

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION)
and SEIU-UHW,)

Plaintiffs,)

v.)

DON WRIGHT, Acting Secretary of the U.S.)
Department of Health and Human Services;)
R. ALEXANDER ACOSTA, Secretary of)
Labor; and STEVEN T. MNUCHIN,)
Secretary of the Treasury, in their official)
capacities,)

Defendants.)

Civil No. _____

COMPLAINT

(Administrative Procedure Act Case)

Plaintiffs American Civil Liberties Union (“ACLU”) and SEIU-UHW, for their complaint in the above-captioned matter, allege as follows:

PRELIMINARY STATEMENT

1. On October 6, 2017, the Trump Administration issued Interim Final Regulations (“IFRs”) that violate the Constitution. The Religious Exemption IFR¹ endorses and promotes certain religious beliefs at the expense of third parties. Both the Religious Exemption IFR and the Moral Exemption IFR² discriminate against women by singling out for disfavored treatment

¹ As used herein, the term Religious Exemption IFR encompasses the Interim Final Rules entitled *Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act* issued by the Department of the Treasury, Department of Labor, and Department of Health and Human Services on October 6, 2017. *available at* <https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the>.

² As used herein, the term Moral Exemption IFR encompasses the Interim Final Rules entitled *Moral Exemptions and Accommodations for Coverage of Certain Preventative Services under the Affordable Care Act* issued by the Department of the Treasury, Department of Labor, and Department of Health and Human Services on October 6, 2017. *available at* <https://www.federalregister.gov/documents/2017/10/13/2017-21852/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable>.

1 health insurance that women use and that is essential for women's equality. Specifically, the
2 IFRs allow any entity, including for-profit companies, as well as non-profits, universities,
3 hospitals, and others, to invoke religious or moral beliefs to block employees and students from
4 receiving insurance coverage that they would otherwise be entitled to receive by law. In so
5 doing, the IFRs facilitate and give employers license to discriminate against women based on
6 religion or other grounds.

7 2. The IFRs grant broad exemptions to the Affordable Care Act ("ACA")'s
8 requirement that health insurance plans include contraception coverage without a co-pay. The
9 contraception coverage requirement is authorized by the Women's Health Amendment to the
10 ACA, which Congress adopted to address discrimination in health care against women.³ Without
11 access to contraception, women are unable to plan the number and spacing of their children,
12 which is crucial to their health and well-being. Moreover, access to contraception plays a critical
13 role in women's equal participation in society and the workforce.

14 3. By authorizing businesses, non-profit organizations, and universities to impose
15 their religious beliefs on their employees and students, and rob women of health coverage that is
16 otherwise guaranteed by law, the Religious Exemption IFR violates the Establishment Clause.
17 Furthermore, by authorizing employers to block contraception coverage based on religious or
18 other grounds, both IFRs violate the right to equal protection guaranteed by the Fifth Amendment
19 to the U.S. Constitution. Moreover, because the IFRs were promulgated without good cause for
20 foregoing notice and comment and without providing a reasoned basis for the change in agency
21 position as required by the Administrative Procedure Act, they violate federal statutory
22 requirements that agencies not act in an arbitrary and capricious manner and observe procedures
23 required by law. Finally, the IFRs exceed the statutory authority given to the agencies by the
24 Affordable Care Act.

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26 ³ This complaint uses the term "women" both because the data Plaintiffs cite throughout
27 this complaint concern women and because women are targeted by the IFRs. Plaintiffs recognize,
28 however, that the denial of reproductive health care (and insurance coverage for such care) also
affects people who do not identify as women, including some gender non-conforming people and
some transgender men.

JURISDICTION AND VENUE

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2 4. This action arises under the First and Fifth Amendments to the United States
3 Constitution, and the Administrative Procedure Act, and presents a federal question within this
4 Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331.

5 5. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28 U.S.C.
6 §§ 2201 and 2202, by Federal Rules of Civil Procedure 57 and 65, and by the inherent equitable
7 powers of this Court.

8 6. This Court has authority to award costs and attorneys’ fees under 28 U.S.C.
9 § 2412.

10 7. Venue is proper in this district under 28 U.S.C. § 1391(e).

11 **INTRADISTRICT ASSIGNMENT**

12 8. This action arises in the San Francisco Division because Plaintiff SEIU-UHW’s
13 headquarters are in Oakland.

14 **PARTIES**

15 9. Plaintiff ACLU is a non-profit, non-partisan, public-interest membership
16 organization dedicated to defending the civil liberties guaranteed by the Constitution and the
17 nation’s laws. The ACLU has more than 1.5 million members nationwide.

18 10. The ACLU has a long history of defending the fundamental right to religious
19 liberty, and routinely brings cases to protect the right to religious exercise and expression,
20 including for people of majority and minority faiths. At the same time, the ACLU is deeply
21 committed to fighting for reproductive rights and gender equality.

22 11. Plaintiff SEIU-UHW is a labor organization representing more than 90,000
23 members who are health care workers employed in hospitals and health care clinics throughout
24 the State of California. SEIU-UHW is organized for the purpose of representing and improving
25 the working lives of its members and all working people, and promoting quality, affordable health
26 care for all.

27 12. The ACLU and SEIU-UHW have members who work for employers or attend
28 universities that are likely to invoke the exemption to the contraception benefit that is authorized

1 by the IFRs, including some ACLU members who receive their insurance coverage from an entity
2 that has challenged the contraception coverage requirement. The affected ACLU and SEIU-
3 UHW members currently have insurance coverage for contraception under the ACA, but are
4 likely to lose that coverage as a result of the IFRs.

5 13. **Defendant Don Wright** is the Acting Secretary of the Department of Health and
6 Human Services. The Department of Health and Human Services is a federal agency within the
7 meaning of the Administrative Procedure Act, 5 U.S.C. § 551(1). He is sued in his official
8 capacity.

9 14. **Defendant R. Alexander Acosta** is the Secretary of Labor. The Department of
10 Labor is a federal agency within the meaning of the Administrative Procedure Act, 5 U.S.C. §
11 551(1). He is sued in his official capacity.

12 15. **Defendant Steven T. Mnuchin** is the Secretary of the Treasury. The Department
13 of Treasury is a federal agency within the meaning of the Administrative Procedure Act, 5 U.S.C.
14 § 551(1). He is sued in his official capacity.

15 **THE AFFORDABLE CARE ACT WOMEN'S PREVENTIVE BENEFITS**

16 16. The Affordable Care Act requires health insurance plans to cover certain
17 preventive services without cost-sharing. Patient Protection and Affordable Care Act, Pub. L.
18 No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C.A. §
19 300gg-13).

20 17. The Women's Health Amendment ("WHA") was adopted during debate over the
21 ACA to ensure that the list of covered services would include preventive services unique to
22 women. *Id.* § 2713(a)(4).

23 18. In passing the WHA, Senator Mikulski noted, "[o]ften those things unique to
24 women have not been included in health care reform. Today we guarantee it and we assure it and
25 we make it affordable by dealing with copayments and deductibles" 155 Cong. Rec.
26 S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

27 19. In particular, the WHA was intended to address gender disparities in out-of-pocket
28 health care costs, which stem in large part from reproductive health care.

1 20. As Senator Gillibrand explained: “Not only do we [women] pay more for the
2 coverage we seek for the same age and the same coverage as men do, but in general women of
3 childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This
4 fundamental inequity in the current system is dangerous and discriminatory and we must act. The
5 prevention section of the bill before us must be amended so coverage of preventive services takes
6 into account the unique health care needs of women throughout their lifespan.” 155 Cong. Rec.
7 S12,019, S12,027 (daily ed. Dec. 1, 2009).

8 21. Congress effectively delegated the responsibility for developing a list of
9 preventive services covered by the ACA to the Department of Health and Human Services
10 (“HHS”). HHS, in turn, asked the Institute of Medicine (“IOM”), an independent, nonprofit
11 organization, to recommend services that should be covered.

12 22. The IOM recommended that the covered preventive services include, among other
13 things, the full range of contraceptives approved by the Food and Drug Administration (“FDA”).
14 Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109-10 (July 2011).

15 23. In making this recommendation, IOM noted that “[d]espite increases in private
16 health insurance coverage of contraception since the 1990s, many women do not have insurance
17 coverage or are in health plans in which copayments for visits and for prescriptions have
18 increased in recent years.” *Id.* at 109.

19 24. It further noted that these cost barriers are aggravated by the fact that women
20 “typically earn less than men and . . . disproportionately have low incomes.” *Id.* at 19.

21 25. Adopting IOM’s recommendations, HHS required non-grandfathered plans
22 covered by the ACA to provide health care coverage without cost-sharing for “[a]ll Food and
23 Drug Administration approved contraceptive methods, sterilization procedures, and patient
24 education and counseling for all women with reproductive capacity.” *See* 45 C.F.R. §
25 147.130(b)(1); Health Res. & Servs. Admin., U.S. Dep’t of Health & Human Servs., *Women’s*
26 *Preventive Services: Required Health Plan Coverage Guidelines*,
27 <http://www.hrsa.gov/womensguidelines> (last visited Feb. 6, 2017).

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26. In announcing the regulations related to the contraception requirement, HHS emphasized the importance of including contraception in the designated list of preventive services, not only to equalize women's health care costs but also to further women's ability to be equal participants in society. The inability of women to access contraception, HHS noted, "places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

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27. The federal government exempted houses of worship from the contraception requirement and developed an accommodation for nonprofit entities that hold themselves out as religiously affiliated organizations and closely held businesses. Under this accommodation, eligible employers who object on religious grounds can opt out of providing coverage "for some or all of any contraceptive items or services required to be covered" by completing a one-page form. 26 C.F.R. § 54.9815-2713A(a); Ctrs. for Medicare and Medicaid Servs. Form No. CMS-10459: Coverage of Certain Preventive Services under the Affordable Care Act (2015). This form can be sent to either the insurance company or the federal government. 26 C.F.R. § 54.9815-2713A(a)(3) (2015). The insurance company then administers and pays for those contraceptive services, including by communicating directly with the employees or students about the coverage, and the employer or university has no responsibility for paying for or communicating about the coverage. *Id.* § 54.9815-2713A(c)-(d).

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28
THE IMPORTANCE OF CONTRACEPTION COVERAGE FOR
WOMEN'S HEALTH AND EQUALITY

28. Before the ACA, many Americans were unable to access preventive health care. Due in large part to cost, Americans used preventive services at about half the recommended rate.

1 See Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 19-20, 109 (July
2 2011).

3 29. This was particularly true of women: A 2010 survey showed that less than half of
4 women were up to date with recommended preventive care screenings and services. *Id.* at 19.

5 30. Preventive care for women includes contraception. Ninety-nine percent of all
6 sexually active women have used birth control at some point in their lives. See Kimberly Daniels
7 et al., *Contraceptive Methods Women Have Ever Used: United States, 1982-2010*, National
8 Health Statistics Reports (Feb. 14, 2013).

9 31. Certain contraception is used for medically prescribed purposes other than
10 preventing pregnancy, such as hormonal disorders and endometriosis. See, e.g., Molina Dayal &
11 Kurt T. Barnhart, *Noncontraceptive Benefits and Therapeutic Uses of the Oral Contraceptive Pill*,
12 19 Seminars in Reprod. Med. 295, 295 (2001).

13 32. Many women are unable to afford contraception – even with insurance – because
14 of high co-pays or deductibles, see generally Su-Ying Liang et al., *Women's Out-of-Pocket*
15 *Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83
16 *Contraception* 528, 531 (2011); others cannot afford to use contraception consistently, see
17 Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family*
18 *Planning and Pregnancy Decisions* 5 (Sept. 2009),
19 <http://www.guttmacher.org/pubs/RecessionFP.pdf>; and costs drive women to less expensive and
20 less effective methods, see Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible*
21 *Contraception*, 117 *Obstetrics & Gynecology* 1105, 1105-06 (2011).

22 33. The Centers for Disease Control and Prevention has declared family planning one
23 of the ten most significant public health achievements of the 20th century. Ten Great Public
24 Health Achievements—United States, 1900-1999, 48 *Morbidity & Mortality Wkly. Rep.* 241, 242
25 (1999), <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf>. This is because having the ability to
26 plan one's family reduces the negative health outcomes associated with unintended pregnancies,
27 including low birth weight, infant mortality, and maternal mortality. Having the ability to
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1 increase the spacing between births also reduces adverse health outcomes for both women and
2 infants.

3 34. Contraception access is also directly tied to equal opportunities for women.
4 Indeed, access to contraception enables women to decide if and when to become a parent,
5 allowing women to make decisions that affect their education, employment, family, and health.

6 35. “Women who can successfully delay a first birth and plan the subsequent timing
7 and spacing of their children are more likely than others to enter or stay in school and to have
8 more opportunities for employment and for full social or political participation in their
9 community.” Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive*
10 *Health*, 7 Guttmacher Rep. on Pub. Policy 5, 6 (2004).

11 36. The availability of the oral contraceptive pill alone is associated with roughly one-
12 third of the total wage gains for women born from the mid-1940s to early 1950s. See Martha J.
13 Bailey et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat’l
14 Bureau of Econ. Research Working Paper No. 17922, 2012), [http://www.nber.org/](http://www.nber.org/papers/w17922)
15 [papers/w17922](http://www.nber.org/papers/w17922) (last visited Feb. 9, 2016); Claudia Goldin & Lawrence F. Katz, *The Power of the*
16 *Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. Pol. Econ. 730,
17 749 (2002).

18 37. Removing barriers to contraception by providing access to the full range of
19 contraception without cost has been shown to make meaningful differences in women’s lives.
20 For example, in one study, when cost was not an obstacle, more women chose long acting
21 contraception methods such as IUDs; as a result, their rates of unintended pregnancy plummeted.
22 See, e.g., Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost*
23 *Contraception*, 120 *Obstetrics & Gynecology* 1291 (2012).

24 **THE INTERIM FINAL RULES AUTHORIZE THE DENIAL OF CRITICAL HEALTH**
25 **INSURANCE FOR WOMEN**

26 38. The IFRs allow employers and universities to invoke their religious or moral
27 beliefs to block their employees’ or students’ health insurance coverage for contraception,
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1 including counseling for contraception, and any health care related to changing or discontinuing a
2 contraception method.

3 39. This means that employers and universities that currently invoke the
4 accommodation can claim an exemption under the IFRs. By claiming an exemption, the
5 employer or university will prevent the insurance company from providing contraception
6 coverage.

7 40. Furthermore, employers that were not previously eligible for the accommodation,
8 can also now obtain either an accommodation or a complete exemption.

9 41. Women who receive their health insurance through an entity that claims an
10 exemption will lose their contraception coverage on the first day of the first plan year that begins
11 thirty days after the date of the revocation of the accommodation or sixty days after notice of the
12 revocation.

13 42. The Departments of Treasury, Labor and Health and Human Services
14 simultaneously implemented these changes through interim final rules with immediate effective
15 dates. These rules constitute final agency action and are legislative rules within the meaning of
16 the Administrative Procedure Act.

17 43. The agencies did not observe the process set forth in the Administrative Procedure
18 Act, which requires good cause for foregoing notice and comment and waiving the 30-day
19 waiting period between publication and effective date, nor did they provide reasoned explanation
20 for changing policy as required by law.

21 44. The agencies exceeded their statutory authority under the ACA in violation of the
22 Administrative Procedure Act. Section 1557 of the ACA prohibits sex discrimination, but the
23 IFRs sanction sex discrimination as discussed above. Moreover, Section 1554 of the ACA
24 prohibits the Secretary of Health and Human Services from promulgating regulations that create
25 unreasonable barriers to the ability of individuals to obtain appropriate medical care, but as
26 discussed above, the IFRs create unreasonable barriers to contraception care. Thus, the IFRs
27 exceed the statutory authority given to the agencies.

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FIRST CLAIM FOR RELIEF

GOVERNMENT ESTABLISHMENT OF RELIGION

IN VIOLATION OF THE FIRST AMENDMENT

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4 45. Plaintiffs reallege and incorporate by reference, as if fully set forth herein, the
5 allegations of paragraphs 1 through 44.

6 46. The First Amendment to the United States Constitution safeguards religious liberty
7 by prohibiting official religious favoritism and barring government establishment of religion.

8 47. On its face, the Religious Exemption IFR violates the Establishment Clause of the
9 First Amendment.

10 48. The Religious Exemption IFR has the predominant purpose of advancing a
11 particular set of religious beliefs.

12 49. The Religious Exemption IFR has the predominant effect of advancing a particular
13 set of religious beliefs.

14 50. The Religious Exemption IFR is an official governmental endorsement of
15 particular religious organizations and beliefs.

16 51. The Religious Exemption IFR fosters excessive government entanglement with
17 religion.

18 52. The Religious Exemption IFR is not neutral between religion and nonreligion, and
19 it promotes and favors religious organizations and particular religious beliefs. The Religious
20 Exemption IFR allows certain religious beliefs to be imposed upon others who must bear the cost.

21 **SECOND CLAIM FOR RELIEF**

22 **DENIAL OF EQUAL PROTECTION UNDER THE FIFTH AMENDMENT**

23 53. Plaintiffs reallege and incorporate by reference, as if fully set forth herein, the
24 allegations of paragraphs 1 through 44.

25 54. The Due Process Clause of the Fifth Amendment to the United States Constitution
26 guarantees the people equal protection of the laws.

27 55. On their face, the IFRs violate the equality principle embodied in the Fifth
28 Amendment.

1 56. By allowing employers and schools to deny only preventive health benefits that
2 women need, the IFRs classify based on gender and therefore discriminate based on sex.

3 57. The IFRs intentionally and impermissibly impose burdens on women that interfere
4 with their equal participation in the workforce and education and therefore discriminate based on
5 sex.

6 58. The IFRs perpetuate gender stereotypes and therefore discriminate based on sex.

7 **THIRD CLAIM FOR RELIEF**

8 **ARBITRARY AND CAPRICIOUS**

9 **IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

10 59. Plaintiffs reallege and incorporate by reference, as if fully set forth herein, the
11 allegations of paragraphs 1 through 44.

12 60. The IFRs are arbitrary, capricious, an abuse of discretion, and otherwise not in
13 accordance with the law and should be set aside as unlawful pursuant to the Administrative
14 Procedure Act, 5 U.S.C. § 706 (2012).

15 a. The IFRs constitute final agency action and are legislative rules within the
16 meaning of the Administrative Procedure Act.

17 b. The IFRs take effect immediately, without the required 30-day waiting
18 period between publication and effective date, without good cause for doing so.

19 c. The IFRs were adopted without observing the notice and comment
20 procedures required by the Administrative Procedure Act, which includes publishing the
21 proposed rule, allowing appropriate time for public comment and considering those
22 comments prior to issuing a final rule, without good cause for doing so.

23 d. The IFRs reverse, in part, a prior agency decision, without providing a
24 reasoned explanation for this change in policy.

25 e. The IFRs were adopted without showing that the change in contraception
26 policy is evidence-based or evidence-informed.

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1 **FOURTH CLAIM FOR RELIEF**

2 **EXCESS OF STATUTORY AUTHORITY**

3 **IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

4 61. The IFRs are in excess of statutory authority and should be set aside as unlawful
5 pursuant to the Administrative Procedure Act 5 U.S.C. § 706.

6 a. The IFRs are contrary to Section 1557 of the ACA, which prohibits sex
7 discrimination in health insurance, because it sanctions sex discrimination by allowing employers
8 and universities to direct health insurance companies to prevent their employees and students
9 from receiving contraception coverage, as discussed *supra*.

10 b. The IFRs are contrary to Section 1554 of the ACA, which prohibits the
11 Secretary of Health and Human Services from promulgating any regulation that, *inter alia*,
12 creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care.
13 The IFRs are contrary to this statutory provision because they unreasonably create a barrier to
14 women who need contraception. As discussed *supra*, some women have historically been unable
15 to obtain contraception because of cost barriers.

16 **RELIEF REQUESTED**

17 WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor
18 and:

19 1. Declare, pursuant to 28 U.S.C. § 2201, that the Religious Exemption IFR, as set
20 forth above, violates the First and Fifth Amendments to the United States Constitution;

21 2. Declare, pursuant to 28 U.S.C. § 2201, that the Moral Exemption IFR, as set forth
22 above, violates the Fifth Amendment to the United States Constitution

23 3. Declare that the IFRs violate the Administrative Procedure Act;

24 4. Enter an injunction prohibiting Defendants from enforcing the IFRs;

25 5. Award costs and fees for this action, including attorneys' fees; and

26 6. Award such further relief as this Court deems appropriate.

1 DATED: October 6, 2017

SIMPSON THACHER & BARTLETT LLP

2 By: 

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*Application for Admission Pro Hac Vice Forthcoming