Lambda Legal
making the case for equality

December 5, 2017

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9925-IFC
P.O. Box 8016
Baltimore, Maryland 21244-8016

Re: Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (RIN 0938-AT46)

Dear Secretary Hargan:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") appreciates the opportunity provided by the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, "the Departments") to offer comments in response to the Moral Exemptions and Accommodations for Coverage of Certain Preventive Services interim final rule ("Moral Exemptions IFR" or "IFR") published in the Federal Register on October 13, 2017. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, policy advocacy, and public education. For decades, Lambda Legal has been a leader in the fight to ensure access to quality health care for LGBT people and people living with HIV. Many people in the communities Lambda Legal serves, like many in the general population, need contraceptive services for a range of health reasons. Consequently, insurance coverage for these services is essential.

In public comments submitted on September 20, 2017, in response to the Request for Information, Coverage for Contraceptive Services, published in the Federal Register at 81 FR 47741 *et seq.*, Lambda Legal explained that the existing accommodation under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (collectively, "ACA") does not substantially burden employers' exercise of religion, and that the accommodation constitutes the least restrictive means necessary to further the government's compelling interest in ensuring full and equal health coverage for employees regardless of gender. Indeed, Lambda Legal also previously briefed these points at length as *amicus curiae* in *Zubik v. Burwell*,[1] in addition to cautioning about negative consequences for

[1] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., *et al*., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), *available at* http://www.lambdalegal.org/in-court/legal-docs/zubik_us_20160217_amicus.

LGBT people and people living with HIV, among others, if religiously-affiliated non-profits are permitted to impose religious beliefs on workers.

These same negative consequences would be aggravated even further by expanding the category of those employers who could refuse contraceptive health care coverage to their employees, not just through accommodations, but by claiming the right to a complete exemption from the law due to asserted moral beliefs. These comments address (1) how the Moral Exemptions IFR creates a harmful and dangerous precedent by allowing a potentially unlimited class of employers to assert moral beliefs to exempt themselves from required provision of health care coverage; (2) how the Moral Exemptions IFR violates statutory and constitution protections under the APA, the ACA, and the U.S. Constitution. We consequently urge the Departments to set aside this IFR.

LGBT People and People Living with HIV Will Be Substantially Harmed by the Proposed New Exemption.

In a stark reversal of its previous concern for protecting the health of employees in this nation reflected in the July 22, 2016 Request for Information,[2] which sought assurances that any additional accommodations under the ACA should ensure seamless coverage for approved contraceptives,[3] the focus of the new IFR is glaringly lacking in any such concern for ensuring continued seamless health care coverage for employees. The failure of the Departments to prioritize the health care needs of employees in its reversal, and its pivot instead toward creating a sweeping exemption for "all bona fide religious objectors"[4] enabling them to deny health care to their employees, will result in substantial harms to employees nationwide, including LGBT employees and those living with HIV.

The IFR would force those in need of contraceptive coverage but who work for employers empowered to block reproductive health care coverage in the name of religion or morality to scramble to find alternative supplemental insurance on their own. Imposing this hardship on employees across the country would be deeply injurious. The creation of such an exemption would not just interfere with the ability of employees to receive seamless health care coverage, but would completely deprive them of an essential aspect of their health insurance coverage through their employer-provided insurance policies. Not only would that denial stigmatize employees in need of contraception services, in a great many cases it very likely would result in delayed health care provision, or complete denial of health care if employees are denied even the basic accommodation the Departments previously recognized as essential to seamless coverage. The creation of a new exemption from the ACA's coverage requirements invites increased demands for other health care

[2] Published in the Federal Register on July 22, 2016, at 81 FR 47741 *et seq*.

[3] *Id*. at 47742-44.

[4] IFR, 82 FR at 47806.

denials, providing the very barriers to the delivery of contraceptive services to which the Departments objected in *Zubik v. Burwell*.[5]

First, requiring employees and other insureds affirmatively to find on their own and enroll in a separate contraceptive-only insurance plan would create an additional layer of confusion, potential for miscommunication, and deterrent to treatment or delay in treatment for some patients. This is particularly true for employees and their family members who do not realize at the time of initial enrollment that they may develop a medical need for contraceptive-related care in the future. For example, an insured person who has not previously used contraceptives to prevent pregnancy may not anticipate that a physician later will determine based on the individual's specific medical history that pregnancy prevention is important for health reasons and that contraceptives constitute the best method for doing so. Additionally, contraceptives are a common form of treatment for health conditions unrelated to pregnancy prevention. An insured person who is not sexually active or of reproductive age may not anticipate being prescribed contraceptives until the patient is diagnosed with a condition such as polycystic ovary syndrome, or until the discovery of risk factors for certain types of cancer. Employees and other insureds should not be required to seek out information and affirmatively enroll in a contraceptives-only plan, particularly given the potential for delay and confusion about whether such enrollment is possible if the primary health care plan is not permitting open enrollment at the time of an unexpected diagnosis necessitating contraceptive coverage.

Second, the proposed exemption would create an unnecessary barrier to care because even if employees were able on their own to obtain such contraceptive-coverage-only policies, those policies may not have the same network of providers as the primary health plan offered by the employer. Employees should not be required to switch doctors or see two physicians once the need for contraceptive-related care arises, which would create the potential for delays in treatment. Third, requiring employees in need of contraceptive coverage to take steps to obtain care that other employees need not take would stigmatize these employees on the basis of their gender-related health care needs, and deter them from seeking out medically necessary treatment. Fourth, the proposed exemption leaves undetermined how, without written notice to covered employees and to the federal government, there would be meaningful oversight.

The proposed exemption concerns Lambda Legal because many members of the LGBT community need contraceptive services, and the exemption would impede their access to necessary care. A majority of lesbian and bisexual women use contraceptives at some point over the course of their lifetimes. Transgender men also may need contraceptive-related care.[6] The need for seamless contraceptive coverage is of deep concern to the communities we represent.

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[5] Supplemental Brief of Respondents Sylvia Burwell, Secretary of Health and Human Services, et al., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) at 3-6.

[6] *See* Camilla Taylor, "Why This Year's Reproductive Freedom Supreme Court Cases are Important for LGBT People and Those Living with HIV," *available at* http://www.lambdalegal.org/blog/20160301_reproductive-freedom-scotus-cases-matter-for-lgbt- hiv (citing studies).

Lambda Legal opposes the proposed exemption for the additional reason that permitting such an exemption would invite any number of non-profits with "moral" views to demand exemptions from the provision of health needs other than contraception, such as for medical care relating to sexual orientation, gender identity or HIV. LGBT people and people living with HIV too often experience discrimination in the workplace and in health care contexts by those who attempt to justify such discrimination on the basis of religion or personal morality. Lambda Legal previously cited numerous examples of such discrimination in response to a prior request for information.[7] Just a few examples include the following:

- A counseling student challenged her expulsion from a counseling program due to her refusal to counsel patients in same-sex relationships. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

- A visiting nurse argued that she had a free-exercise right to engage in anti-gay proselytizing to a home-bound AIDS patient. *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001).

- A physician argued that his religious beliefs justified refusing to employ gay people. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001), vacated on other grounds by 53 Fed. Appx. 740 (6th Cir. 2002).

- A physician withheld infertility treatment from a lesbian patient, citing religious justifications. *North Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008).

- A lab technician refused to do tests on specimens labeled with HIV because he believed "AIDS is God's plague on man and performing the tests would go against God's will." *Stepp v. Review Bd. of Indiana Emp. Sec. Div*., 521 N.E.2d 350 (Ind. 1988).

- A religiously-affiliated hospital cited religious justifications for refusing to allow a physician to perform a hysterectomy on a transgender man. *See* A. Littlefield, "Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds," *available at* https://rewire.news/article/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds/.

Although courts routinely have rejected such religious and moral objections to treating LGBT people and people living with HIV as impermissible discrimination, distressing examples of discriminatory treatment in the health care context continue to occur with regularity.[8] This

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[7] *See* Lambda Legal Response to Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 1557 RFI (RIN 0945-AA02 & 0945-ZA01) (submitted Sept. 30, 2013) ("Lambda Legal 1557 Response"), *available at* http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services.

[8] *See* Lambda Legal Comments on Proposed Rule 1557 Re: Nondiscrimination in Health Programs and Activities, 1557 NPRM (RIN 0945-AA02) (submitted Nov. 9, 2015) ("Lambda Legal 1557 Comments"),

discrimination contributes to persistent health disparities for LGBT people and people living with HIV.[9] As we previously explained in our September 30, 2013 submission in response to a Request for Information,[10] preventing discrimination in the provision of health care services can have significant ameliorative effects on the health of LGBT people and people living with HIV. Given this landscape, Lambda Legal is concerned that permitting the proposed exemption would invite employers to demand similar exemptions in contexts involving sexual orientation, gender identity, or HIV. Past examples of religiously-based discrimination suggest that such employers may demand exemptions from ensuring that the following employees and other insureds receive full health care coverage:

- Employees and other insureds who have a same-sex spouse or are in a same-sex relationship, including with respect to bereavement counseling after the loss of a same-sex partner or other mental health care that involves affirmation of an employee's sexual orientation or gender identity.[11]

- Employees and other insureds with health care needs relating to HIV, including with respect to pre-exposure prophylaxis (PrEP), a highly effective medication that dramatically reduces the risk of HIV infection among those who are otherwise at high

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available at https://www.lambdalegal.org/in-court/legal-docs/hhs_dc_20151117_letter-re-1557; Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., *et al*., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (filed Oct. 30, 2017), *available at* https://www.lambdalegal.org/in-court/cases/masterpiece-cakes-v-co-civil-rights-commission; Brief of Amici Curiae Lambda Legal, Defense and Education Fund, Inc., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191), *available at* https://www.lambdalegal.org/in-court/cases/zubik-v-burwell.

[9] *See* Inst. of Med., The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011) ("IOM Report") (undertaken at the request of the National Institutes of Health, and providing an overview of the public health research concerning health disparities for LGBT people and the adverse health consequences of anti-LGBT attitudes), *available at* http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx. Additionally, in 2010, Lambda Legal conducted the first-ever national survey to examine the refusals of medical care, other barriers to care, and substandard treatment confronting LGBT people and those living with HIV. The report, WHEN HEALTH CARE ISN'T CARING ("Lambda Legal, Health Care"), is available at http://www.lambdalegal.org/publications/when-health-care-isnt-caring. Because LGBT people and those living with HIV too often do experience discrimination in health care services, and are especially vulnerable to breaches of confidentiality in medical settings, and to violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters, Lambda Legal works to address this discrimination nationally with litigation, policy advocacy, community education, and education to ensure that medical professionals and healthcare facilities understand their responsibility to treat LGBT and HIV-positive patients fairly. *See* Lambda Legal, Health Care, *available at* http://www.lambdalegal.org/issues/health-care-fairness.

[10] *See supra* n. 8, Lambda Legal 1557 Response, 1557 RFI (RIN 0945-AA02 & 0945-ZA01).

[11] *See, e.g.*, *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2016).

risk, including people who are in a sexual relationship with an HIV-positive partner.

- Employees and other insureds who need hormone replacement therapy, gender confirmation surgeries, or other treatments for gender dysphoria.[12]

- Employees and other insureds who are unmarried or in a same-sex relationship and who require infertility treatment.[13]

To deny coverage to such employees and other insureds would not only constitute discrimination, but would harm them by interfering with their ability to obtain medically necessary health care and also by stigmatizing them. The Departments would give unnecessary encouragement to such efforts if it were to create the broad exemptions from ACA coverage proposed in this Rule.

Finally, the IFR's sweeping new exemption for a "moral" objector who wishes to block access to an employee's contraceptive health care because of the employer's subjective moral beliefs is dangerously broad. Efforts to carve out such broad exemptions from legal requirements that have the effect of harming others, endorsed as a special exemption under law, threaten not just the wellbeing of those in need of reproductive health care, but also the rule of law itself. This is because there is no limiting principle to temper the inevitable harms of the requested exemptions. Consequently, all the harms described herein could be just the tip of the iceberg in the scope of health care denials effectuated by employers invoking a new "moral" exemption to evade complying with the ACA and providing meaningful preventive health care to their employees.

Indeed, the Moral Exemptions IFR goes beyond the religiously-based objections under the ACA and *Burwell v. Hobby Lobby* by allowing any non-profit or closely-held for-profit employer, and private institutions of higher education that issue student health plans, to apply for an accommodation or exemption from contraceptive coverage based on "moral" convictions. This IFR provides no guidance, definition, or limiting principle for what can constitute a "moral"

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[12] *See* Complaint, *Taylor v. Lystila*, 2:14-cv-02072- CSB-DGB (C.D. Ill., April 15, 2014), *available at* https://www.lambdalegal.org/in-court/legal-docs/taylor_il_20140416_complaint. In addition to secular medical providers such as the defendants in *Taylor* that discriminate on religious grounds, some religiously affiliated medical providers refuse medically necessary care to transgender patients as a matter of institutional policy. *See, e.g., Franciscan Alliance, Inc., et al. v. Burwell, et al.*, Case 7:16-cv-00108-O, U.S. Dist. Ct., W.D. Tex., Wichita Falls Div. (complaint filed Aug. 23, 2016) (objecting on religious grounds to ACA's gender identity nondiscrimination requirement), *available at* https://assets.documentcloud.org/documents/3033562/Franciscan-Alliance-v-Burwell.pdf; Comments of U.S. Conference of Catholic Bishops, *Nondiscrimination in Health Programs and Activities*, RIN 0945-AA02, p. 9, fn. 17 (Nov. 6, 2015) (quoting Pope Francis, *General Audience on Man and Woman* (Apr. 15, 2015), which rejects gender transition as an improper elimination of "the sexual difference between males and females" and as forbidden sterilization), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf.

[13] *See N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, 44 Cal. 4th 1145, 189 P.3d 959 (2008).

conviction. Consequently, the IFR allows employers to claim exemptions without any accountability. In addition, the rule does not provide employees any recourse or ability to challenge an employer's asserted moral belief. Without accountability and safeguards, employers will be free to exploit the moral exemption for financial and business reasons.

Accordingly, we strongly urge the Departments to reinforce the principle that claims of "moral" beliefs cannot be used to discriminate, and to reject efforts to replace the accommodation process that already respects religious freedom and the autonomy of religious non-profit employers with the creation of sweeping exemptions with no meaningful limiting principle. The creation of such a sweeping exemption would subordinate the health and wellbeing of American workers to the subjective religious or moral beliefs of any given employer who seeks to block necessary reproductive health care access to employees, denying the seamless access to the reproductive health care to which employees are entitled under the law.

The IFR Violates Constitutional and Statutory Protections Under the Affordable Care Act, the Administrative Procedure Act and the United States Constitution.

The IFR is in violation of statutory protections under the ACA, administrative requirements under the APA, and constitutional protections under the U.S. Constitution.

As to the statutory violations posed by the IFR, the issuance of the IFR fails to comply with the APA by constituting an arbitrary and capricious rulemaking process, by exceeding statutory authority, by failing to satisfy required notice and comment procedures, and by otherwise creating potential statutory and constitutional violations.

Under the Administrative Procedure Act (APA), a rule is invalid if the rulemaking processes of agencies in promulgating it is impermissibly arbitrary and capricious. [14]

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[15]

The arbitrary and capricious standard articulated in *State Farm* is one that requires a "hard look" at an agency's rulemaking record, rather than employing a highly deferential form of arbitrary and capricious review.[16] Here, there is no evidence that Congress intended the Departments to implement sweeping exemptions to the ACA's coverage mandates. Rather, the IFR is directly

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[14] 5 U.S.C. § 706.

[15] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[16] *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (*citing State Farm, id.*; *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541 (11th Cir.1990)).

contrary to Section 1557 of the ACA, which prohibits sex discrimination in certain health programs and activities, because it sanctions sex discrimination by allowing employers and universities to direct health insurance companies to prevent their employees and students from receiving contraceptive coverage. The rule is also contrary to Section 1554 of the ACA, which prohibits the Secretary of Health and Human Services from promulgating any regulation that "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care."

Further, when Congress passed the Women's Health Amendment to the ACA at Section 2713(a)(4), it intended "to ensure that recommended preventive services for women are covered adequately by non-grandfathered group health plans and group health insurance coverage, recogniz[ing] that women have unique health care needs and burdens." The intent of Congress to include contraceptive access and other family planning services under the Amendment is further documented in the Congressional Record, which includes, for example, statements of Senator Gillibrand that "[w]ith Senator Mikulski's amendment, even more preventive screening will be covered, including for…family planning"; and Senator Franken that the Amendment was added because "affordable family planning services must be accessible to all women in our reformed health care system."

This clear intent of Congress to ensure contraceptive coverage to employees receiving health insurance under the ACA through their employers' plans would be thwarted by allowing those claiming "moral" objections to their employees' personal reproductive health needs to exempt themselves from the contraceptive coverage requirements of the Women's Health Amendments to the ACA. Allowing virtually anyone claiming a "moral" exemption to deprive women of contraceptive coverage, as the IFR does, strikes at the very purpose of the contraceptive coverage requirement. By permitting a limitless number of employers to deny contraceptive coverage to their employees, the rule's proposed exemption from contraceptive coverage erects harmful and unreasonable barriers to medical care and impedes timely access to contraception. Were the proposed IFR to be promulgated, these provisions of the ACA would be contravened, in violation of the APA.

For purposes of the APA, the only relevant statute that establishes the permissible parameters of a regulatory promulgation is the authorizing statute, not other statutes. Thus, attempts to justify the sweeping new exemption in the IFR by reference to other statutes – i.e., federal laws allowing some health care entities to refrain from directly providing abortion care, and other federal laws allowing religious refusals – do not satisfy the requirements of the APA, under which there must be direct and clear authority under the ACA itself for the IFR. Similarly, attempts to rationalize the proposed exemption by reference to the grandfathering of some plans, temporarily exempting them from other ACA requirements, are misguided, because plans are only entitled to grandfather status on a temporary basis, until employers are able to transition into full compliance. The Religious Freedom Restoration Act (RFRA) is not even implicated by the "moral" exemption set forth in the IFR, because RFRA provides no authority to craft moral exemptions. RFRA neither requires nor allows the type of exemption contemplated here, which would impede access to contraceptive coverage and the ability to make personal decisions regarding reproductive health solely based on another person's moral conviction.

Consequently, not only is the IFR arbitrary and capricious, but it exceeds the authority set by, and conflicts with, the ACA.

In addition, the IFR does not meet the procedural requirements of the APA. The Departments published this rule *for the first time* as an interim final rule, effective immediately upon publication. Such an abbreviated regulatory process bypasses and violates the procedural safeguards of the APA. The APA requires that agencies must publish notice of proposed rules in the federal register and provide opportunity for public comment. Specifically, the APA provides that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or have actual notice thereof in accordance with law," after which, a new rule must be subjected to public comment.[17] By skipping this statutory requirement and instead presenting a new sweeping exemption for the first time in the form of an interim final rule, the Departments have failed to comply with the requirements of the APA.

The previous notice and comment period accompanying the previous proposed rules (which did not include such a sweeping exemption as set forth in the IFR here) does not satisfy these requirements, because changes between a proposed rule and a final rule are governed by the "logical outgrowth test," under which the Departments failed to give required notice that would have "fairly apprise[d] interested parties" of the issues and which is only satisfied "if the final rule is a 'logical outgrowth' of the notice and comments already given." *Chocolate Mfrs. Ass'n of the U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (citation omitted). Here, the previous rulemaking proceeding was focused on ensuring seamless coverage of contraceptive and other preventive health care, and only contemplated potential accommodations to employers that would have ensured no interruption of that seamless preventive health care coverage. To now issue an IFR that allows employers to be completely exempted from providing such coverage is a jarring reversal of the previous approach considered and reviewed in the Departments' rulemaking process. Under this IFR, there is no guaranteed right of contraceptive coverage for the employees, dependents, and students of the organizations claiming a "moral" exemption. This is a dramatic departure from what was guaranteed to these employees under prior rulemaking. Consequently, the IFR does not satisfy the "logical outgrowth" test and is invalid on that basis.

Thus, the IFR, and the lack of required rulemaking process as set forth under the APA, violate the procedural requirements under the APA.

Finally, the failure to provide adequate notice that a new rule was being proposed that would create a new sweeping exemption from ACA coverage requirements for those claiming "moral" objections to complying with the law also raises troubling constitutional concerns. In addition to those constitutional issues raised in other sets of public comments to the IFR,[18] the

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[17] 5 U.S.C. § 553(b) and (c).

[18] *See, e.g.*, Comments of The Leadership Conference on Civil and Human Rights, *et al*., to this IFR, filed on December 5, 2017.

failure to provide adequate notice could constitute a procedural due process violation. As one federal appellate court has explained:

> Due process protects against the deprivation of "life, liberty, or property." U.S. Const. amend. V. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "To be entitled to procedural due process, a party must show a liberty or property interest in the benefit for which protection is sought." *Greenwood v. FAA*, 28 F.3d 971, 975 (9th Cir.1994) (citing *Morrissey v. Brewer*, 408 U.S. 471, 480–81 (1972)). A notice and comment period is generally required for agency rulemaking . . . . *See* 5 U.S.C. § 553; *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir.1994).[19]

While freedom of religion is a fundamental right, protected by our Constitution and federal law, it does not give anyone the right to use religious or moral beliefs as grounds for violating the rights of and harming others. The Constitution commands that a religious or moral accommodation must be "measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]."[20] Indeed, the Supreme Court in *Hobby Lobby* described that the impact of the Religious Freedom Restoration Act accommodation affirmed in that case on third parties would be "precisely zero."[21] Prior to this IFR, HHS met this requirement by ensuring employees continued to receive seamless no-cost contraception coverage, even if their employer objected to providing that coverage itself. The IFR fails the constitutional avoid-harm-to-others test.

Conclusion

Lambda Legal has historically been a strong supporter of the ACA and applauds the Departments for their past work in ensuring that all people can receive affordable and high quality health care. We are especially grateful for the Departments' work to increase access to care for LGBT people and those living with HIV because barriers to care – specifically including discrimination based on gender identity, gender expression, sexual orientation, and HIV status – have been and remain serious problems in our health care system. At Lambda Legal, we have made these problems a primary focus of our work spanning the last four decades. It is our hope that the Departments will re-evaluate their reversal from their previous positions recognizing the critical importance of ensuring seamless and equitable health care provision to all employees,

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[19] *MacLean v. Dep't of Homeland Sec*., 543 F.3d 1145, 1151 (9th Cir. 2008).

[20] *E.g., Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005).

[21] *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2760 (2014). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. *See id* at 2781 n.37.; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

balanced against the already existing accommodations provided to employers with certain "moral" beliefs. For all of the above reasons, the IFR should be rescinded.

We would be pleased to respond to any questions the Departments may have regarding these comments.

Sincerely,

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s/ Nancy Marcus

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