

Secretary Xavier Becerra
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-9903-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: REG 124930-21, CMS-9903-P

Dear Secretary Becerra:

First Liberty Institute (“First Liberty”) submits this comment responding to the proposed rule, “Coverage of Certain Preventive Services Under the Affordable Care Act,” published on February 2, 2023.¹

First Liberty is the largest legal organization in the nation dedicated exclusively to defending religious liberty for all Americans by pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, Buddhist, Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom in the courts, including the U.S. Supreme Court, as well as by testifying before Congress and advising federal, state, and local officials about constitutional and statutory protections for religious liberty.

First Liberty emphasizes that the proposed rule cannot conflict with religious liberty protections under the First Amendment to the U.S. Constitution and other federal religious liberty and conscience laws. Furthermore, the proposed rule must reflect the legislative intent of the Women’s Health Amendment and must be internally consistent with other provisions of the Affordable Care Act. Furthermore, First Liberty believes the proposed rule’s regulatory impact analysis also needs to properly address the substantial burden it places on sincerely held beliefs of a diversity of Americans, including small faith-based businesses, students, and health insurance issuers. Given recent caselaw developments and confusing aspects of the proposed rule, the government should provide more detail and clarifications and offer additional opportunity to comment on such clarifications.

I. Implementing the Women’s Health Amendment

The regulations interpreting the Women’s Health Amendment to the Patient Protection and Affordable Care Act (ACA) must be interpreted

¹ 88 FR 7236 (Feb. 2, 2023).

consistently with the language of and statement of intent of Congress. The Women’s Health Amendment to the ACA requires a group health plan and a health insurance issuer offering group or individual health insurance to provide minimum coverage and no-cost sharing for for certain preventive care and screenings with respect to women.²

Although the proposed rule is focused on “contraception” and “unintended pregnancy” as part of the mandate, those words were not spoken in the floor speeches addressing the scope of the Women’s Health Amendment on December 3, 2009.³ Reading the statute and legislative history also shows evidence that “prevention” was understood by Congress in terms of prevention of *physical disease*, not prevention of fertility and childbirth. The preventive services provision of the ACA also specifically mentions breast cancer screening and mammography as types of preventive services covered by the Women’s Health Amendment.⁴ Congress discussed screenings for diseases, such as ovarian cancer and cervical cancer;⁵ as well as women’s higher risk for lung cancer, breast cancer, and cardiovascular disease.⁶ Senator Stabenow mentioned heart disease and strokes as the #1 killer of women.⁷ She also discussed mammograms, cervical cancer screenings, osteoporosis screenings, mammograms for women over 50, domestic violence screenings, and annual checkups.⁸ When referring to pregnancy, the discussion was about pregnancy and post-partum *screenings*—not medications or procedures.⁹ Furthermore, a medication such as Plan B or Ella would be a medication used *after* sexual activity and conception, not a preventive service or screening that occurs *before* risky sexual behavior. The floor debate did not contemplate pregnancy prevention as a women’s health issue that warranted mandatory insurance coverage.

As the floor debate indicates, the Women’s Health Amendment intentionally does not require abortion coverage. Former Senator Barbara Ann

² 42 U.S.C. § 300gg–13(a)(4).

³ See 155 Cong. Rec. 29,237.

⁴ 42 U.S.C. § 300gg-13(a)(5).

⁵ 155 Cong. Rec. 29,237, at 29,302.

⁶ *Id.*

⁷ 155 Cong. Rec. 29,237, at 29,306.

⁸ *Id.*

⁹ *Id.*

Mikulski, who sponsored the Women’s Health Amendment, stated explicitly on the floor of the Senate that (emphasis added):

This amendment does not cover abortion. Abortion has never been defined as a preventive service. This amendment is strictly concerned with ensuring that women get the kind of preventive screenings and treatments they may need to prevent diseases particular to women such as breast cancer and cervical cancer. There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.¹⁰

Contrary to the legislative intent of the Women’s Health Amendment, the proposed rule mandates abortion coverage, because the underlying guidance requires medications that suppress ovulation, alter cervical mucus to hinder the transport of sperm, slow the transport of the ovum or inhibit implantation of the newly conceived human embryo—each of which are mechanisms to which certain Americans of faith object as abortifacients.¹¹ Many people of faith also expressly oppose abortion as a means of contraception. For example, publications note that “[t]he use of abortion as a contraceptive means is clearly forbidden by Islam.”¹² Episcopalians said they “emphatically oppose abortion as a means of birth control”¹³ Presbyterians “affirm that abortion should not be used as a method of birth control”¹⁴ The Assemblies of God state that “[a]bortion is a morally unacceptable alternative for birth control, population

¹⁰ 155 Cong. Rec. 29,237, at 29,307.

¹¹ U.S. Conference on Catholic Bishops, “Fact Sheet: Contraceptive Mandates,” <https://www.usccb.org/issues-and-action/human-life-and-dignity/contraception/fact-sheets/contraceptive-mandates>.

¹² D. Atighetchi, “The position of Islamic tradition on contraception,” *Med Law* 1994; 13(7-8):717–25, <https://pubmed.ncbi.nlm.nih.gov/7731352/>.

¹³ 71st General Convention of the Episcopal Church, “Reaffirm General Convention Statement on Childbirth and Abortion,” Res. No. 1994-A054 (1994), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1994-A054.

¹⁴ The Office of the General Assembly Presbyterian Church (U.S.A.), “Report of the Special Committee on Problem Pregnancies and Abortion” (1992), https://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf

control, sex selection, and elimination of the physically and mentally handicapped.”¹⁵

Furthermore, the Women’s Health Amendment must also be interpreted consistently within the other provisions of the Affordable Care Act, which show the legislative intent to accommodate religious and moral objections in health care and insurance. The special rules for health care conscience under Section 1303 apply “[n]otwithstanding any other provision.”¹⁶ Those rules include the limitation that “[n]othing in this [Affordable Care] Act shall be construed to have any effect on Federal laws regarding—conscience protection.”¹⁷

The proposed rule’s characterization of the scope of the Church Amendments as narrow¹⁸ is misleading, because it applies to a vast number of entities which receive funding under the Public Health Service Act. The Church Amendments are relevant to proper interpretation of the ACA as not infringing on the right of individuals who object to assistance in the performance of any health service, including the contraceptives in this mandate, on the grounds of *religious or moral* objections.¹⁹

Under Section 1303 of the ACA, Congress expressly recognized the rights of individual insurance *issuers* to make decisions on abortion coverage,²⁰ but the proposed rule improperly restricts the ability of issuers to receive exemptions. For example, March for Life had an insurer willing to accommodate their beliefs on contraception and abortion by offering insurance with a moral exemption for employees with religious objections.²¹ The proposed rule would no longer allow decisionmaking that respects religious objectors.

II. Protection of Sincerely Held Beliefs About Health Services

The proposed rule states the need for this rule on the basis of “women’s significant interests in access to contraceptive services” and the government’s interest in “promoting coverage for contraceptive services and assuring access to

¹⁵ The General Presbytery, “Sanctity of Human Life: Abortion And Reproductive Issues” (August 9–11, 2010), <https://ag.org/beliefs/position-papers/abortion-sanctity-of-human-life>.

¹⁶ 42 U.S.C. § 18023(a)(1)(A).

¹⁷ 42 U.S.C. § 18023(c)(2)(A)(i).

¹⁸ 88 FR at 7250.

¹⁹ 42 U.S.C. § 300a-7(d).

²⁰ 42 U.S.C. § 18023.

²¹ See *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015).

contraception.”²² However, such “broadly formulated interests” are insufficient for the government to justify a rule that substantially burdens the free exercise of religion.²³

Religious objectors hold a diversity of sincerely-held religious beliefs about the preventive services implicated by the proposed rule. The HRSA guidance²⁴ listing the required services contains a wide array of reproductive interventions: (1) sterilization surgery, (2) implantable rods, (3) copper intrauterine devices, (4) intrauterine devices with progestin (all durations and doses), (5) injectable contraceptives, (6) oral contraceptives (combined pill), (7) oral contraceptives (progestin only), (8) oral contraceptives (extended or continuous use), (9) the contraceptive patch, (10) vaginal contraceptive rings, (11) diaphragms, (12) contraceptive sponges, (13) cervical caps, (14) condoms, (15) spermicides, (16) emergency contraception (levonorgestrel), and (17) emergency contraception (ulipristal acetate).

The HRSA guidance also has a problematic catchall provision mandating coverage of “any additional contraceptives approved, granted, or cleared by the FDA,” which is overbroad. It is unclear and may be impossible to know now what future “additional” contraceptives the FDA will approve, grant, or clear in the future. This overbroad interpretation of the preventive services in relation to contraception and abortion by the U.S. Preventive Services Task Force and Health Resources Services Administration has been the source of the major litigation thus far. Continued expansion of the mandated list by USPTF, HRSA, or FDA in the areas of reproductive health is likely to continue to substantially burden more sincerely-held beliefs and result in costly litigation, delays, uncertainty in the health care market, and confusion for all.

Diverse people of faith have sincere religious objections to contraception. Many Muslims, Jews, and Catholics believe that “[f]amily planning and the use of contraceptives for any other reason [than the mother’s health] (i.e. to save money) is looked down upon.”²⁵ With regard to the Greek Orthodox Church, “The official position . . . recommended abstinence as the only legal method of avoiding conception. The position of the Christian Orthodox Church on abortion and contraception is fundamentally identical to that of the Roman

²² 88 FR at 7241.

²³ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

²⁴ 87 FR 1763 (Jan. 12, 2022).

²⁵ Pandia Health, “Birth Control and Religion,” <https://www.pandiahealth.com/resources/birth-control-religion>.

Catholic Church.”²⁶ In Islam, scholars note “there has always been a minority of jurists opposed to contraception.”²⁷ The Catholic Church “has always taught the intrinsic evil of contraception, that is, of every marital act intentionally rendered unfruitful.”²⁸ Similarly, the Orthodox Church links its doctrine to its beliefs about marriage and “does not approve of the use of contraception or hormonal birth control for anyone not married; unmarried Christians should remain celibate until marriage.”²⁹ Some Muslims and Jews specifically object to condoms or barrier methods.³⁰ Many Jews believe they “must enable sexual intercourse to occur and happen without a barrier naturally. This way, there is no “seed wasted” . . . [therefore] contraception via items such as condoms is not accepted.”³¹

The proposed rule’s justification for changing the preventive care rules for the 19th time is the rise in new state legislation restricting abortion after the U.S. Supreme Court’s decision in *Dobbs*.³² However, in accordance with Section 1303 of the ACA, the Women’s Health Amendment may not “preempt or otherwise have any effect on State laws” prohibiting “coverage, funding, or procedural requirements on abortions”³³

Others believe that promoting contraception facilitates objectionable reproductive coercion, sexual assault, and disrespect for a woman’s physical, emotional, and spiritual health. One religious text explains: “Another effect that

²⁶ Nila Kapor-Stanulovic and B.M. Beric, “[The Greek Orthodox Church and position regarding birth control],” *Contraception, fertilit , sexualit * (Paris). 1983 Sep;11(9):1053–55. PMID: 12279632, <https://pubmed.ncbi.nlm.nih.gov/12279632/>.

²⁷ D. Atighetchi, “The position of Islamic tradition on contraception,” 13(7-8) *Med. Law* 717 (1994), <https://pubmed.ncbi.nlm.nih.gov/7731352/>.

²⁸ Pope Paul VI, *Humanae Vitae*, https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

²⁹ St. John the Evangelist Orthodox Church, “The Orthodox Church’s Teaching on Contraception” (June 28, 2022), <https://www.saintjohnchurch.org/contraception-orthodox-church>.

³⁰ See Pandia Health, *Birth Control and Religion*, <https://www.pandiahealth.com/resources/birth-control-religion/>.

³¹ *Id.*

³² 88 FR at 7240 (citing *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. __ (2022)).

³³ 42 U.S.C. § 18023(b)(1).

gives cause for alarm is that a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner whom he should surround with care and affection.³⁴ Theologian Janet Smith explained that the promotion of contraception results in increased abortion: “contraception leads to more extra-marital sexual intercourse, more extra-marital sexual intercourse leads to more unwanted pregnancies; more unwanted pregnancies lead to more abortions.”³⁵

The proposed rule attempts to justify the mandate in terms of financial cost of contraception.³⁶ However, many within Judaism, Catholicism, and Islam object to family planning and the use of contraceptives if used to “save money.”³⁷ Individual religious objections may relate only to their use in certain circumstances, such to prevent the birth of a child with physical, developmental, mental, or genetic illness; or to prevent a birth for social or economic reasons, such as age of the mother or available money.³⁸ Some Americans also hold religious and moral objections to promoting sterilization or termination of pregnancy as a eugenic method to reduce the population of certain groups on the basis of their race, color, national origin, sex, religion, age, or disability.³⁹

³⁴ Pope Paul VI, *Humanae Vitae* No. 14, https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

³⁵ Rev. Walter J. Schu, L.C., U.S. Conf. on Cath. Bishops, “Contraception and Abortion: The Underlying Link,” <https://www.usccb.org/es/issues-and-action/human-life-and-dignity/contraception/articles-and-publications/contraception-and-abortion-the-underlying-link.cfm>.

³⁶ 88 FR at 7241.

³⁷ Pandia Health, Birth Control and Religion, <https://www.pandiahealth.com/resources/birth-control-religion>.

³⁸ Sarah R. Hayford and S. Philip Morgan, “Religiosity and Fertility in the United States: The Role of Fertility Intentions,” 86(3) *Social Forces* 1163 (Aug. 10, 2009) (analyzing data from the 2002 National Survey of Family Growth).

³⁹ Sharon M. Leon, “An Image of God: The Catholic Struggle with Eugenics,” 103 *Journal of American History*, Issue 2, September 2016, at 498–99, <https://doi.org/10.1093/jahist/jaw254>.

This is particularly poignant for racial minorities and persons with disabilities who historically endured forced sterilizations.⁴⁰

The proposed rule claims that individual moral beliefs about employment responsibilities or personal services are not relevant to an employer's, college's, university's, or health insurance issuer's moral objections.⁴¹ However, a person has a right to freely associate with those who share their religious beliefs and to exercise those beliefs at work, school, or in the health insurance marketplace.

III. Burdens of the Proposed Rule

The proposed rule's "individual contraceptive arrangement" in § 137.131(d) burdens and ignores parents' rights to holistically care for their children's physical, mental, emotional, and spiritual lives. The Supreme Court has recognized that parents have constitutional rights to direct the care, upbringing, and education of their children, including their religious education and health care decisions.⁴² Furthermore, the government must give "special weight" to parental determinations and must subject government interference with parental rights to strict scrutiny.⁴³

The proposed rule burdens a significant number of individuals and entities with religious or moral objections, such as students using university health insurance, insurance issuers, individuals who work at small organizations, and grandfathered plan users who wish to make amendments to coverage.

The proposed rule's reliance on a 99% contraceptive use statistic⁴⁴ is misleading, because it excludes women who are celibate, intending to become pregnant, breastfeeding, using natural family planning methods, or older than the reproductive age. The CDC found only 65% of women aged 15 to 49 years of age who are sexually active used contraception between 2015–2017; only 27.5%

⁴⁰ See National Council on Disabilities, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children" (2012), <https://www.ncd.gov/publications/2012/Sep272012>.

⁴¹ 88 FR at 7250.

⁴² See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁴³ See *Troxel v. Granville*, 530 U.S. 57 (2000).

⁴⁴ 88 FR at 7261.

use medical contraception.⁴⁵ As recognized by the Federal government⁴⁶ and health professionals,⁴⁷ the most effective way to prevent unintended pregnancy is abstinence. Yet, fertility-awareness based services, natural family planning, or abstinence counseling are not acknowledged by this rule as alternative, employer-covered contraceptive options for reproductive health that would not offend the conscience of religious employers.

The mandate also burdens publicly traded companies, health insurance issuers, non-religious universities, organizations that administer health care facilities on campus or at place of employment, organizations with moral exemptions, entities that employ health care personnel, and states that accommodate the objections of religious individuals. The Department must recognize the full scope of individuals and entities affected by this rule, which have protections under the First Amendment, Religious Freedom Restoration Act, Title VII of the Civil Rights Act, and health care conscience laws like the Church Amendments.

The accommodations in the proposed rule must cover all sincerely-held objecting entities, such as houses of worship, for-profit employers, non-profit employers, universities, and ministries. Others seek freedom to exercise their beliefs that they not pay for, refer for, cover insurance for, prescribe, administer, or counsel on contraception, because it would render them morally complicit.⁴⁸ Moreover, individuals have the ability to exercise their beliefs by working as employees of organizations that advocate against contraception and abortion as part of their mission, and form organizations that focus on providing the types of reproductive health services consistent with their beliefs. The proposed rule excludes publicly traded companies from the list of entities that may seek

⁴⁵ “CDC: 65.3 Percent of U.S. Women Currently Using Contraceptives,” *Physicians Weekly* (Oct. 21, 2020), <https://www.physiciansweekly.com/cdc-65-3-percent-of-u-s-women-currently-using-contraceptives/>.

⁴⁶ According to the Centers for Disease Control, “Abstinence from vaginal, anal, and oral intercourse is the only 100% effective way to prevent HIV, other STDs, and pregnancy.” *See* CDC, *Sexual Risk Behaviors* (Mar. 16, 2023). <https://www.cdc.gov/healthyyouth/sexualbehaviors/index.htm>.

⁴⁷ *See, e.g.*, Lonna P. Gordon, MD, *Abstinence*, Nemours TeensHealth <https://kidshealth.org/en/teens/abstinence.html>.

⁴⁸ *See, e.g.*, William W. Bassett, “Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine,” 17 *J. Contemp. Health L. & Pol’y* 455, 529 (2001); Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine*, 2013 *Int’l. J. Family Med.* 1, 9 (2013).

religious or moral exemptions, but offers no justification for such an exclusion. There is evidence indicating that Americans choose to invest in publicly traded companies that are consistent with their religious and moral beliefs, and that there are religious publicly-traded companies or publicly-traded companies formed with particular moral convictions in the marketplace.⁴⁹

The proposed rule relies on Executive Order 14070,⁵⁰ which directs the agencies to “help reduce the burden of medical debt,” to “make it easier for all consumers to enroll in and retain coverage,” and to “improve linkages between the health care system and other stakeholders.” The proposed rule fails to further those goals by forcing Americans to choose between the mandate or their faith. Such coercion violates the U.S. Constitution and the Religious Freedom Restoration Act. The U.S. Supreme Court has already found that mandated coverage substantially burdens sincerely held beliefs about contraception and abortion.⁵¹

In order to live in accordance with their beliefs, Americans face severe financial burdens: the cost of forgoing health insurance entirely, the loss of a job, and the inability to form small businesses or non-profits that advance these moral convictions on contraception. The government is prohibited from discriminating against or imposing such special burdens, like these penalties, upon individuals because of their religious beliefs or status.⁵² In addition, the rule’s mandate reduces the overall availability of employment and higher

⁴⁹ See, e.g., Russ Wiles, Religious investors who want to buy into companies that uphold their beliefs have these options, AZ Central (Apr. 17, 2022), <https://www.azcentral.com/story/money/business/consumers/2022/04/17/faith-based-investing-options-expanding-for-religious-portfolios/7319844001>; “4 Publicly Traded Religious Companies If You’re Looking to Invest in Faith,” Nasdaq (Feb. 7, 2014), <https://www.nasdaq.com/articles/4-publicly-traded-religious-companies-if-youre-looking-invest-faith-2014-02-07>; Carolyn Bigda, 5 Religion Funds for Faith-Based Investors, Kiplinger (Sept. 10, 2014), <https://www.kiplinger.com/article/investing/t041-c009-s002-5-religion-funds-for-faith-based-investors.html>; Geri Terzo, What Are the Faith-Based Companies on the Stock Market? Zacks Finance, <https://finance.zacks.com/faithbased-companies-stock-market-10959.html>.

⁵⁰ 87 FR 20689 (Apr. 5, 2022).

⁵¹ See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 918 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁵² See *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); *McDaniel v. Paty*, 435 U.S. 618, 627 (1978).

educational opportunities that accommodate or are consistent with such beliefs. The scope of individuals and entities covered by the religious exemptions is insufficient to protect all Americans who hold such sincerely held beliefs.

The rule fails to assess the the rule's impact on religious persons with sincerely-held religious beliefs about contraception and its access. Even if beliefs are held by a minority, Congress still, under the Constitution, must allow their free exercise in the public square and in health care and medication decisions.

In particular, the proposed rule imposes certain burdens on students of faith by excluding student health plans from availability for exemptions. Students have already filed lawsuits objecting to the contraceptive mandate, because they choose to attend a college or university that offers a health insurance plan with the type of coverage behavior that accords with their beliefs.⁵³ The rule of construction in proposed § 147.131(f) fails to address religious beliefs of students and interest in insurance.

The proposed rule contains a certification of no significant economic impact on a substantial number of small entities.⁵⁴ However, the proposed rule provides no analysis of where religious objectors work. In lawsuits, objectors have worked at small businesses like automotive dealerships⁵⁵ and retirement homes.⁵⁶ Given the numerosity and diversity of entities that already have sued over the contraceptive mandate, the proposed rule should analyze how many of these small businesses in their different sectors will be impacted in order to comply with the requirements of the Regulatory Flexibility Act requirements.

IV. Equal Treatment of Religious and Racial Minorities

Executive Order 13895 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government is cited as a justification for proposing this rule. However, aspects of the proposed rule

⁵³ See, e.g., *Fellowship of Catholic University Students v. Burwell*, No. 1:13-cv-03263-MSK-KMT (D.Colo. 2014).

⁵⁴ 88 FR at 7270.

⁵⁵ See, e.g., *Hastings Chrysler Center Hastings Chrysler Center, Inc. v. Sebelius*, No. 0:14-cv-00265-PAM-HB (D. Minn. Dec. 11, 2014).

⁵⁶ Retirement communities which have sued challenging the mandate have included Shell Point retirement Community; Alliance Community for Retirement Living in Florida, Town and Country Manor in California, and Chapel Pointe at Carlisle. See <https://firstliberty.org/news/victory-federal-court-grants-insight-for-living-ministries-relief-from-federal-abortion-pill-mandate-fines/>.

actually constitute “agency policies and actions [which] create or exacerbate barriers to full and equal participation”⁵⁷ for minorities.

First, “members of religious minorities” are specifically identified as among the populations⁵⁸ that deserve equitable, just, and impartial treatment. But the proposed rule, by mandating coverage of contraceptive methods objected to by religious minorities, actually further discourages participation by those minority groups.

Second, E.O. 13895 directs the agencies to ensure vulnerable populations have “full opportunity to participate in aspects of economic, social, and civic life.”⁵⁹ However, the proposed rule will have the impact of segregating Americans of faith from other Americans instead of permitting accommodations and promoting tolerance of diversity. Individual Americans will be discouraged from forming non-profits, publicly-traded organizations, or insurers that hold certain moral convictions.

V. Need for Additional Opportunity to Comment

The March 30, 2023, court decision in *Braidwood v. Becerra*⁶⁰ raised complicated legal issues relating to the authority of the U.S. Preventive Task Force to set forth ratings under the constitutional appointment clause and the authority to mandate preventive measures for sexually transmitted diseases over covered entities’ religious and moral objections.⁶¹ Given this significant development a few days before the close of the comment period, the public needs additional time to address it and its implications on the preventive services provision.

Second, in footnote 3 of the rule, the Women’s Health Amendment’s definition of “women” is said to include the words “men,” “transgender,” and “non-binary individuals,” which is confusing in conjunction with the definition of “women” as well to define it as “capacity to become pregnant.”⁶² If a male, non-binary individual, or transgender individual identifies as a woman but does

⁵⁷ E.O. 13895, § 4(a).

⁵⁸ E.O. 13895, § 2(a).

⁵⁹ E.O. 13895, § 2(b).

⁶⁰ *Braidwood Management Inc. v. Becerra*, No. 4:20-cv-00283-O (N.D. Tex. Mar. 30, 2023).

⁶¹ 42 U.S.C. § 300gg-13(A).

⁶² See FDA, “Birth Control Guide,” <https://www.fda.gov/media/150299/download>.

not personally have capacity to be pregnant, does the rule interpret Women’s Health Amendment to mandate male condoms or male sterilization under the Women’s Health Amendment? The rule text does not include any definition of “women.” Because of this substantially confusing footnote, the agencies should re-open the rule to allow additional time for public comment because of the public’s inability to understand this interpretation and adequately comment on whether it would be consistent with the legislative intent of the ACA and whether it would burden other religious or moral beliefs.

Furthermore, the rule cites⁶³ to a source making a blanket statement about all religious affiliations and contraceptive use, but the provided link does not work. Without public access to the cited data and research methods, the public is without ability to comment on the address the accuracy of the data as a valid representation of individual religious beliefs of Americans.⁶⁴ If the Federal government relies on such data, it should extend the comment period to allow sufficient public comment. The government should be cautious about making wholesale characterizations of beliefs of individuals who belong to particular religious traditions. The Free Exercise Clause still protects a beliefs of an individual, even if it is different from other adherents of a particular religious tradition.⁶⁵

VI. Conclusion

To protect the constitutional and civil rights protections of free exercise of religion and conscience, the government should provide adequate religious and moral accommodations. The proposed rule’s rollback of civil rights protections will have a disastrous effect on Americans of faith, and reduce tolerance for a diversity of beliefs in our society as a whole.

Maya M. Noronha
Special Counsel for External Affairs

Justin E. Butterfield
Deputy General Counsel

Christine Pratt
Counsel

⁶³ 88 FR at 7240 n. 41.

⁶⁴ “The requested page could not be found”
<https://www.guttmacher.org/print/article/2020/10/people-all-religions-use-birth-control-and-have-abortions> (accessed Apr. 2, 2023).

⁶⁵ See *Frazee v. Illinois Dept. of Emp’t Sec.*, 489 U.S. 829, 833–34 (1989).