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VIA ELECTRONIC SUBMISSION

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New York State Department of Financial Services
One Commerce Plaza
Albany, NY 12257

Comments in regard to Proposed Rule Making: Addition of Sections 52.1(p), 52.2(y), (z), (aa) and 52.16(o) to Title 11 NYCRR

Dear Mr. Dorfman,

The Public Rights/Private Conscience Project (PRPCP) at Columbia Law School respectfully submits the following comments to Department of Financial Services (DFS) on the addition of Sections 52.1(p), 52.2(y), (z), (aa) and 52.16(o) to Title 11 New York Codes, Rules & Regulations (NYCRR). The mission of PRPCP is to bring legal academic expertise to bear on the multiple contexts in which religious liberty rights conflict with or undermine other fundamental rights, including the right to abortion. As such, we write specifically to express our deep concerns regarding the regulations' expansion of New York's existing definition of religious employers. We strongly recommend that the Department narrow this definition to ensure that the overly-broad accommodation of religion does not result in the denial of necessary health services to, or discrimination against, those seeking reproductive services.

The proposed rule makes explicit that insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for "medically necessary" abortions.¹ It creates a religious exemption from the requirement, however for two categories of employers: 1) religious employers as defined by Insurance Law sections 3221(l)(16)(A)(1) and 4303(cc)(1)(A) and 2) "qualified religious organization employers." The latter category is defined to include non-profit organizations and closely held for-profit entities whose management or owners have religious objections to abortion. Insurance companies that exclude coverage of "medically necessary" abortions from a religious employer's health care plan must issue a rider to insured employees providing separate coverage for this care at no-copayment.

¹ The proposed rule does not define the term "medically necessary abortion." DFS should clarify that the determination of medical necessity is left to the attending health care provider and cannot be limited by the insurance policy.

New York currently exempts religious organizations from certain health and labor regulations.² However existing exemptions are properly narrow in scope, applying to a limited number of organizations and allowing them to carry out their religious missions in accordance with their beliefs. For example, New York exempts only the first category of employers cited above from a requirement to provide contraceptive health care coverage to employees. This tailored exemption was upheld by the New York Court of Appeals in the face of a lawsuit seeking to expand the accommodation.

Expanding the right to religious accommodations to organizations that serve the public at large is unwarranted and sets a harmful precedent. Rather than follow a troubling national trend by expanding the accommodation of certain religious beliefs at the expense of other liberty and equality rights, New York should serve as a model for the country by robustly protecting the right to comprehensive and non-discriminatory health care.

I. Religious Organizations Are Already Protected in New York & Further Accommodations Are Unnecessary

New York has long been a leader in both guaranteeing access to comprehensive women’s health care and in protecting religious liberty. The state is one of the most religiously diverse in the nation, and the right to practice one’s faith freely is enshrined in our constitution and laws.³ However the right to religious liberty encompasses not only a right to practice one’s faith, but also a right to be free from the government taking sides in a theological debate.⁴ While exemptions for religious individuals or institutions are sometimes warranted, particularly where they do not affect third parties, allowing an organization that operates in the public sphere to violate neutral employee health and benefit laws serves to reduce, not enhance, true religious pluralism. This is especially true when such accommodations single out particular religious tenets, such as opposition to abortion, for special protection.

Significantly, the broad exemption at issue is not required by either the New York or federal Constitution. In the 2006 case *Catholic Charities of Diocese of Albany v. Serio*, the Court of Appeals rejected an argument that a broad religious exemption from a similar health coverage requirement was constitutionally mandated.⁵ In 2002, the New York legislature enacted the Women's Health and Wellness Act (WHWA), which required health coverage for contraceptive services. The WHWA contained a religious exemption for employers whose purpose, staff, and beneficiaries were predominantly religious. In response, several religiously-affiliated non-profits

² N.Y. Exec. Law Art. 15 § 292(9) (exempting any “religious corporation incorporated under the education law or the religious corporations law” from the definition of a place of public accommodation); § 296(11) (permitting certain religious organizations to favor co-religionists in hiring and housing); N.Y. Insurance Law Art. 32 § 3221 (16)(A) (exempting a narrow category of religious employers from requirement to provide contraceptive coverage).

³ See N.Y. CONST. Art 1 § 3; N.Y. Exec. Law § 296 *et seq.*

⁴ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005) (“The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters... but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate”) (internal citation omitted); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice”).

⁵ *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (N.Y. 2006).

not covered by the exemption brought suit. They argued in that the Act, as applied to them, violated the religious liberty guarantees of the federal and New York State Constitutions.

The Court of Appeals disagreed. It held that the federal First Amendment, which rarely provides a right to religious exemptions from neutral, generally applicable laws, did not require any additional exemption from the WHWA.⁶ While the opinion held that New York's Constitution offered a broader right to religious exemptions,⁷ it nevertheless found that the organizations were not entitled to an accommodation. First, it explained that the employers were not in fact mandated to provide contraceptive coverage, as they could decline to provide drug coverage altogether.⁸ Noting that "many of plaintiffs' employees do not share their religious beliefs," the court further pronounced that "when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit."⁹ Finally, the opinion outlined "the State's substantial interest in fostering equality between the sexes, and in providing women with better health care."¹⁰ It concluded that the organizations had not demonstrated that the WHWA's interference on their religious practice was unreasonable.

The reasoning in *Catholic Charities of Diocese of Albany v. Serio* is dispositive here. The requirement to cover "medically necessary" abortions is a neutral rule of general applicability, intended to promote equality and ensure that women have access to medically necessary care. Organizations which have a religious mission and both serve and hire co-religionists may, under *Serio*, be exempted from a requirement to provide health coverage that violates their religious beliefs. In contrast, organizations which hire and serve persons of all faiths should abide by non-discriminatory health and labor laws. As with the WHWA, the federal and New York Constitutions do not mandate a broad exemption from the regulation.

Nor does any federal or state law require a broader exemption. The application of the exemption to closely-held, for-profit corporations is likely inspired in part by the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby*.¹¹ In *Hobby Lobby*, the Court held that such companies were legally entitled to a religious exemption from a provision of the Affordable Care Act (ACA) requiring employers to offer cost-free contraceptive coverage in employee health plans. This entitlement, however, derived not from the First Amendment but a federal statute, the Religious Freedom Restoration Act (RFRA). RFRA provides a robust right to religious exemptions from federal laws and policies. However it does not exempt organizations from *state* regulations, and no similar law exists at the New York State level. Thus *Hobby Lobby* imposes no requirements whatsoever on New York regulations.

⁶ *Id.* at 522 ("The burden on plaintiffs' religious exercise is the incidental result of a 'neutral law of general applicability,'").

⁷ *Id.* at 525 ("we have held that when the State imposes "an incidental burden on the right to free exercise of religion" we must consider the interest advanced by the legislation that imposes the burden, and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified").

⁸ *Id.* at 527 ("the WHWA does not literally *compel* them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives.").

⁹ *Id.* at 528.

¹⁰ *Id.*

¹¹ *Burwell v. Hobby Lobby*, 134 S.Ct. 2751(2014).

II. An Overly-Broad Religious Exemption Creates a Barrier to Abortion Care and Constitutes Gender Discrimination

Religious accommodations should be carefully scrutinized when they affect third parties that do not share the relevant religious belief. The Department has attempted to ensure that employees of exempted religious organizations are covered for abortion care through abortion-only riders. However the ability of riders or third-party administrators to provide seamless access to health services is unclear. Such programs often suffer from a lack of oversight and accountability. At the least, the use of a rider scheme could increase administrative burdens and stress on employees during a medical emergency. At worst, it could result in coverage gaps.

Furthermore, even if employees do receive seamless coverage, the rule nevertheless permits organizations to treat a medically necessary procedure that is overwhelmingly obtained by women differently than any other type of care. This constitutes a license to disfavor women in the provision of health benefits, and sets a dangerous precedent. It opens the door to the creation of exemptions from other laws that serve to advance equality, merely because of an organization or company's religious beliefs. When an organization is open to the public, it should be expected to abide by antidiscrimination laws and norms. To decide otherwise would be to place the religious preferences of employers over the liberty and equality rights of their employees.

III. In the Face of a Movement to Expand Religious Exceptions, New York Should Take the Lead in Promoting Women's Equality & Reproductive Rights

There has been a concerted movement over the past several years, and especially since the Supreme Court's decision in *Obergefell v. Hodges*¹² recognizing a constitutional right to marriage for same-sex couples, to roll back important health and equality protections through the use of religious exemptions. This trend has historical roots, as past efforts to advance equality rights, including the Civil Rights Act of 1964 and the watershed 1973 decision *Roe v. Wade*¹³ have also been met with demands for broad religious exemptions.¹⁴ Recent proposed and adopted exemptions have not been limited to the marriage equality context, but impact a range of health and labor protections for women and LGBTQ people.¹⁵

For example, the proposed federal First Amendment Defense Act would create special legal protections for those opposed to marriage between people of the same sex, and to sex outside marriage. In effect, it could eliminate the federal government's ability to enforce an enormous

¹² *Obergefell v. Hodges* 135 S.Ct. 2584 (2015).

¹³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴ See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (rejecting a religious exemption from the Civil Rights Act); 42 U.S. Code § 300a-7 (religious exemption from abortion).

¹⁵ See PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *State & Federal Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session* (Sept. 20, 2016)

http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_exemption_overview_-_9.20.16.pdf; PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *Unmarried & Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color* (2017)

http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf.

number of laws—from the Fair Housing Act to the Employee Retirement Income Security Act—to protect single-parent, unmarried, or LGBTQ families.¹⁶ Other proposed state and federal exemptions would allow health care providers to decline to provide any type of health or counseling service that violates their religious beliefs, or broadly protect the religious belief that “human life begins at conception.”¹⁷

In the face of this movement, New York should continue its legacy of robustly protecting reproductive rights and women’s equality. Creating a religious exemption for organizations that serve the public could serve as precedent for future exemption requests from laws and policies that ban discrimination on the basis of sexual orientation and gender identity, or from other health protections. Such broad exemptions are not only unnecessary, they serve to degrade a proper balance between religion and the rights to equality, bodily autonomy, and to be free from the state taking sides in a religious conflict.

For the forgoing reasons, the Public Rights/Private Conscience Project strongly urges the Department to remove “qualifying religious organizations” from the list of employers that may refuse to include medically necessary abortion care in their health plans. A narrow exemption for institutions that employ and serve co-religionists advances both interests of religious liberty and protecting women’s health and equality.

¹⁶ Testimony of Professor Katherine Franke, *House Of Representatives Committee On Oversight And Government Reform Hearing on H.R. 2802, the First Amendment Defense Act (FADA)* (July 12, 2016)

http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf

¹⁷ S.B. 185, 2017 Leg., Reg. Sess. (Ala. 2017); S.B. 1352, 53rd Leg., Reg. Sess. (Ariz. 2017); H.B. 1628, 91st Gen. Assemb. (Ark. 2017); S.B. 24, 201y Gen. Assemb., Reg. Sess. (Pa. 2017); S.B. 1, 110th Gen. Assemb. (Tenn. 2017); S.B. 2096, 85th Leg. Reg. Sess (Tex. 2017); H.B. 2779, 85th Leg. Reg. Sess (Tex. 2017); Sarah Posner, *Leaked Draft of Trump’s Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017) <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/>.