0938-AT20 and 0938-AT46)

To whom it may concern:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, and the 37 undersigned organizations, we write to provide detailed comments below in response to (1) Religious Exemptions and Accommodations for Coverage of Certain Preventive Services, an interim final rule ("Religious Exemptions IFR") published in the Federal Register on October 13, 2017 at 82 Fed. Reg. 47792 *et seq.*, and (2) Moral Exemptions and Accommodations for Coverage of Certain Preventive Services, an interim final rule ("Moral Exemptions IFR") published in the Federal Register on October 13, 2017 at 82 Fed. Reg. 47838 *et seq.* (collectively, the "IFRs"). However, we must also register our strong objection to this process of changing the rule before public input, which creates significant barriers to women's access to reproductive health services, particularly for low income women and women of color.

For the reasons set forth below, we urge the Department of the Treasury, Department of Labor, and Department of Health and Human Services (collectively, "the Departments") to revoke the broad exemptions permitted under these rules. First, the IFRs create a harmful and dangerous precedent by allowing the denial of health care coverage based on religious or moral views while paying scant attention to the harm such denials cause to the people affected. Second, the IFRs are unlawful, in violation of the Administrative Procedure Act ("APA"), the U.S. Constitution, and the ACA. Finally, these rules obstruct reproductive justice, infringe upon reproductive rights, and will disproportionately harm low-income women and women of color.

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I. Background

A. Health Care Disparities for Women of Color

While people of color suffer disparities in almost every area of health care, these inequities are particularly egregious for reproductive health services. Women of color face greater obstacles to obtaining sexual and reproductive health services than non-Hispanic white Americans,[1] and African-American women experience higher rates of reproductive cancers, unintended pregnancies, and sexually transmitted infections than white Americans.[2] African American patients are often diagnosed later than others with the same health problems and have less access to high quality affordable care, resulting in higher death rates from the same conditions.[3]

Similar reproductive health disparities exist in the Hispanic community. Latinas are more likely to be diagnosed with cervical cancer than women of any other racial or ethnic group[4] and are more likely to live in areas with poor access to family planning services.[5] About 31 percent of Latinas are uninsured and approximately 25 percent live in poverty.[6] One study found that "even when diagnosed at similar ages and stages and with similar tumor characteristics, Latinas are more likely to die from breast cancer than non-Latina white women."[7] Furthermore, approximately 16 percent of Latinas have not visited a physician in the last two years, and about 25 percent reported not having a regular health care provider.[8]

1.Disparities in Health Care Coverage

Disparities in reproductive health are undeniably linked to the disparities that women of color face in health care coverage. For example, while most private insurance providers cover reproductive health services and abortion care, African American women are 55 percent more likely to be uninsured than their white counterparts,[9] and 31 percent of African-American women and 27 percent of Hispanic women ages 15-44 are enrolled in Medicaid, which denies coverage for abortion.[10] The ongoing health disparities faced by African-American women has also resulted in an increased rate of pregnancy complications and maternal mortality. African-

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[1] PLANNED PARENTHOOD, *Addressing Sexual and Reproductive Health Disparities among African Americans* (2015), https://www.plannedparenthood.org/files/3614/2773/6927/AA_Disparities.pdf.
[2] *Id.*
[3] *Id.*
[4] Planned Parenthood, *Addressing Sexual and Reproductive Health Disparities among Latinos* (2015), https://www.plannedparenthood.org/files/2814/2773/6927/Latino_Disparities.pdf.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Kaiser Family Foundation, *State Health Facts: Uninsured Rates for the Nonelderly by Race/Ethnicity* (2016) https://www.kff.org/uninsured/state-indicator/rate-by-raceethnicity/.
[10] *Id.*

American women are between three to four times more likely to die from pregnancy-related causes than white women.[11]

These inequities are present in contraceptive coverage as well. According to one study by Perspective Sex Reproductive Health, before the ACA, African-American women were 60 percent less likely, and Latina women were 40 percent less likely, to receive oral contraception as compared to white women.[12] African-American women were also 50 percent less likely to receive IUD contraception, and 30 percent less likely to receive the contraceptive ring, compared with white women of the same age.[13] The lack of insurance coverage for contraception significantly contributes to disparities among racial and ethnic groups regarding unintended pregnancies.[14]

2. Combatting Health Disparities through Reproductive Justice and Reproductive Rights

Reproductive justice, an approach developed by women of color based on their unique experiences, is centered on a woman's decision to: "become a parent, along with the conditions under which to give birth; not to become a parent, including access to all of the options for ending or preventing pregnancy and be treated with dignity; and to parent a child she already has in safe, supportive communities free from violence and oppression."[15] Reproductive rights, on the other hand, address the lack of legal protection, laws, or enforcement of laws that protect an individual woman's legal right to comprehensive reproductive health care services.[16] These closely interrelated concepts focus on strengthening women's ability to exercise self-determination in their own lives, including reproduction, notwithstanding the impact of inequities inherent in our society's institutions, environment, economics, and culture.[17] The enactment of the ACA in 2010 was a critical milestone for affirming reproductive justice and advancing reproductive rights.

B. Progress Made Under the Affordable Care Act ("ACA")

The Patient Protection and Affordable Care Act ("ACA") is a critical source of health care coverage for the traditionally underserved communities that are the individuals and communities

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[11] *Id.*
[12] Race, Ethnicity and Differences in Contraception Among Low-Income Women: Methods Received by Family PACT Clients, California, 2001–2007.
[13] *Id.*
[14] CHRISTINE DEHLENDORF ET AL, *Disparities in Family Planning*, Am J Obstet Gynecol. 2010 Mar; 202(3): 214–220. doi: 10.1016/j.ajog.2009.08.022; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835625/
[15] Loretta Ross, *What Is Reproductive Justice?*, Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change, Berkley Law, 4 https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051.
[16] Asian Communities for Reproductive Justice, *A New Vision For Advancing Our Movement For Reproductive Health, Reproductive Rights and Reproductive Justice*, 2005, http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf.
[17] *Id.*

our organizations represent, including individuals and families living in poverty, people of color, women, immigrants, LGBTQ individuals, individuals with disabilities, seniors, and individuals with limited English proficiency. The ACA reduced the number of people without insurance to historic lows, including a reduction of 39 percent of the lowest income individuals.[18] Although racial disparities in health care, especially reproductive health care, persist, the ACA was a step toward addressing the health care disparities that exist for people of color.

1. The ACA's Contraceptive Coverage Provision

The ACA consists of ten separate legislative Titles and has several health care reform goals. One of these goals is to strengthen primary health care access while bringing about longer-term changes in the availability of primary and preventive health care services. When preventive services coverage was written into the ACA, members of Congress recognized that many important services for women would not be included, as they fell outside of the national consensus guidelines upon which the coverage was to be based. Congress therefore included a provision requiring the Department of Health and Human Services (HHS) to add a set of women's preventive services following enactment of the statute.

HHS undertook a thorough and evidence-based process to develop this list of women's preventive services, calling on the independent Institute of Medicine (IOM) to convene experts and determine what should be on the list. It surprised no one with a background in public health or medicine that contraception was among the services that the Institute included in its recommendations. Anticipating objections from religious entities, when issuing the rule that would add these recommended services to the scope of preventive services coverage, the Departments included a full exemption from covering contraception for houses of worship. But before that rule even became final, employers filed suits under the guise of religious objections.

The challenges brought by for-profit entities found their way to the U.S. Supreme Court in 2014, resulting in the decision in *Burwell v. Hobby Lobby*.[19] The Court ruled that a closely-held for-profit company had religious exercise rights that were burdened by having to provide comprehensive health coverage, including contraception, because of the company owners' personal faith. It is critical to note that the Court's holding rested largely on its finding that there would be no third-party harm resulting from allowing a closely-held for-profit entity to use the accommodation workaround to achieve contraceptive coverage.

Additional challenges to the contraceptive coverage requirement were brought by *non-profit* entities, and as the Departments are well aware, several rounds of rulemaking have been undertaken in an attempt to address the religious objections of these employers.

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[18] Kelsey Avery, Kenneth Finegold and Amelia Whitman, *Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ASPE ISSUE BRIEF, (Sep. 29, 2016) https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncrease Coverage.pdf.
[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2786–87 (2014).

Through an Advanced Notice of Proposed Rulemaking, and then a Notice of Proposed Rulemaking, an accommodation was finalized in July of 2013. Through this accommodation, religiously affiliated non-profit employers could self-certify that they objected to contraception, notify their insurer or third-party administrator (TPA), and then that insurer or TPA would arrange for contraceptive coverage for the objecting employer's employees at no cost to the employer or the employee. Following the *Hobby Lobby* decision, two more rules were adopted—one creating an additional notice mechanism for objecting non-profits (to HHS rather than to the insurer/TPA), and another allowing closely-held for-profit entities to avail themselves of the accommodation, pursuant to the holding in *Hobby Lobby*.

None of this satisfied the non-profit religious employers who continued to press their claims in federal court that even this accommodation was too great a burden on their religious beliefs. These cases came before the Supreme Court last year in *Zubik v. Burwell*,[20] but the eight-member Court declined to issue a decision on the merits. Rather, it first sought supplemental briefing from the parties on possible new workarounds that would satisfy the religious objections *while still ensuring access to contraception*. The Court then remanded the cases to the lower courts.

C. Changes Under the IFRs

The administration, through the IFRs, seeks to evade the *Zubik* directive—to "ensur[e] that women covered by [employers'] health plans receive full and equal health coverage, including contraceptive coverage."[21] While the Court in *Hobby Lobby* allowed closely-held for-profit employers to forgo providing coverage for contraception under the accommodation, their employees still received the ACA-required coverage seamlessly, directly from their regular insurance plan. Even after the various lawsuits, eligibility for the full exemption was limited to houses of worship.

The IFRs expand eligibility for the exemption to *all* nonprofit and closely-held for-profit employers with religious or moral objections to coverage. The Religious IFR, however, does not stop there. All publicly traded for-profit companies with objections based on religious beliefs can also qualify for an exemption. Under these Rules, there is no guaranteed right of contraceptive coverage for the employees, dependents, and students of these organizations. By claiming to relieve the alleged burden on employers' religious beliefs, the Departments defer completely to employers' religious rights without any concern for the burden placed on women's access to health care.

This flawed outcome reflects the IFRs' internally inconsistent reasoning. On the one hand, the Departments argue that they cannot ascertain the Rules' impact on women's access to health care, but they *can* ascertain the burden of contraceptive coverage on employers' religious or moral beliefs. Similarly, while the Departments claim that the scope of contraceptive coverage

[20] *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).
[21] *Id.*

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imposes an enormous burden on employers, they also minimize the number of employers that will request an exemption or optional accommodation.

Moreover, the Rules reveal that the Department of Health and Human Services has abandoned its mission as a public health agency charged with promoting evidence-based health care services. The health benefits of contraception are well documented and outlined above, but the Department of Health and Human Services rejects these findings and instead gives credence to beliefs not grounded in scientific evidence, including that certain methods of contraception are abortifacients and that the link between contraception use and reduced frequency of unintended pregnancy is uncertain.[22] In reality, research shows that women at risk of unintended pregnancy who use contraception correctly and consistently make up only 5 percent of all unintended pregnancies, while women at risk of unintended pregnancies who do not use contraception account for 52 percent of all unintended pregnancies.[23] In addition to health benefits, contraception also enables women to make their own economic, social, and educational decisions. In light of all of these evidence-based findings, the Centers for Disease Control and Prevention named birth control one of the top ten public health achievements in the past century.[24] The Department of Health and Human Services has chosen to dispute and ignore these facts.

Although health care disparities decreased after the ACA's contraceptive coverage provision, there is no doubt that the IFRs will disproportionately hurt communities of color by limiting access to contraceptive care without cost sharing. Studies have consistently shown that eliminating the disparities in reproductive health care involves increasing access to contraception and contraceptive counseling.[25] It is essential that access to seamless contraceptive coverage is guaranteed for all individuals, including women of color, regardless of where they work. Because they limit women's access to contraception and contraception-related counseling, the Moral and Religious Exemptions IFRs violate the principles of both reproductive justice and reproductive rights. By limiting women's access to contraceptive coverage, the Departments have hindered women's ability to plan their family, including making choices regarding what type of contraception they will use, if any. These decisions are critical to gender equality, women's empowerment, and reducing socio-economic disparities.[26]

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[22] IFR at 12, 44–46.
[23] *Contraception Works – and Publicly Funded Family Planning Programs Are Essential to Reduce Unintended Pregnancy and Abortion*, GUTTMACHER INSTITUTE (Mar. 9, 2011), https://www.guttmacher.org/article/2011/03/contraception-works-and-publicly-funded-family-planning-programs-are-essential.
[24] *Ten Great Public Health Achievements in the 20th Century*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 26, 2017), https://www.cdc.gov/about/history/tengpha.htm.
[25] ELIZABETH REINER PLATT & KIRA SHEPHERD, *Why Zubik is Especially Important for Women of Color* (Mar. 24, 2016), http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/03/24/why-zubik-is-especially-important-for-women-of-color/
[26] United Nations Population Fund, Family Planning Overview, http://www.unfpa.org/family-planning.

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II. Comments

Considering this evidence of the benefits of making contraception available at no cost to individuals, The Leadership Conference urges the Department to revoke these IFRs for several reasons. Allowing restrictions on the availability of health care services based on the religious or moral beliefs of others—already too prevalent in reproductive health care—sets a dangerous precedent for women of color's access to health care. Limiting the availability of contraceptive coverage will itself have an adverse and disparate impact on communities of color. Furthermore, these Rules are unlawful, in violation of the Administrative Procedure Act and the United States Constitution.

A. The IFRs Will Have a Disparate Impact on Women of Color

Before the ACA, African-American women were 60 percent less likely, and Latina women were 40 percent less likely, to receive oral contraception as compared to white women.[27] African-American women were also 50 percent less likely to receive IUD contraception, and 30 percent less likely to receive the contraceptive ring, compared with white women of the same age.[28] The lack of insurance coverage for contraception significantly contributes to disparities among racial and ethnic groups regarding unintended pregnancies.[29] Although these disparities decreased after the contraceptive coverage provision, there is no doubt that the IFRs will disproportionately hurt communities of color by limiting access to contraceptive care without cost sharing.

1. The Religious Exemptions IFR

The Religious Exemptions IFR vastly expands the universe of potential exemptions.[30] This IFR allows any employer—nonprofit or for-profit—to exclude some or all contraceptive methods and services from the health plans it sponsors if the employer has religious objections. It gives that same option to colleges and universities for health plans they sponsor for their students.

In addition, the Religious Exemptions IFR does not set any standards for how an organization might establish that it has a religious objection, nor does it provide a mechanism for employees or students to challenge that claim. Objecting employers and schools may still make use of the accommodation, but doing so is merely optional. This regulation also provides religious exemptions for individuals and insurance companies. In essence, the expanded religious exemptions leave women vulnerable to the whims of their employers who have no place in these

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[27] Race, Ethnicity and Differences in Contraception Among Low-Income Women: Methods Received by Family PACT Clients, California, 2001–2007.
[28] *Id.*
[29] CHRISTINE DEHLENDORF ET AL, *Disparities in Family Planning*, Am J Obstet Gynecol. 2010 Mar; 202(3): 214–220. doi: 10.1016/j.ajog.2009.08.022; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835625/
[30] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792 *et seq.*

private decisions, just as they would not in any other conversations about an employee's healthcare.[31]

The Departments predict that 120,000 women will lose access to contraception through the combined rules. They concede, however, that they do not know, and so did not include in their estimate, the number of women who will lose access to contraceptive coverage because: (1) an employer or insurer that did not cover contraceptive coverage on the basis of religious beliefs before the ACA now would be exempt from providing coverage under the new regulation; or (2) employers that qualify for an exemption under the Religious Exemptions IFR will no longer make use of the accommodations provided under the previous rule. The Departments underestimate the profound impact the Religious Exemptions IFR will have on women's access to contraceptives—especially because publicly traded companies previously had not been included even under the accommodation.

A 2015 study from the Henry J. Kaiser Family Foundation of non-profit organizations making use of the accommodation under the prior regulations estimated that 3% of all nonprofits and 10% of the largest nonprofits have been using the accommodation.[32] The authors were unable to estimate how many nonprofits or enrollees that included; but, they did note that there are more than 1.4 million nonprofits in the United States, and that thousands of nonprofits—including hospitals, long-term care facilities, schools, and charities—are affiliated with the Roman Catholic Church, which objects to contraception.[33] The new regulations now make the accommodation optional and allow these entities to be totally exempt, thus enabling these nonprofits to deny contraceptive coverage to all of their employees, dependents, and students. Without clear standards or procedures for claiming a religious objection and without any oversight mechanisms or ways for affected employees and students to appeal such a claim, the new regulations open a door for potential abuse.

The full impact of these regulations depends on how many employers and schools will claim a religious or moral exemption, whether they will object to some or all methods and services, whether they will use the now-optional accommodation, and how many employees, students, and dependents will be affected. The new IFR would require women whose employers have a religious objection to pay the costs of contraceptive care out of pocket. This would have a devastating impact on the indigent, people of color, immigrants, the LGBTQ community, people with disabilities, and those with limited English proficiency.

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[31] Amy Goldstein, Juliet Eilperin and William Wan, *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, THE WASHINGTON POST (Oct. 6, 2017) https://www.washingtonpost.com/national/ health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?utm_term=.66c07b8e74e9.
[32] THE HENRY J. KAISER FAMILY FOUNDATION, *The Future of Contraceptive Coverage* (Dec. 7, 2016), https://www.kff.org/womens-health-policy/issue-brief/the-future-of-contraceptive-coverage/.
[33] *Id.*

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The Religious Exemptions IFR notes that there are "multiple other Federal programs that provide free or subsidized contraceptives for women at risk of unintended pregnancy."[34] When viewed alongside this Administration's related healthcare policies and actions (*e.g.*, the cuts to Medicaid, Title X, and the proposed defunding of Planned Parenthood) access to contraceptives for women has already decreased. Despite the common myth that all low-income people could enroll in Medicaid, the Medicaid program has only been available to certain categories of individuals (*e.g.*, children, pregnant women, seniors, and people with disabilities) that have little to no savings or assets. Parents of children and childless adults are often excluded from Medicaid or only the very lowest income individuals in these categories are eligible.

Every year, more than four million individuals access life-saving care such as birth control, cancer screenings, and testing for sexually transmitted infections (STIs)—including HIV—at Title X-funded health centers.[35] Seventy-five percent of Planned Parenthood patients are at or below 150 percent of the federal poverty level and half of their health centers are located in rural or underserved areas.[36] People of color comprise forty percent of Planned Parenthood patients.[37]

In addition to the harm the Religious Exemptions IFR will cause to women, the IFR will harm states by leaving "millions of women" without access to birth control,thus increasing contraceptive costs to state-funded programs.[38] For these reasons, we urge the Departments to repeal the Religious Exemptions IFR.

2. The Moral Exemptions IFR

Effective immediately, the Moral Exemptions IFR allows non-profits and for-profit employers with an objection to contraceptive coverage, based on their moral beliefs, to qualify for an exemption and eliminate contraceptive coverage from their plans.[39] Unlike the Religious Exemptions IFR, the Moral Exemptions IFR does not include publicly traded employers.[40]

The Moral Exemptions IFR creates a new category of employers who can now either qualify for an exemption or voluntarily choose an accommodation.[41] The Departments have claimed,

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[34] 82 Fed. Reg. 47792
[35] Fowler et al, "Family Planning Annual Report: 2015 National Summary," RTI International, (Aug. 2016), available at http://www.hhs.gov/opa/pdfs/title-x-fpar-2015.pdf.
[36] Planned Parenthood, The Urgent Need for Planned Parenthood Health Centers (Dec. 7, 2016), available at https://www.plannedparenthood.org/files/4314/8183/5009/20161207_Defunding_fs_d01_1.pdf.
[37] Planned Parenthood, This is Who We Are, (July 11, 2016), https://www.plannedparenthood.org/files/6814/6833/9709/20160711_FS_General_d1.pdf.
[38] Amy Goldstein, Juliet Eilperin and William Wan, *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, THE WASHINGTON POST (Oct. 6, 2017) https://www.washingtonpost.com/national/ health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?utm_term=.66c07b8e74e9.
[39] THE HENRY J. KAISER FAMILY FOUNDATION, *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women* (Oct. 6, 2017), https://www.kff.org/womens-health-policy/issue-brief/new-regulations-broadening-employer-exemptions-to-contraceptive-coverage-impact-on-women/.
[40] *Id.*
[41] *Id*.

without any evidence, that this will not limit a person's access to contraceptive care; but, on the contrary, this rule will create a "considerably larger pool of employers than when the exemption was available only to those who were employees of a house of worship or who were eligible for an accommodation in the past."[42] While it is unclear how many organizations will avail themselves of this new moral objection exemption, there is no doubt that more women will lose coverage as a result.

People of color experienced some of the largest gains in health coverage under the ACA. While the ACA included critical provisions ensuring full and equitable access to essential services without discrimination, the Moral Exemptions IFR threatens equal access to contraceptive coverage and will have a disproportional effect on poor families and people of color. One report found that "half of pregnancies in the United States are unintended, with the highest proportions occurring among African-Americans, Hispanics, and teenagers."[43] Therefore any expansion of the exemption, *i.e.* the Moral Exemptions IFR, may be detrimental to these employees who already face barriers to accessing comprehensive reproductive health care services.[44]

This rule is contrary to the Government's responsibility for ensuring that women covered by health plans "obtain, without cost, the full range of FDA approved contraceptives."[45] The Departments have always taken a compromise approach in accommodating opposing interests. In *Zubik v. Burwell*, the Court remanded the case so that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[46] This compromise in *Zubik* essentially permits a religious group to opt out of providing coverage, but the insurer would then be obligated to help women obtain contraceptive coverage.[47] After *Zubik*, the Departments' efforts to implement the previous accommodation centered its policymaking on preserving women's health care access.

The Moral Exemptions IFR undermines the objective of the ACA's contraceptive coverage provision, the Departments past efforts, and prior judicial decisions by allowing an employer's personal beliefs to supersede a woman's access to reproductive health care and her freedom to make decisions regarding her own reproductive health. The Moral Exemptions IFR invites employers to cherry pick what type of coverage they would like to offer under the guise of a

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[42] *Id.*
[43] Amaranta D. Craig et al., *Exploring Young Adults' Contraceptive Knowledge and Attitudes: Disparities by Race/Ethnicity and Age*, 24 WOMEN'S HEALTH ISSUES 281 (2014), http://www.sciencedirect.com/science/article/pii/S1049386714000097.
[44] National Center for Lesbian Rights. Re: CMS-9931-NC; Coverage for Contraceptive Services (2016), available at http://www.instituteforscienceandhumanvalues.com/FP/public-policy/public-policy-pdf/CMS-9931-NC-Coverage-for-Contraceptive-Services.pdf
[45] *Zubik v. Burwell*, 136 S.Ct 1557, 1560-1561 (2016).
[46] *Id.* at 1560.
[47] Dahlia Lithwick & Mark Joseph Stern, *Our Bodies, Their Choice*, SLATE (Oct. 6, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/assessing_the_new_exemption_to_the_affordable_care_act_s_contraceptive_mandate.html.

"moral objection," at the expense of their employees. Without access to this coverage, employees and their dependents will lose their ability to plan for their families and their future, face further economic insecurity, and continue to experience health inequities. This will affect women of color on a greater scale because of the disparities that already exist in accessing quality and affordable health care.

B. The IFRS are Unlawful

In addition to subjecting women of color's access to health care to the religious veto of employers, and increasing health disparities faced by communities of color, the IFRs should also be rescinded because they violate the APA and United States Constitution.

1. The IFRs Violate the APA

The APA imposes procedural requirements on the actions of executive branch agencies, including when agencies are "formulating, amending or repealing" a rule.[48] The APA is applicable here because the IFRs are final agency actions and are legislative rules within the meaning of the APA.[49] By enacting the IFRs in the manner they did, the Departments have violated several procedural and substantive requirements of the APA.

a. Procedural Violations of the APA

The APA contains two procedural rulemaking requirements that must be followed when an agency is "formulating, amending or repealing" a rule.[50] Section 553(b) of the APA requires notice and comment rulemaking, involving a notice of proposed rulemaking and a comment period prior to finalization of regulatory requirements—except when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest.[51] In addition to the pre-adoption notice-and-comment requirements, section 553(d) of the APA has a post-adoption publication requirement that agencies have a 30-day period between when a final rule is published and its effective date, unless the agency has good cause.[52] "[T]he purpose of the thirty-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."[53]

The IFRs violate the notice and comment requirement and the 30-day "wait" period between publication and effective date. An agency will be granted reprieve from these requirements only when the agency has "good cause" for not following them. Despite its stated reasoning, the Departments do not have good cause, which is limited to an agency finding that compliance with

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[48] 5 U.S.C. § 551(5).
[49] *Id.*
[50] *Id.*
[51] 5 U.S.C. § 553(b).
[52] 5 U.S.C. § 553(d) (Final agency action and legislative rules must be published in the Federal Register not less than 30 days before the effective date.).
[53] *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996).

notice and comment rulemaking is "impracticable, unnecessary, or contrary to the public interest."[54] Courts have found good cause in cases that involve: (1) emergencies;[55] (2) context where prior notice would subvert the underlying statutory scheme;[56] and (3) situations where Congress intends to waive section 553's requirements.[57] An agency's determination of "good cause" to abstain from following the APA's procedural requirements applies to each procedural requirement separately.[58] This means that the Departments must have good cause to waive each requirement.

The Departments claim that this provision of the APA does not apply "because of the specific authority granted to the Secretaries by section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act."[59] While these rules empower the Secretaries to promulgate such regulations as may be necessary or appropriate to carry out the provisions of the Health Insurance Portability and Accountability Act of 1996,[60] they do not empower the secretaries to disregard the APA's procedural requirements.

In the alternative, the Departments argue that they "have determined that it would be impracticable and contrary to the public interest to delay putting these provisions in place until a full public notice-and-comment process is completed."[61] This however is a declaratory argument that is conclusory in nature and does not rise to the levels described above when Courts have found that the circumstances surrounding a rulemaking rise to the standard of "good cause." This reasoning is similar to other instances in which agencies made conclusory claims of an emergency situation, unaccompanied by independent facts, which the courts determined are insufficient to constitute good cause.[62]

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[54] 5 U.S.C. § 553(b).
[55] For example, in 2004, the D.C. Circuit upheld the Federal Aviation Administration's (FAA) rule, promulgated without notice and comment, covering the suspension and revocation of pilot certificates on security grounds. *See Jifry v. F.A.A.*, 370 F.3d 1174, 1179–80 (D.C. Cir. 2004).
[56] For example, the Ninth Circuit upheld the Secretary of Agriculture's invocation of good cause to bypass the APA's 30-day publication requirement when issuing rules governing the orange market. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) (reasoning that requiring the Secretary to give 30-day advance notice of each rule would cause harm by forcing the agency to predict the proper restrictions in advance of when a reasonable determination could actually be made).
[57] For instance, when Congress imposes certain procedures, which, taken together with a deadline, are irreconcilable with Section 553's requirements, then courts may read congressional intent to waive the APA's requirements. *See, e.g., Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1998); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1998) (finding that the APA is inapplicable, rather than that good cause is established).
[58] *United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014).
[59] 82 Fed. Reg. at 47831.
[60] 26 U.S.C. § 9833; 29 U.S.C. § 1191(c); and 42 U.S.C. § 300gg–92.
[61] 82 Fed. Reg. at 47831.
[62] *See, e.g., Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 707 (D.C. Cir. 2014) (finding that no good cause existed when the agency failed to establish facts supporting a "threat of impending fiscal peril"). In addition, a number of courts rejected the Attorney General's invocation of good cause in the SORNA cases as merely restating the purpose of the statute, rather than proffering independent evidence. *See United States v.Valverde*, 628 F.3d 1159, 1167 (9th Cir. 2010) ("[T]he Attorney General did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted

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The Departments further argue that "[g]ood cause is supported by providing relief for entities and individuals for whom the provision operates in violation of their sincerely held moral or religious beliefs, but who would have to experience that burden for many more months under the prior regulations if these rules are not issued on an interim final basis."[63] However, this reasoning must be weighed against the burdens that many women will face if their employer or university decides to take advantage of the IFRs and cease to offer contraception without cost-sharing. They will be forced to find alternative means for contraceptive coverage or to pay high prices out of pocket to maintain the contraception coverage they currently have.

As explained above, the Departments have failed to provide good cause for violating both the APA's pre-adoption notice-and-comment requirements and the APA's post-adoption publication requirements. They have not adequately established that the APA's procedural requirements don't apply or that they have good cause for disregarding the APA's procedural rulemaking requirements. Because the IFRs were promulgated without adherence to the APA's procedural requirements, and without good cause for doing so, the Departments have violated 5 U.S.C. §§ 553(b) and 553(d) and the IFRs should be repealed.

b. Substantive Violations of the APA

In addition to the APA's procedural requirements described above, the APA contains several substantive rule making requirements that must be followed when an agency is "formulating, amending or repealing" a rule.[64] The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[65] "contrary to a constitutional right,"[66] or "in excess of statutory jurisdiction."[67] The IFRs violate 5 U.S.C. § 706(2) because they contradict the ACA.

The ACA (and implementing regulations) require all new insurance plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" without cost-sharing requirements in order to protect women's health, ensure that women do not pay more for insurance coverage than men, and advance women's equality and well-being.[68] The IFRs violate these requirements. In addition, section 1554 of the ACA prohibits the Departments from issuing regulations that "create[] any unreasonable barriers to the ability of individuals to obtain

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SORNA."); *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) ("[T]he Attorney General's 'public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA.'") (quoting *United States v. Reynolds*, 710 F.3d 498, 512 (3d Cir. 2013)); *see also United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009).

[63] 82 Fed. Reg. at 47814-15.

[64] 5 U.S.C. § 551(5).

[65] 5 U.S.C. § 706(2)(A).

[66] 5 U.S.C. § 706(2)(B).

[67] 5 U.S.C. § 706(2)(C).

[68] *See* 4 2 U.S.C. § 300gg-13(a)(4); 4 5 C.F.R. § 147.130 (2013)(a)(1)(iv).

appropriate medical care"[69] and Section 1557 of the ACA, prohibits sex discrimination in certain health programs and activities.[70] By permitting objecting institutions to deny no-cost contraceptive coverage, the IFRs erect unreasonable barriers to medical care violating Section 1554 of the ACA. By permitting objecting institutions to deny coverage for contraceptives, and thus deny women essential health coverage, the IFRs discriminate based on sex, in violation of section 1557 of the ACA. And as explained below, the IFRs are also contrary to the Establishment Clause and the Due Process Clause of the Fifth Amendment.

Because the IFRs violate the ACA and other constitutional provisions, they also violate the APA and must be set aside on that basis.

2. The IFRs Are Unconstitutional.

a. The Religious Exemptions IFR Violates the Establishment Clause of the First Amendment.

The Religious Exemption IFR impermissibly allows employers to impose their own religious viewpoint on employees, regardless of those employees' personal beliefs, and even when doing so causes employees serious harms.[71] Courts have held that the Establishment Clause of the First Amendment prevents the government from shifting the cost of religious accommodation to third parties[72] While the administration has asserted that the Religious Freedom Restoration Act[73] allows, or even requires, that the government create an avenue for exempting certain organizations from the Affordable Care Act's contraceptive coverage provision, the government can only constitutionally achieve such an outcome by replacing the current coverage with a program that provides contraception at no additional cost to employees.[74] Instead, the Rule as issued impedes access to contraceptive coverage and the ability to make personal decisions regarding reproductive health solely based on another person's religious beliefs.

Similar to benefits conferred by the Social Security Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and many other federal statutes that expressly require specific employee compensation and benefits, contraceptive coverage is a legally ensured and economically valuable employee entitlement. There is nothing in First Amendment jurisprudence

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[69] 42 U.S.C. § 18114(1).
[70] 42 U.S.C. § 18116.
[71] *See* U.S. CONST. amend. I.
[72] *See Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (rejecting a facial challenge to RLUIPA, a federal statute that permits accommodation of certain religious practices in prison, stating "[s]hould inmate requests for religious accommodations become excessive, *impose unjustified burdens on other institutionalized persons*, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition.") (emphasis added); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (stating, "The First Amendment . . . gives no one the right to insist that in pursuit of their own interest others must conform their conduct to his own religious necessities."); *but see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (distinguishing the obligations imposed on churches from those imposed on other types of organizations).
[73] 42 U.S.C. § 2000bb.
[74] *See Zubik v. Burwell*, 136 S. Ct. 1557; *Hobby Lobby*, 134 S. Ct. at 2786–87.

to distinguish between these federal statutory entitlements and the contraceptive coverage provision in the ACA. The Religious Exemption IFR tells employers that they can reject insurance coverage for a critical health service that 99% of sexually active women have used at one point in their lives, if they find it religiously objectionable. Such a result would impermissibly shift the cost of religious accommodation onto third parties, subjecting employees to serious harms with no recourse.

b. The IFRs Violate the Due Process Clause of the Fifth Amendment.

These Rules also violate the Fifth Amendment because they constitute impermissible sex discrimination.[75] The ACA's women's preventive services provision, which includes contraceptive coverage, was implemented in part to address the fact that women tended to pay more for insurance coverage than did men.[76] The IFRs violate the Fifth Amendment because it exclusively targets a benefit provided to women. By permitting objecting institutions to deny coverage for contraceptives, and thus deny women essential health coverage, the IFRs discriminate based on sex.

The ACA has expanded contraceptive coverage without cost-sharing to millions of privately insured women across the nation.[77] Since the implementation of the ACA, out-of-pocket spending on prescription drugs has decreased dramatically, with an almost 65% decrease directly attributed to oral contraception costs newly covered by the contraceptive coverage provision of the ACA.[78] It is estimated that the ACA created an annual out-of-pocket savings of approximately $1.4 billion for oral contraceptives for newly covered women, and ensured that a majority of women had no out-of-pocket costs for their healthcare.[79] Under these Rules, there is no guaranteed right of contraceptive coverage for the employees, dependents, and students of these organizations who are now eligible for the exemption. While it is unclear how many organizations will avail themselves of one of these exemptions, it is certain that many women will see a dramatic increase in their reproductive healthcare costs as employers avail themselves of the newly available exemptions.

III. Conclusion

Under the IFRs, many women—especially low-income women and women of color—will lose their access to quality and affordable reproductive health care, including contraceptives. Extensive research has shown that the "contraception mandate was urgently necessary to protect

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[75] U.S. CONST. amend. V.
[76] *See* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130 (2013)(a)(1)(iv).
[77] Adara Beamesderfer, Alina Salganicoff, and Laurie Sobel, *Private Insurance Coverage of Contraception*, THE HENRY J. KAISER FAMILY FOUNDATION (Dec. 7, 2016), https://www.kff.org/womens-health-policy/issue-brief/private-insurance-coverage-of-contraception/.
[78] Nora V. Becker and Daniel Polsky, *Women Saw Large Decrease in Out-Of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFFAIRS 1204–11 (2015), http://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2015.0127.
[79] *Id.*

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the health of women, that the cost of contraception decreased radically after the mandate was put in place, and that the millions of American women who are insured though their employers have better outcomes when they have access to affordable preventive reproductive care."[80] Access to comprehensive contraception coverage and full information about and choice of contraceptive methods are integral components to women's health care. All women should have unhindered and affordable access to all U.S. Food and Drug Administration-approved contraceptives. The IFRs impair a woman's right to make personal decisions regarding her reproductive health, and denies her right to access quality and affordable health care. For all of these reasons, we urge the Departments to revoke the broad exemptions permitted under these rules and revert to the previous standard for exemptions created by the ACA.

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If you require additional information, please do not hesitate to contact June Zeitlin, Senior Advisor, at The Leadership Conference at zeitlin@civilrights.org.

Sincerely,

Kristine Lucius, Executive Vice-President
The Leadership Conference on Civil and Human Rights

Alliance for Justice
American Academy of Nursing
American Association of University Women (AAUW)
American Bridge, Women's Rights Initiative
American Civil Liberties Union
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American Federation of Teachers
Anti-Defamation League
Asian Americans Advancing Justice
Asian & Pacific Islander American Health Forum
Bend the Arc Jewish Action
Black Women's Roundtable
Feminist Majority
Hispanic Federation
Human Rights Campaign

[80]http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/assessing_the_new_exemption_to_the_affordable_care_act_s_contraceptive_mandate.html

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Lawyers' Committee for Civil Rights Under Law
League of United Latin American Citizens
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Movement Advancement Project
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National Center for Transgender Equality
National Health Law Program
National Immigration Law Center
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National Organization for Women
National Women's Law Center
NEAT - the National Equality Action Team
People For the American Way Foundation
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