



April 3, 2023

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9903-P
P.O. Box 8016
Baltimore, MD 21244-8016
submitted via Regulations.gov

NPRM: Coverage of Certain Preventive Services Under the Affordable Care Act
Agency/Docket Numbers: REG 124930-21; CMS-9903-P
RIN: 0938-AU94; 1210-AC13; 1545-BQ35

To Whom It May Concern:

Americans United for Separation of Church and State submits the following comments to the Departments of Health and Human Services, Labor, and Treasury's proposed rule, "Coverage of Certain Preventive Services Under the Affordable Care Act," which was published in the Federal Register on February 2, 2023.

With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding the foundational American principle of separation of church and state since 1947. Our nation promises everyone the freedom to believe as they want, but our laws cannot allow anyone to use their religious beliefs to discriminate or harm others, including denying people access to healthcare.

Americans United has a particular interest in the Proposed Rule. We have submitted comments in response to every rulemaking on the Affordable Care Act's contraceptive coverage requirement put forth by the Departments since 2011. We have filed amicus briefs in support of the coverage requirement in nearly all appellate cases challenging it. We have represented university students whose coverage was at risk in three different lawsuits. In addition, we were original supporters of the Religious Freedom Restoration Act (RFRA) and are now deeply troubled that the law increasingly is being misused.

Ensuring access to contraception is, as the Proposed Rule explains, a "national public health imperative." It protects people's health, allows them to make decisions about their reproductive health and family planning, and promotes better economic outcomes by allowing people to participate in the workforce, pursue their education, and care for their children. Access to contraception is essential to people's health and equality. That's why the Affordable Care Act requires seamless, cost-free coverage of contraceptives.

In 2018, the Trump administration implemented religious and moral exemptions for all employers and private universities and colleges, stripping employees' and students' contraceptive coverage. The 2018 Rule is unconstitutional and harms people. The Proposed Rule would amend and rescind parts of the 2018 Rule in addition to creating a new way for people harmed by the religious exemption to access contraceptive services. We support the creation of the new pathway for coverage and the rescission of the moral exemption. But concerns about the Proposed Rule remain; thus, our comments set forth these concerns and suggest changes that the Departments should make when they finalize the rule.

The Establishment Clause's Limits on Religious Exemptions

The government's ability to provide religious exemptions, including under RFRA, is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."¹

First, before the government may grant a religious exemption, it must determine that there is a substantial, government-imposed burden on the claimant's religious exercise.² Giving a religious exemption without such a determination would be an unconstitutional promotion of religion by the government.³ Accordingly, the government is permitted—indeed required—to inquire into the circumstances underlying a claim for a religious exemption and make an objective assessment; the government may not defer to a claimant's assertions.⁴

¹ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). See also *Board of Educ. v. Grumet*, 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits").

² See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (RLUIPA "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (accommodations impermissible if they "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); *Amos*, 483 U.S. at 334-35 (Congress did not impermissibly preference religion when it acted "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."); see also, e.g., *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (accommodation must lift actual, "identifiable burden" on "exercise of religion").

³ Doing so would violate the historic, foundational principle at the heart of the Establishment Clause: the government must remain neutral between religions, and between religion and nonreligion. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982). See also, e.g., *Cutter*, 544 U.S. at 720 (accommodation of "exceptional government-created" burden is "compatible with the Establishment Clause") (citing *Amos*, 483 U.S. at 349 (O'Connor, J., concurring in judgment)); *Texas Monthly*, 489 U.S. at 15 (if accommodation does not remove "significant state-imposed" burden, it "provide[s] unjustifiable awards of assistance to religious organizations") (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)); *Amos*, 483 U.S. at 334-35 (granting accommodation to alleviate "significant governmental interference" does not "abandon[] neutrality [or] act[] with the intent of promoting a particular point of view in religious matters").

⁴ See, e.g., *Bowen v. Roy*, 476 U.S. 693, 696, 702-03 (1986) ("[C]laims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional."); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff'd by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims were not at issue in Supreme Court case) ("Most circuits . . . have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged."); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (while it

Second, the government cannot favor the religious beliefs of some at the expense of the rights, beliefs, and health of others. The Establishment Clause prohibits granting religious exemptions that would detrimentally affect any third party.⁵ When crafting such an exemption, the government “must take adequate account of the burdens” that it “may impose on nonbeneficiaries” and must ensure that any exemption is “measured so that it does not override other significant interests.”⁶

For example, in *Estate of Thornton v. Caldor, Inc.*, the Supreme Court invalidated a statute that gave employees an unqualified right to take time off on the Sabbath day of their choosing.⁷ The statute violated the Establishment Clause because it “[look] no account of the convenience or interests of the employer” and “would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.”⁸

The Supreme Court acknowledged the limitations imposed by the Establishment Clause yet again in *Hobby Lobby*—every member of the Court authored or joined an opinion acknowledging that “detrimental effect[s]” on nonbeneficiaries must be considered.⁹ This limit also is reflected in Free Exercise cases: the Supreme Court, for example, rejected a request for an exemption that would “operate [] to impose [an] employer’s religious faith on the employees.”¹⁰

There is only one set of circumstances in which the Supreme Court has upheld religious exemptions that had the effect of burdening third parties in any meaningful way—when core Establishment and Free Exercise Clause protections for ecclesiastical authority were directly implicated. In two cases, the Supreme Court has held that, under the “ministerial exception,” the government may not enforce civil rights laws that bar employment discrimination in a way that would interfere with a church’s decisions about who can preach and teach the faith.¹¹ And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the Court upheld under Title VII’s limited religious

“is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, . . . [we] have doubts whether the alleged burden imposed . . . is a substantial one”); see also Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 *Geo. Wash. L. Rev.* 94, 100–101 (2017) (“No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment.” (quoting *The Federalist* No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961))).

⁵ E.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter*, 544 U.S. at 720); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”).

⁶ *Cutter*, 544 U.S. at 720, 722; see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709–10 (1985).

⁷ *Caldor*, 472 U.S. at 705–08.

⁸ *Id.* at 709–10.

⁹ See 573 U.S. at 729 n.37; *id.* at 693; *id.* at 739 (Kennedy, J., concurring); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

¹⁰ *United States v. Lee*, 455 U.S. 252, 261 (1982).

¹¹ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012).

exemption a church's firing of an employee who was not in religious good standing.¹² This narrow category did not run afoul of the Constitution because the cases embody the First Amendment's "special solicitude" for the rights of churches to select their clergy, govern themselves, and control their internal operations.¹³

The Religious Exemption

Under the 2018 Rule, *all* nonprofit and for-profit employers as well as private universities and colleges are eligible for the religious exemption. But objectors do not have to show, or even assert, substantial burdens on their religious exercise. Indeed, they do not even have to give any notice that they plan to take the exemption. The 2018 Rule strips employees, students, spouses, and dependents of the insurance coverage to which they are entitled by law, imposing on them substantial costs and burdens to obtain the critical healthcare that should be available to them without cost-sharing. Compounding the harm, employers and universities are not even required to inform people that they have no contraceptive coverage—employees could start a job and students could enroll in school without knowing they will lose their right to coverage. Without coverage, the financial, administrative, and logistical hurdles are too severe for many people and they are unable to access contraceptive services.

Because the 2018 Rule provides exemptions without a showing that the objector's religious exercise is substantially burdened and the exemptions cause harm to employees and students, it runs afoul of the Establishment Clause's mandates.

The Proposed Rule acknowledges that the 2018 Rule "did not give sufficient consideration" to employees' and students' "significant interests in access to contraceptive services" and harms that the 2018 Rule causes them. Unfortunately, the Proposed Rule does not change the religious exemption at all and its constitutional flaws remain.

Although we strongly believe the Departments should reconsider the religious exemption, we agree that establishing the Individual Contraceptive Arrangement (ICA) as an alternative pathway to obtaining contraceptive services at no cost for those enrolled in health plans excluding that coverage is a necessary step. Indeed, if the Departments are to maintain the existing religious exemption, they, at a minimum, have a duty to ameliorate its harms.

In order for ICA to be an effective alternative, the Departments should take additional steps.¹⁴ In particular, we urge the Departments to clarify that the ICA is available to every person who does not have contraceptive coverage because of an objection by an employer,

¹² 483 U.S. 327, 337-39 (1987).

¹³ *Hosanna-Tabor*, 565 U.S. at 189.

¹⁴ We strongly support the specific recommendations made in coalition comments submitted by forty-five organizations on April 3, 2023. In order to fulfill their duty to the people who are harmed by the exemption, the Departments must commit to making the ICA as seamless and effective as possible so that it is a workable alternative path for no-cost contraceptive coverage.

school, issuer, or individual, including those whose lack of coverage is based on an injunction or a settlement agreement,¹⁵ or because they are enrolled in a Church Plan.

But as the Proposed Rule explains, in light of the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, “[e]nsuring access to contraception at no cost . . . is a national public health imperative.” We thus urge the Departments to expand the ICA’s eligibility to include anyone who lacks no-cost contraceptive coverage, including those enrolled in grandfathered plans, who are uninsured, covered through Medicare, and with short-term health insurance exempt from contraceptive coverage requirements. This would serve two important goals: (1) it would fulfill the government’s substantial and immense interest in ensuring people have access to contraceptive coverage and (2) it would ensure that there are enough people using the ICA to make it work well, which is necessary to ameliorate the harm to people who don’t have coverage because of the religious exemption.

Beyond the ICA, the Departments should consider other ways to mitigate the harm caused by the religious exemption. The 2018 rule expanded the religious exemption—sweeping in *all* nonprofit and for-profit employers—without justification. It goes without saying that the broader the exemption, the more harm it causes. Thus, if the Departments keep the religious exemption in place, they should reexamine its scope and restore definitions eliminated in the 2018 Rule.

At a minimum, we urge the Departments to strike the religious exemption for not-closely-held for-profits. The 2018 Rule unnecessarily exempted publicly traded corporations without pointing to even one that had asked for an exemption; describing what religious exercise or burden there might be for a publicly held company; or identifying who might assert substantial burdens, or how, on behalf of shareholders.¹⁶ Yet as the Supreme Court explained in *Hobby Lobby*, “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”¹⁷

Another straightforward way to mitigate harm would be to change the accommodation process from optional to required. As the Proposed Rule acknowledges, the accommodation “would likely be easier” for people to use to “obtain contraceptive services” than the ICA. Indeed, the Proposed Rule says that the ICA does not fulfill the ACA’s “goal of ensuring” that people have “seamless cost-free coverage of contraceptives, because the individual contraceptive arrangement would require some additional action” by the affected

¹⁵ Americans United, along with the National Women’s Law Center, represent Irish 4 Reproductive Health, a student group at the University of Notre Dame, that may be affected by a settlement agreement between the government and 76 entities that challenged an earlier version of this rule. [Second Am. Compl.](#), *Irish 4 Reproductive Health v. U.S. Dep’t of Health & Human Servs.*, 3:18-cv-00491-PPS-JEM (N.D. Ind. Aug. 20, 2020) (Ex. A). Because we only received the settlement agreement in response to a FOIA request, there may be additional settlement agreements that are also not publicly available. Every person potentially affected by any settlement must be eligible for the ICA. If terms of other settlement agreements would conflict with any recommendations to improve the ICA, we urge the Departments to make the settlement agreements available and explain how they will resolve the conflicts.

¹⁶ See 83 Fed. Reg. 57,536, 57,562-63 (Nov. 15, 2018).

¹⁷ 573 U.S. at 717.

people and “could require them to obtain contraceptive care” from other providers. Thus we suggest the Departments reconsider whether the accommodation process could be required.¹⁸

The Moral Exemption

Like the religious exemption, the Departments acknowledge that “the potential harm” caused by the moral exemption “was not adequately considered” in the 2018 Rule and explain that there is a “strong public interest in making contraceptive coverage as accessible” as possible. We agree and support the proposed rescission of the moral exemption.

The creation of the moral exemption was a discretionary choice by the Departments. There is no law that requires an exemption for non-religious moral objections and the 2018 Rule’s references to the Church Amendments and other laws in support of the exemption were misguided. Moreover, as the 2018 Rule and Proposed Rule explain, very few entities are likely to seek this exemption.

We oppose all the alternatives to rescinding the moral exemption that the Departments suggest, as all are more burdensome than the seamless access provided by insurance coverage as required by the ACA.

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For the reasons explained, we urge the Departments to consider changes to the rule to better fulfill their obligations to people who need access to contraceptive coverage.

Thank you for the opportunity to provide comments. If you should have further questions, please contact Dena Sher, sher@au.org.

Respectfully submitted,



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¹⁸ The Proposed Rules states that people who are enrolled in plans that invoke the optional accommodation are not eligible for the ICA. Given that there may be confusion among both individuals and providers between the optional accommodation and the ICA, we suggest either making these individuals eligible for the ICA or otherwise ensuring that individuals, providers, and issuers are held harmless if someone uses the ICA rather than the accommodation.