ARTICLES

THE UNION OF CONTRACEPTIVE SERVICES AND THE AFFORDABLE CARE ACT GIVES BIRTH TO FIRST AMENDMENT CONCERNS

*Evelyn M. Tenenbaum**

TABLE OF CONTENTS

* Professor, Albany Law School and Professor of Bioethics, Albany Medical College. Many thanks to my wonderful research assistants, Paul Baillargeon, Cara Janes, and Kathleen Rivers. Many thanks also to Maura S. Kernan, Nadia Isobel Arginteanu, and the Journal of Science & Technology for hosting a fascinating and thought-provoking symposium. This article is dedicated to three important women in my life, my sisters Judy and Nancy, and my sister-in-law Ronnie Sue.

I. INTRODUCTION

Women who are poor or have low incomes tend to underutilize preventive health care services even though those services can save lives and help avoid costly medical procedures.[1] Studies show that "even moderate co-pays for preventive services such as mammograms or Pap smears result in fewer women obtaining this care."[2] For example, in one study, eliminating deductibles and co-pays resulted in a nine percent increase in the number of women who received mammograms.[3]

Another preventive service that women underutilize is contraceptive care.[4] Lowering the cost of contraceptive services

---

[1] *See Affordable Care Act Rules on Expanding Access to Preventative Services*, HEALTHCARE.GOV, http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html (last updated Feb. 1, 2013).

> Chronic diseases – which are responsible for 7 of 10 deaths among Americans each year and account for 75% of the nation's health spending – often are preventable . . . . [W]hile women are more likely to need preventive health care services, they often have less ability to pay . . .[A] report by the Commonwealth Fund found that in 2009 more than half of women delayed or avoided necessary care because of cost.

Id. This is particularly problematic because "women have unique needs and high rates of chronic disease including diabetes, heart disease, and stroke." *Id.*

[2] *Id.*

[3] *Id.* "In addition to saving lives by catching cancer early, mammograms can also protect families from skyrocketing medical bills that result from treating the advanced stages of the disease." *Id.*

[4] *See* Testimony of Guttmacher Inst., Submitted to the Committee on Preventive Services for Women Inst. of Medicine 1, 7, Jan. 12, 2011, *available at* http://www.guttmacher.org/pubs/CPSW-testimony.pdf.

can dramatically affect the health of women and their babies while significantly reducing health care costs.[5] As with other preventive care, even moderate co-pays can cause women with low and moderate incomes to forego contraceptive services.[6] In a 2009 survey, twenty-three percent of women reported having difficulty affording birth control and twenty-four percent reported postponing a birth control or gynecological visit due to cost.[7] Other studies have confirmed that cost is one of the major reasons women do not use birth control and a major reason that women do not use the most effective forms of birth control.[8] In the United States, approximately half of all pregnancies are unintended and the number of accidental pregnancies is obviously related to the failure to use effective contraception.[9]

Planning pregnancies can improve the health of women and

---

[5] *Id.* at 1–2, 7.

[6] NATIONAL WOMEN'S LAW CENTER, FACT SHEET: DENYING COVERAGE OF CONTRACEPTIVES HARMS WOMEN 1, *available at* http://www.nwlc.org/sites/default/files/pdfs/denying_covg_of_cont_harms_women_081312_pdf.pdf (last visited Aug. 2, 2013). "Evidence suggests that even moderate co-payments can cause individuals to forego needed preventive care, particularly those with low and moderate incomes. For example, a survey by Planned Parenthood found that one in three women reported struggling with the cost of prescription birth control at some point." *Id. See also* Adam Sonfield, *Policy Forum: The Religious Exemption to Mandated Insurance Coverage of Contraception*, 14 AM. MED. ASS'N J. OF ETHICS no. 2, at 137, 139 (Feb. 2012) ("[C]ost is one important access barrier . . . . [to] women us[ing effective] contraception . . . . [U]ninsured women were 30 percent less likely to report using prescriptions than women with private or public health insurance . . . [W]hen out-of-pocket costs were eliminated, women's use of long-acting [contraceptive] methods increased substantially.").

[7] NATIONAL WOMEN'S LAW CENTER, *supra* note 6, at 1–2.

[8] Robyn E. Zolman, Insurance Coverage of Prescription Contraceptives (Apr. 23, 2002) (unpublished student paper) *available at* http://leda.law.harvard.edu/leda/data/527/Zolman.html.

> If contraceptives are not covered by insurance, women will spend between $7000 and $10,000 on contraceptives during their lifetimes. Studies have found that this cost is one of the main reasons that women do not use birth control . . . . Cost also plays a role in causing unintended pregnancies because the most effective contraceptive methods require a prescription and treatment by a physician, making them more costly to obtain and to use than the less effective over-the-counter methods.

Id. NATIONAL WOMEN'S LAW CENTER, *supra* note 6, at 2 ("Costs can also lead women to use contraception inconsistently or incorrectly; for example, 18% of women report inconsistent use as a means of saving money.")

[9] Zolman, *supra* note 8 ("The failure to use birth control contributes to the fact that approximately half of the pregnancies in the United States each year are accidental . . . .").

their babies in a number of ways.[10] Women who get pregnant too soon after delivering a child increase their risk of having a preterm birth, low birth weight babies, and smaller babies.[11] "Women with unintended pregnancies are [also] less likely to obtain prenatal care, more likely to engage in unhealthy activities, more likely to deliver unhealthy babies, and more likely to have abortions."[12] The timing of conception can prevent complications during pregnancy including "gestational diabetes, high blood pressure, and placental problems."[13] Not only do women and their babies suffer from these direct health risks from unplanned pregnancies, but having an unplanned pregnancy can also result in "a litany of physical, emotional, economic, and social consequences."[14] For example, there may be substantial unanticipated financial burdens, especially if the newborn has health issues, and women may have to forego educational and career opportunities, reducing their financial ability to raise a child.[15]

In the Patient Protection and Affordable Care Act (ACA), the Obama Administration attempted to deal with the underutilization of preventive services by requiring that some of these services be provided free of charge.[16] In implementing the Act, the Department of Health and Human Services (HHS) promulgated regulations requiring, *inter alia,* that well-woman visits, contraception, and domestic violence screening and

---

[10] NATIONAL WOMEN'S LAW CENTER, *supra* note 6, at 1.

> Planned pregnancies — which for most women require contraception — improve women's health and their ability to have healthy pregnancies. The ability to determine the timing of a pregnancy can prevent a range of pregnancy complications that can endanger a woman's health, including gestational diabetes, high blood pressure, and placental problems, among others.

Id.

[11] *Id.* (citation omitted). *See also* Zolman, *supra* note 8, at 7.

[12] Zolman, *supra* note 8, at 7.

[13] NATIONAL WOMEN'S LAW CENTER, *supra* note 6, at 1.

[14] Zolman, *supra* note 8, at 7, 43 (quoting Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1273 (W. D. Wash. 2001)).

[15] *See* Zolman, *supra* note 8, at 1-2. *See also* Sonfield, *supra* note 6, at 138–39 (explaining that "nearly half of U.S. pregnancies . . . are unintended, and [that] unintended pregnancy rates increased by 50 percent among poor women between 1994 and 2006").

[16] *Affordable Care Act Rules on Expanding Access to Preventative Services*, *supra* note 1, at 1 ("In 2011, 54 million Americans with private health insurance gained access to preventive services with no cost sharing because of the [ACA].").

counseling be provided to women without cost.[17] The goal of these regulations and others mandating free preventive care was to eliminate financial disincentives to using preventive services, thereby improving health and reducing health care costs.[18]

Although the ACA's motivations for providing free preventive services are laudable, the provisions requiring that covered health plans include contraceptive services at no cost to insured women have spawned more than fifty lawsuits.[19] Numerous entities—both not-for-profit and for-profit—claim that the government cannot compel them to violate their religious beliefs by funding these services.[20] The federal courts have already made preliminary rulings in a number of lawsuits challenging the mandate, more lawsuits are expected, and it is likely that one of these cases will be heard and decided by the Supreme Court.[21]

The outcome of these lawsuits over whether employers must provide coverage for contraceptives in their health plans if they have a sincere religious objection will impact entities with religious affiliations, companies owned by individuals with strong religious beliefs, and the many women who use contraceptive services.[22] "[Ninety-nine] percent of U.S. women who have ever

---

[17] *Id.* On August 1, 2011, HHS adopted additional Guidelines for Women's Preventive Services – including well-woman visits, support for breastfeeding equipment, contraception, and domestic violence screening and counseling – that will be covered without cost sharing in new health plans starting in August 2012 . . . . Beginning on August 1, 2012, about 47 million women gained guaranteed access to additional preventive services without paying more at the doctor's office. *Id.*

[18] Sonfield, *supra* note 6, at 137. "The goal behind the ACA provision on preventive health care services is to eliminate financial disincentives to using effective preventive care, thereby improving health. Numerous studies have found that even modest cost-sharing requirements can dramatically reduce use of preventive health services, particularly among lower-income Americans." *Id.*

[19] Stuart Taylor Jr., *More ACA Lawsuits: The 'Contraceptive Mandate' Versus Religious Freedom (Analysis)*, KAISER HEALTH NEWS, Dec. 13, 2012, at 1, *available at* http://www.kaiserhealthnews.org/Stories/2012/December/14/legal-challenges-to-birth-control-mandate.aspx. These lawsuits are collected on a website maintained by the Becket Fund for Religious Liberty, a non-profit law firm that claims it is "dedicated to protecting the free expression of all religious traditions." The Becket Fund represents plaintiffs in seven of the lawsuits challenging the contraceptive care regulations, and coordinates information nationally on developments in the other cases. *See* THE BECKET FUND, http://www.becketfund.org/hhsinformationcentral/ (last visited Aug. 2, 2013).

[20] *Id.*

[21] *Id.* Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, N.Y. TIMES, Jan. 26, 2013, *available at* http://www.nytimes.com/2013/01/27/health/religious-groups-and-employers-battle-contraception-mandate.html.

[22] *See* Taylor, *supra* note 19, at 1.

had sex with a man have used a contraceptive method other than natural family planning, and that figure is virtually the same across religious groups, including [ninety-eight] percent among sexually experienced Catholic women."[23]

In October 2012, Albany Law School hosted a nonpartisan symposium at which professionals presented diverse viewpoints on the merits of the contraceptive mandate as applied to employers with sincere religious objections and answered questions from the large and engaged audience. The speakers addressed both the rights of religious objectors to follow the dictates of their religions and act according to their consciences and the equally compelling rights of women to have access to contraceptive coverage. This article provides a foundation for the debate on contraceptive coverage. It starts with a brief history on the use of contraceptives, the preventive services for women in the Affordable Care Act, the Obama administration's contraceptive mandate, and the current accommodation for religiously-affiliated institutions. The article then addresses some of the major free exercise of religion claims brought by religiously-affiliated organizations eligible for the accommodation under the Act and by for-profit commercial businesses that are required to comply with the contraceptive mandate without the benefit of an accommodation.

II. A BRIEF HISTORY OF CONTRACEPTION

The desire to control conception and the consequent use of contraception are far from new.[24] In Ancient Egypt, recipes for barrier methods, which included "honey, sodium carbonate and crocodile dung," were "buried with the dead to prevent unintended pregnancy in the afterlife."[25] There were also contraceptives for the living.[26] "The Kahun Gynecological

[23] Sonfield, *supra* note 6, at 140; RACHEL K. JONES & JOERG DREWEKE, COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 4 (Apr. 2011), *available at* http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf.

[24] *See* Jon Knowles, A History of Birth Control Methods 1, 6 (Nov. 2002), *available at* http://www.plannedparenthood.org/files/PPFA/history_bc_methods.pdf.

[25] *Id.* at 6.

[26] *See id. See also* Isharul Hasan, Mohd Zulkifle, A.H. Ansari, A.M.K. Sherwani & Mowd Shakir, *History of Ancient Egyptian Obstetrics & Gynecology: A Review,* 1 J. MICROBIOLOGY & BIOTECHNOLOGY RESEARCH, no. 1, 35, 38 (2011), *available at* http://scholarsresearchlibrary.com/JMB-vol1-

Papyrus, the oldest surviving of the medical papyri, provides instructions for preparing numerous contraceptives to be inserted into the vagina."[27] An Egyptian manuscript dated 1550 B.C.E. describes how to create a pessary (a vaginal suppository) by spreading a paste made of dates, acacia, and honey smeared over wool.[28]

In other parts of the world, various other substances were used—such as vegetable seedpods, plugs made from grass and crushed roots, seaweed, moss and bamboo, and empty pomegranate halves—to block the way to the uterus and sometimes to absorb semen.[29] Other materials such as "sponge, tissue paper, beeswax, rubber, wool, pepper, seeds, silver, tree roots, rock salt, fruits, vegetables, and [] balls of opium"—have also been used at various points in time to cover the woman's cervix.[30]

More recently, in the 18th century, Giovanni Giacomo Casanova used lemon halves as a diaphragm/cervical cap.[31] Although Casanova reportedly took credit for inventing this early version of the diaphragm, "[s]imilar devices had been used for centuries around the world."[32]

Contraceptives for men have also been used as far back as ancient times.[33] There are illustrations of men using condoms during sexual intercourse on a cave wall in France.[34] The drawings are estimated to be between 12,000 and 15,000 years old.[35] In 3,000 B.C.E., condoms were made from a variety of materials including "fish bladders, linen sheaths, and animal intestines."[36]

---

iss1/JMB-2011-1-1-35-39.pdf.

[27] *Id. See also* Raymond Hang Wun Li & Sue Seen Tsing Lo, *Evolutionary Voyage of Modern Birth Control Methods,* HKJGOM 2005; 5:40, 40 ("In ancient Egypt and Rome, tampon soaked with various plant extracts, juices, honey, lactic acid and so on were placed in the vagina to prevent women from conceiving.").

[28] *A Brief History of Birth Control,* TIME (May 3, 2010), *available at* http://www.time.com/time/magazine/article/0,9171,1983970,00.html. *See also* Knowles, *supra* note 24.

[29] Knowles, *supra* note 24, at 6.

[30] *Id.* at 7.

[31] *Id. See also A Brief History of Birth Control*, *supra* note 28, at 1; HANG WUN LI. & SEEN TSING LO, *supra* note 27, at 41.

[32] Knowles, *supra* note 24, at 7.

[33] *Id.* at 5.

[34] *Id.*

[35] *Id.*

[36] OUR BODIES OURSELVES 1 (updated as of May 2012), *available* at

More recently—around 1838—Charles Goodyear invented and patented the process of vulcanizing rubber, which he put to use in manufacturing and then mass-producing rubber condoms.[37] Vulcanized rubber was also used to manufacture intrauterine devices (IUDs), douching syringes, and "womb veils."[38]

Even though "the Pill" was not created until 1960, oral contraceptives have a far longer history.[39] In "ancient Greek myth[ology], Persephone, the goddess of spring, . . . was kidnapped to the underworld" where she refused to eat anything except pomegranate seeds.[40] Medical historians have since discovered that pomegranate seeds were one of the first oral contraceptives.[41] Another early contraceptive came from the silphium plant, which grew in North Africa.[42] In the seventh century B.C.E., silphium was such a reliable contraceptive that it could be sold for very high prices in shipping ports all over the ancient world.[43] Demand for the plant was so high that it became scarce by the first century C.E. and was completely extinct by the fourth century C.E.[44]

In modern times, issues regarding contraception do not center around its availability or effectiveness, but rather on religious objections concerning its use and who should pay for it.

III. PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT

The ACA was enacted in March 2010.[45] Among its many components, the ACA amended the Public Health Service Act (PHS Act)[46] to require that group health plans[47] provide certain

http://www.ourbodiesourselves.org/book/companion.asp?id=18&compID=53.

[37] Knowles, *supra* note 24, at 5 (citation omitted); *See also A Brief History of Birth Control*, *supra* note 28.

[38] *Id.*

[39] *Id. See* OUR BODIES OURSELVES, *supra* note 36.

[40] Knowles, *supra* note 24, at 8.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010). The amendments applied to group health plans and health insurance issuers in the group and individual markets.

[46] *See* Patient Protection and Affordable Care Act of 2010, § 1201 (The ACA also incorporated those amendments in the Employee Retirement Income

preventive health benefits without cost to those insured under the plans.[48] One of the purposes of these new requirements was to "fill the gaps in current preventive services guidelines for women's health, ensuring a comprehensive set of preventive services for women."[49] This focus on preventive services for women was an enormous change in the provision of health care. Under the ACA, an estimated 47 million women are expected to gain guaranteed access to preventive services without cost-sharing.[50]

To implement the provisions relating to preventive services for women, comprehensive guidelines were to be issued by the Health Resources and Services Administration (HRSA),[51] an

Security Act (ERISA) and the Internal Revenue Code (Code)).

[47] 42 U.S.C. § 18011(a)(2); Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310, 313 (E.D.N.Y. 2012) (The ACA's preventive services coverage requirement applies to group health plans except those that are grandfathered. "A group health plan is grandfathered when at least one person was enrolled in the plan on March 23, 2010 and the plan has continually covered at least one individual since that date . . . . A plan may lose its grandfathered status, however, if, when compared to the terms of the plan as of March 23, 2010, it eliminates benefits, increases a percentage cost-sharing requirement, significantly increases a fixed-amount cost-sharing requirement, significantly decreases an employer's contribution rate, or imposes or lowers an annual limit on the dollar value of benefits.") *See also Focus on Health Reform*, THE HENRY J. KAISER FAMILY FOUNDATION, Jan. 2012, p. 1, *available at* http://www.kff.org/healthreform/upload/8275.pdf ("The ACA permits those [] businesses that wish to keep the insurance plan they [had when the law was enacted] to do so. In 2011, approximately 72% of small businesses (with 100 or fewer workers) had at least one plan grandfathered under the ACA . . . [T]he plan remains grandfathered even if the company enrolls new employees in the plan . . . Grandfathered plans may keep this status so long as they do not make significant changes to coverage (such as increasing cost-sharing or cutting benefits."); Sonfield, *supra* note 6, at 138 ("HHS projects that most plans will lose grandfathered status by making [these] types of changes within a few years.").

[48] 42 U.S.C. § 300gg-13(a). *See* Patient Protection and Affordable Care Act of 2010, § 2713. The regulations are codified at 45 C.F.R. § 147.130(a)(1)(iv).

[49] *Affordable Care Act Rules on Expanding Access to Preventative Services*, *supra* note 1, at 2 ("For the first time, HHS is adopting new guidelines for women's preventive services to fill the gaps in current preventive services guidelines. . . ."). *See* 42 U.S.C. § 300gg-13(a)(4); Patient Protection and Affordable Care Act of 2010, § 2713(a)(4).

[50] Adelle Simmons & Laura Skopec, *ASPE Issue Brief: 47 Million Women Will Have Guaranteed Access to Women's Preventive Services With Zero Cost-Sharing Under the Affordable Care Act*, Dep't of Health and Human Resources (July 31, 2012), *available at* http://aspe.hhs.gov/health/reports/2012/womensPreventiveServicesACA/ib.shtml. These provisions apply to policies renewed on or after August 1, 2012.

[51] The PHS Act includes provisions requiring preventive services for women

agency within HHS designated as "the primary Federal agency for improving access to health care services for people who are uninsured, isolated or medically vulnerable."[52] In developing its Guidelines, HRSA requested that the Institute of Medicine (IOM) provide recommendations on the services that should be included.[53] The IOM was established in 1970 as the "health arm of the National Academy of Sciences" and "is an independent, nonprofit organization that . . . provide[s] unbiased and authoritative advice to decision makers and the public."[54]

The IOM issued its Report ("Report") on July 19, 2011 and identified eight categories of preventive services that should be made available to women, including well-woman visits, gestational diabetes screening, HPV DNA testing, and "a full [] range of contraceptive education, counseling, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes."[55] The IOM found that "[w]omen stand to benefit from this shift [toward preventive services] given their longer life expectancies, reproductive and genderspecific conditions, and historically greater burden of chronic disease and disability,"[56]

including breast and cervical cancer screening, vaccinations, and reproductive health counseling for adolescents. The fourth subdivision was added by the Senate in December 2009 to fill in gaps in women's preventive health care needs. Sonfield, *supra* note 6, at 137-38 (*citing* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011); Health Resources and Services Administration, Women's Preventive Services: required Health Plan Coverage Guidelines, 2011, *available at* http://www.hrsa.gov/about/index.html).

[52] *See* Health Resources and Services Administration, *supra* note 51.

[53] *See* Institute of Medicine, Report Brief, *Clinical Preventive Services for Women: Closing the Gaps*, July 2011, *available at* http://www.iom.edu/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/PreventivdServicesWomen2011ReportBrief.pdf. *See also* 77 Fed. Reg. 16,502 (March 21, 2012) (discussing the history of the preventive services regulations).

[54] *See About the IOM,* INST. OF MEDICINE, http://www.iom.edu/About-IOM.aspx (last updated Oct. 31, 2013).

[55] *See* Report Brief*, supra* note 53, at 2. The IOM website containing the Report notes that "[t]he IOM defined preventive health services as measures – including medications, procedures, devices, tests, education and counseling – shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Clinical Preventative Services for Women: Closing the Gaps*, INST. OF MEDICINE, (July 19, 2011), http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

[56] *See* Report Brief*, supra* note 53, at 1. The IOM Report explained that:

> The evidence provided to support a recommendation related to unintended pregnancy is based on systematic evidence reviews and other peer-

and explained that "family planning services improve maternal health and birth outcomes."[57]

HRSA relied heavily on the IOM Report and issued its Guidelines on August 3, 2011 (2011 AIFR).[58] The Guidelines require that group health plans provide coverage, without cost-sharing, to plan participants for the eight categories of preventive services for women listed in the IOM Report, including "contraceptive methods and counseling."[59] Coverage includes "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[60] The definition is broad enough to cover "newer emergency contraceptives like ella, which sometimes act after

> reviewed studies, which indicate that contraception and contraceptive counseling are effective at reducing unintended pregnancies. Current federal reimbursement policies provide coverage for contraception and contraceptive counseling, and most private insurers also cover contraception in their health plans. Numerous health professional associations recommend family planning services as part of preventive care for women. Furthermore, a reduction in unintended pregnancies has been identified as a specific goal in *Healthy People 2010* and *Healthy People 2020*.

Clinical Preventative Services for Women: Closing the Gaps, *supra* note 55, at 10. The summary of the Report included in the IOM website added that "[t]he inclusion of evidence-based screenings, counseling and procedures that address women's greater need for services over the course of a lifetime may have a profound impact for individuals and the nation as a whole." *See id.* at 1.

[57] Simmons & Skopec, *supra* note 50, at 2. *See also* Sonfield, *supra* note 6, at 138 (explaining that unintended pregnancy has been connected to maternal behavior that can adversely affect a child's health throughout his/her life, and interfere with women's educational and financial success).

[58] 77 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The HRSA Guidelines are available at http://www.hrsa.gov/womensguidelines. *Affordable Care Act Rules on Expanding Access to Preventative Services*, *supra* note 1, at 2 ("HHS based its Guidelines for Women's Preventive Services on the IOM report issued July 19, 2011.").

[59] HRSA Guidelines at 1–4.

[60] 77 Fed. Reg. 16,502 & n.2 (because these services are intended only for women, the definition excludes items and services such as vasectomies and condoms). *See* also 77 Fed. Reg. 8725 (discussing the history of the regulations); OFFICE OF WOMEN'S HEALTH, FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE 10–12, 16–20 (2012), *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf. *See also* Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES (Jan. 20, 2012), *available at* http://www.nytimes.com/2012/01/21/health/policy/administration-rules-insurers-must-cover-contraceptives.html ("Among the drugs and devices that must be covered are emergency contraceptives including pills known as ella and Plan B. The rule also requires coverage of sterilization procedures for women without co-payments or deductibles.").

fertilization to prevent pregnancy."[61]

IV. HISTORY OF THE IMPLEMENTING REGULATIONS– THE RELIGIOUS EXEMPTION & ACCOMMODATION

One year before the IOM Report was issued, HHS published interim final regulations (2010 IFR). These interim rules covered preventive services, but did not include the women's preventive services that were addressed in the 2011 AIFR. When HHS published the 2010 IFR, HRSA announced that additional regulations – in the form of HRSA guidelines addressing women's preventive services – were forthcoming.[62]

Many groups, especially religious organizations, submitted comments voicing strong objections to any future regulations that would require the provision of contraceptive services.[63] In response to the comments it received and after conducting its own analysis, HHS exempted group health plans established or maintained by a "religious employer" from the contraceptive mandate in the amended interim final regulations (2011 AIFR) that were published on August 3, 2011.[64]

The Obama Administration was aware that this exemption was tantamount to a denial of contraceptive benefits for those women employed by houses of worship, including lay employees such as administrative staff, custodians, and organists, who may not have any religious affiliation with a church.[65] The limited, but blanket, exemption was troubling because women without contraceptive coverage historically pay more for their health care

---

[61] Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, And Other Clashes Between Religion And The State*, 53 B.C. L. REV. 1417, 1418 (2012).

[62] 75 Fed. Reg. 41,726, 41,728, 41,731, 41,733, 41,757 (July 19, 2010). The 2010 interim final regulations mandated that new plans provide certain preventive services, without cost sharing, including mammograms, colonoscopies, blood pressure checks, and diabetes screenings.

[63] 76 Fed. Reg. 46,623-24 (Aug. 3, 2011).

[64] 76 Fed. Reg. 46,621-26 (amending 29 CFR § 2590.715-2713(a)(1)(iv) and 45 CFR § 147.130(a)(1)(iv)(A), (B)).

[65] *See* Annamarya Scaccia, *Religious Exemptions and Contraceptive Coverage: How Far Can Denial Go and Still Be Constitutional?* RH Reality Check, Sept. 30, 2011, at 1–2, *available at* http://rhrealitycheck.org/article/2011/09/30/religious-exemptions-contraceptive-coverage-denial-still-constitutional/ (discussing objections to any exemption raised by women's rights groups and other proponents of contraceptive services). *See also* Sonfield, *supra* note 6, at 140 ("[T]his exemption would also affect numerous other employees, including clerical and administrative staff, cafeteria workers, and custodians.").

than men with the same jobs. In the 1990s, when contraceptive services were not included in employer-sponsored health plans, women paid 68% more than men for health care due in large part to "[t]he costs of contraceptives and other reproductive health care services . . . ."[66]

To provide an exemption that would respect the "unique relationship between a house of worship and its employees in ministerial positions" and to also ensure that most women would receive contraceptive benefits, HHS crafted its exemption to mirror "the religious exemptions to contraceptive coverage laws established and upheld by courts in California and New York."[67] The exemption required a showing that the employer: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under [certain sections of the Internal Revenue Code that] refer to churches . . . [or] the exclusively religious activity of any religious order."[68]

Although HHS modeled its exemption on provisions contained in state laws, many religious organizations, religious leaders, congregants and others were upset about the limited nature of the exemption.[69] They claimed that the definition of "religious

---

[66] *See* Melissa Seifer Briggs, *Exempt or Not Exempt: Mandated Prescription Contraception Coverage and the Religious Employer*, 84 ORE. L. REV. 1227, 1229 (2005) (citation omitted). *Id.* at 1229–30 ("Findings from a study of private insurance revealed that almost half of large group health insurance plans did not provide contraceptive coverage. The same study showed that only 33% of the 97% of large group plans that covered prescription drugs covered oral contraceptives, and only 15% of those plans that covered prescription drugs covered the five most common methods of reversible contraception. . . .").

[67] 76 Fed. Reg. 46,623. *See* also Sonfield, *supra* note 6, at 139 (stating that the language of the exemption mirrors the provisions in California and New York). The preamble to the 2011 AIFR noted that this definition "is based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services." 76 Fed. Reg. 46,623.

[68] 76 Fed. Reg. 46,623. The exemption for religious employers is codified at 45 C.F.R. § 147.130(a)(1)(iv)(A), (B)(1)–(4). Under (4), the employer must be "a non-profit organization under [specified sections of the Internal Revenue Code that] refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." 76 Fed. Reg. 46,623.

[69] Sue Tolleson-Rinehart, *Women's Rights and the Politics of Health: Contraception, Health Reform, and the 2012 Election*, Paper Presented at the 2012 Annual Meeting of the American Political Science Ass'n 6 (Aug. 30 – Sept. 2, 2012) ("[T]he Obama Administration's position provoked immediate outcry

employer" was too narrow to cover their religious objections.[70]

In evaluating these comments for purposes of issuing final rules, the Obama Administration found itself caught in the middle between those groups that advocated in favor of a narrow exemption to protect women's access to contraceptive care without cost, and those groups that found themselves "in the untenable position of having to choose between violating the law and violating their consciences."[71] In January 2012, the Administration decided not to broaden the exemption to include religiously-affiliated organizations, such as not-for-profit hospitals and schools, which do not primarily employ members of their own faith,[72] but agreed to officially modify the final rules in two respects.

First, certain objecting religious institutions were given a one-year moratorium during which the contraceptive mandate would not be enforced, i.e., a "safe-harbor" on enforcement of the final rules.[73] The religious employers that were covered by this safe harbor provision did not include churches because they were already fully exempt from the contraceptive mandate. The covered religious employers also did not include for-profit employers and non-profit organizations that either (1) already provided contraceptive services or (2) were located in a state that requires contraceptive coverage and did not exempt the organization from the state-mandated coverage of contraceptive

from the Catholic Bishops, numerous evangelical groups, and even some secular employers who said that providing contraception coverage was against their beliefs.").

[70] 77 Fed. Reg. 8726 (Feb. 15, 2012) ("Commenters included concerned citizens, civil rights organizations, consumer groups, health care providers, health insurance issuers, sponsors of group health plans, religiously-affiliated charities, religiously-affiliated educational institutions, religiously-affiliated health care organizations, other religiously-affiliated organizations, secular organizations, sponsors of group health plans, women's religious orders, and women's rights organizations.").

[71] *See* Matthew Larotonda, *Catholic Churches Distribute Letter Opposing Obama Healthcare Rule,* ABC NEWS (Jan. 29, 2012, 8:19 PM), http://abcnews.go.com/blogs/politics/2012/01/catholic-churches-distribute-letter-opposing-obama-healthcare-rule.

[72] Robert Pear, *Birth Control Rule Altered to Allay Religious Objections*, N.Y. TIMES, Feb. 1, 2013. *See* Wilson, *supra* note 61, at 1419 (noting that the "cramped definition of religious employer" would not apply to religiously affiliated universities, hospitals, and social services agencies such as Catholic Charities").

[73] 77 Fed. Reg. 8727-28. *See also* 77 Fed. Reg. 16,503 (Mar. 21, 2012) (discussing the history of contraceptive services regulations, including "safe harbor.").

services.[74] These entities had to provide contraceptive services by August 1, 2012 or face severe penalties.[75]

Second, this safe harbor provision not only gave religious employers an additional year to comply, but also gave the Administration time to work out the details of a proposed accommodation for these employers.[76] The proposed accommodation would allow objecting religious organizations to opt out of the contraceptive mandate, while still allowing their employees to get free contraceptive coverage.[77] This would be

[74] *See* 77 Fed. Reg. 16,504–05 (a related question is whether "the definition of religious organization should include religious organizations that provide coverage for some, but not all, FDA-approved contraceptives consistent with their religious beliefs"); Wilson, *supra* note 61, at 1423–24 & n.20 ("[H]HS issued guidance on August 15, 2012, which clarifie[d] that the safe harbor is available to plans that object to covering 'some but not all contraceptive[s],' as well as to objectors who unsuccessfully attempted before the February 10, 2012 safe harbor date to exclude or limit contraceptive coverage in their plans.").

[75] For employers who employ hundreds of employees, these fines can amount to several million dollars per year. *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H(a) (approximately $2,000 per employee annual tax assessment for noncompliance). *See also* Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310, 315 (demonstrating the burden imposed on certain employers because of the ACA's provision that "large employers who fail to offer 'full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan' can be assessed an annual fine of $2,000 per full-time employee. 26 U.S.C. § 4980H(a), (c)(1)). An additional tax of $100 per employee per day may be imposed for 'any failure of a group health plan' to provide required coverage. 26 U.S.C. § 4980D(a), (b)(1). *See also* 42 U.S.C. § 300gg-22(b)(2)(C)(i) (providing for penalties of up to $100 per person per day for failures to satisfy coverage requirements)."

[76] Wilson, *supra* note 61, at 1422–24. *See* Briggs, *supra* note 66, at 1235–36 ("Many religious organizations do not focus solely on evangelism and the inculcation of religious beliefs . . . [t]hus, strict statutory definitional requirements often exclude religious organizations such as Catholic hospitals, schools, and charitable groups from inclusion as a religious employer."). *See id.* at 1247–48 ("Catholic Charities does not meet any of the four statutory requirements for the religious employer exemption under the [California Women's Contraception Equity Act statute]. Instead of the inculcation of religious values, Catholic Charities describes its purpose as offering social services to the community and the general public.").

[77] Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES, Jan. 20, 2012. *See also* Helene Cooper & Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies,* N.Y. TIMES, Feb. 10, 2012 (explaining that the contraceptive compromise announced that day was driven by Catholic allies of the White House seen as the religious left, like Sister Carol Keehan, who told the White House that the new rule went too far); Richard Wolf, *Obama Tweaks Birth Control Rule*, USA TODAY (Feb. 10, 2012, 3:57 PM) ("White House officials took pains to avoid the word 'compromise,' [because]

accomplished by requiring insurance companies to provide these benefits to the organizations' employees without any direct involvement by the religious employer.[78]

As opposition to the contraceptive mandate continued to mount, even with the proposed inclusion of the accommodation, HHS attempted to curb further objections by pointing to the positive experiences of both the federal and state governments in mandating contraceptive coverage. HHS explained that:

> [W]hen contraceptive coverage was added to the Federal Employees Health Benefits Program, premiums did not increase because there was no resulting health care cost increase. Further, the cost savings of covering contraceptive services have already been recognized by States and also within the health insurance industry. Twenty-eight States now have laws requiring health insurance issuers to cover contraceptives. A 2002 study found that more than 89 percent of insured plans cover contraceptives. A 2010 survey of employers revealed that 85 percent of large employers and 62 percent of small employers offered coverage of FDA approved contraceptives.[79]

HHS also pointed out that covering contraceptive services would improve the social and economic status of women.[80]

On February 6, 2013, HHS issued its long-anticipated Notice of Proposed Rulemaking (2013 NPR) setting out its proposed final rules regarding the application of the contraceptive mandate to religious institutions.[81] The key features of the 2013 NPR

---

under the accommodation, no woman who wants access to contraceptives should be denied.").

[78] The compromise was patterned after a provision in Hawaii, where employees of religiously affiliated institutions obtained contraceptives through a side benefit offered by insurance companies. The Administration's work-around differs from Hawaii's in that it shifts the cost to insurers, instead of employees. It also differs from Hawaii's in that it requires insurers–and not the religious institutions–to inform employees about the availability of contraceptive services. Briggs, *supra* note 66, at 1233–35 (*citing* HAW. REV. STAT. §431:10A-116.7(a)(1)–(4) (Supp. 2004)). 77 Fed. Reg. 8728–29.

[79] 77 Fed. Reg. 8727–28.

[80] 77 Fed. Reg. 8728 (the Departments also explained that contraceptives have medical benefits for women who have medical reasons for not getting pregnant and "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (e.g., treatment of menstrual disorders, acne, and pelvic pain.")) *See also* Briggs, *supra* note 66, at 1230 (showing that a 1998 study found that the average monthly cost to the employer of providing the full range of Food and Drug Administration approved prescription contraceptives would be $1.43 per employee, which amounted to an overall rise in insurance costs for employers of only 0.6%).

[81] 78 Fed. Reg. 8456 *passim* (Feb. 6, 2013). The final HHS regulations were

included the following:

First, the 2013 NPR expanded the religious employers that were eligible for an exemption from the contraceptive mandate.[82] The reason for expanding the exemption was that the four factors initially chosen by the Administration to define "religious employers" left out entities that the Administration never meant to exclude.[83] For example, the four factors – "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization [under certain section of the Internal Revenue Code]"[84] – could exclude churches that "provide benevolent services to their communities."[85]

> [I]f a church maintains a soup kitchen that provides free meals to low-income individuals irrespective of their religious faiths, it could fail to satisfy the third prong of the definition of religious employer. . . . The same question could arise if a church runs a parochial school that employs people of different religious faiths.[86]

The Administration decided to fix this oversight by eliminating the first three prongs of the definition and clarifying that a nonprofit entity is a "religious employer" if it meets the definition of a house of worship under the Internal Revenue Code.[87] This definition would "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship and religious orders,"[88]

---

issued in early July, 2013 after this article was accepted for publication. The regulations were effective on August 1, 2013 and the temporary safe harbor provisions were continued until January 1, 2014 for religiously-affiliated entities whose plan year begins between August 1, 2013 and January 1, 2014. 78 Fed. Reg. 39,870-99 (July 2, 2013); 78 Fed. Reg. 39,889. The final rules do not substantially change the key aspects of the exemption and accommodation as discussed in this article, but some material changes are noted in this article in the applicable footnotes.

82 78 Fed. Reg. 8458–59.

83 78 Fed. Reg. 8461.

84 *Id.* A religious employer, for tax exempt purposes, is described in section 6033(a)(1) and 6033(a)(3)(A)(i), (iii) of the Internal Revenue Code. 26 U.S.C. §§ 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii) (West 2010).

85 78 Fed. Reg. 8461.

86 78 Fed. Reg. 8461.

87 78 Fed. Reg. 8461 (Section 6033(a)(3)(A)(i) and (iii) of the Code refers to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as to the exclusively religious activities of any religious order.) 26 U.S.C. §§ 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii) (West 2010)).

88 78 Fed. Reg. 8461 ("By restricting the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other

while ensuring that these organizations would still qualify for the exemption if they also "provide[d] educational, charitable and social services to their communities."[89]

Second, the 2013 NPR used the term "eligible organization" to describe the religiously-affiliated institutions that would be eligible for the proposed accommodation. To qualify as an "eligible organization," an entity would have to meet the following four requirements: (1) "oppose[] providing coverage for some or all of the contraceptive services required" under the rules, (2) "[be] organized and operate[] as a nonprofit entity . . . (3) hold[] itself out as a religious organization . . . [and] (4) self-certif[y] that it satisfies the first three criteria."[90]

Third, the rules laid out the details of the proposed accommodation that was created to insulate eligible organizations from providing contraceptive coverage, while also ensuring that the employees of these organizations had access to free coverage.[91] Under the 2013 NPR, an eligible organization would self-certify to its insurance company that it met the requirements necessary to qualify for the accommodation.[92] The insurance company would then provide notice to the participants and beneficiaries in the eligible organization's plan that they

houses of worship, and religious orders, the fourth prong of the current definition of religious employer would alone suffice to meet the goal.").

[89] 78 Fed. Reg. 8461; *see* proposed 45 C.F.R. § 147.131 (a); 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A (All three proposed C.F.R. provisions are included in 78 Fed. Reg. 8461). This definition of "religious employer" was retained in the final rules. *See* 45 C.F,R, § 147,131(a); 78 Fed. Reg. 39,873-74, 39,896.

[90] 78 Fed. Reg. 8462 (HHS did not include for-profit secular employers as eligible organizations. According to HHS, "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations. Accordingly, the Departments believe it would be appropriate to define eligible organization to include nonprofit religious organizations, but not to include for-profit secular organizations."). The four-part definition of "eligible organization" was retained in the final rules. 78 Fed. Reg. 39,874.

[91] 78 Fed. Reg. 8462. *See* proposed 45 C.F.R. § 147.131 (a); 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A (All three proposed C.F.R. provisions are included in 78 Fed. Reg. 8461). *See also* 45 CFR § 147.130, 29 CFR § 2590, 26 CFR § 54.

[92] 78 Fed. Reg. 8462-63. The final regulations clarified that the self-certification "needs to be executed once" and does not have to be provided to HHS, but must be retained in the entities' records and made available on request. 78 Fed. Reg. 39,875. A copy of the self-certification must be provided to the health insurance issuer or third-party administrator and to any new health insurance issuer or administrator. 78 Fed. Reg. 39,875.

could receive contraceptive coverage.[93] The insurance company would be responsible for ensuring that the contraceptive services identified in the self-certification as being against the religious beliefs of the organization[94] (1) are not included in the terms of the group policy provided by the eligible organization, (2) do not affect the group health insurance premium paid by the organization, and (3) do not result in any other fee or charge imposed on the organization.[95] These requirements were imposed to ensure that the eligible organization has no role in "contracting, arranging, paying, or referring" its employees for this separate contraceptive coverage.[96] The insurance company would "assume sole responsibility, independent of the eligible organization and its plan," for providing the contraceptive coverage to plan participants and beneficiaries without charging the recipients of these benefits for the services or imposing any other fees.[97]

---

[93] 78 Fed. Reg. 8464. The final rules require that the insurer or administrator provide notice to plan participants that it will be providing separate payments for contraceptive services at no cost to the insured. 78 Fed. Reg. 39,875-76, 39,881.

[94] 78 Fed. Reg. 8462. A separate issue that HHS did not resolve in the 2013 NPR is how to address the scope of contraceptive coverage where the employer's self-certification limits the type of contraceptive services for which a religious accommodation is needed. For instance, while the Catholic Church prohibits the use of artificial contraception, Evangelical Christians "generally permit the use of birth control, but they object to specific methods such as the morning-after contraceptive pill, which they argue is tantamount to abortion." Rachel Zoll, *Birth Control Lawsuits: Obama Health Care Mandates Loosen Legal Challenges*, HUFF POST POLITICS, (Jan. 26, 2013), *available at* http://www.huffingtonpost.com/2013/01/26/birth-control-lawsuits_n_2559773.html. The 2013 NPR stated that HHS is still deciding whether there are "efficient ways to limit the benefits provided under the separate individual health insurance policies for contraceptive coverage to match the contraceptive benefits identified in the self-certification or whether the separate individual health insurances policies for contraceptive coverage should simply cover the full set of recommended contraceptive services." 78 Fed. Reg. 8464. In the final regulations, HHS eliminated the requirement that the self-certification specify the contraceptive services that the eligible organization refuses to provide. The eligible organization need only indicate that it objects to providing contraceptive services. 78 Fed. Reg. 39,875.

[95] 78 Fed. Reg. 8462 (The contraceptive services would not be included in "the group policy, certificates, or contract of insurance . . . [and the insurance company would be required to] provide contraceptive coverage under individual policies, certificates, or contracts of insurance.").

[96] 78 Fed. Reg. 8462, 8463. *See* proposed 45 C.F.R. § 147.131 (a); 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A (All three proposed C.F.R. provisions are included in 78 Fed. Reg. 8461).

[97] 78 Fed. Reg. 8462 ("If the plan uses a separate issuer for certain coverage,

Fourth, HHS also had to deal with self-insured eligible organizations.[98] Because self-insured entities generally do not have an existing relationship with an insurance company, HHS would assist the organization in identifying insurance companies willing to offer "the separate individual health insurance policies for contraceptive coverage."[99] The eligible organization would then self-certify to the insurance company that was selected or to a third-party administrator that would arrange for an insurance company to provide the coverage.[100]

Finally, HHS had to have a financial incentive to encourage insurance companies to provide individual health insurance policies for contraceptive coverage for the employees of self-insured eligible organizations.[101] For employers that purchased health insurance, rather than being self-insured, the cost to the insurance companies of providing contraceptive coverage would be offset by lower health care costs because women and babies would theoretically be healthier.[102] Therefore, the insurance premiums these companies already received would more than cover the costs of providing contraceptive coverage.[103] But the insurance companies providing policies for employees of the self-insured organizations would not have any premiums to offset

such as prescription drug coverage, the eligible organization may also need to provide a copy of its self-certification to the separate issuer.").

[98] 78 Fed. Reg. 8463.

[99] *Id.* at 8463–64 (The insurers "could either be affiliated with, or be independent of, the third party administrator" and the third party administrator would be responsible for actually arranging with an insurer to provide individual health insurance policies for contraceptive coverage for a self-insured eligible organization's employees.).

[100] *Id.* at 8463 (The "eligible organization" would provide a copy of its self-certification to a third-party administrator that would then "automatically arrange separate individual health insurance policies for contraceptive coverage from an issuer providing such polices, . . ." The insurers could either be affiliated with, or independent from, the third-party administrator.).

[101] Adjustment of fees for providing contraceptive services would serve the significant interests supporting contraceptive care coverage without cost sharing, which, according to HHS, includes furthering "the governmental interests in promoting public health and in promoting gender equality." 78 Fed. Reg. 8465.

[102] *See supra* note 45–57 and accompanying text. In the final rules, HHS included guidance that would allow insurance companies to adjust their "claims costs for purposes of medical loss ratio and risk corridor program calculations" to account for providing contraceptive coverage. 78 Fed. Reg. 39,878.

[103] *Id.* (indicating that through the expansion of preventive health care to women, insurance costs will decrease as a result of overall health care costs decreasing).

their costs. These insurance companies would also be responsible for paying the "reasonable charge[s] of third party administrators" and their contraceptive coverage would have to comply with "all applicable federal and state laws, including state filing and rate review requirements."[104]

To encourage insurance companies to provide contraceptive coverage to the employees of self-insured eligible organizations, HHS proposed allowing the insurance company to claim an adjustment in its user fees.[105] The user fees are fees paid by the insurance companies to the federal government for selling health insurance.[106] The adjustment would include "the estimated cost of [the contraceptive coverage], together with reasonable administrative costs, a reasonable profit margin of around three percent, and the costs of reimbursing the third-party administrator for its administrative fees."[107] HHS determined that this adjustment should be enough to encourage insurance companies to provide this coverage.[108]

The Administration issued the final regulations regarding the accommodation on July 2, 2013. Numerous religious organizations and private employers have already gone to federal court to challenge the proposed rules as an infringement of their First Amendment rights.

---

[104] 78 Fed. Reg. 8465.

[105] In the 2013 NPR, HHS proposed that the existing user fee calculation take into account, "that an issuer [] offers a qualified health plan (QHP)" and suggested that the user fee be adjusted accordingly. 78 Fed. Reg. 8465. Just two months earlier, HHS had issued proposed rules on user fees. "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014," 77 Fed. Reg. 73,213 (Dec. 7, 2012).

[106] Robert Pear, Health Insurers will be Charged to use New Exchanges, N.Y. TIMES, Nov. 30, 2012, *available at* http://www.nytimes.com/2012/12/01/health/health-insurers-will-be-charged-to-use-new-exchanges.html.

[107] 78 Fed. Reg. 8465–66. The rationale for receiving an adjustment of the reasonable costs for the third party administrator is to encourage such entities to serve as the conduit for this program. 78 Fed. Reg. 8463. In some circumstances, the adjustment may result in a credit and, if that occurs, the credit could be used in succeeding months. 78 Fed. Reg. 8466.

[108] "In order to receive the Adjustment or Credit, [the insurer] would have to provide coverage for all recommended contraceptive services identified in the eligible organization's self-certification, and do so without cost-sharing or the imposition of any premiums, fees, or other costs to plan participants and beneficiaries." 78 Fed. Reg. 8465, Finally, the insurer would also "have to provide documentation to HHS justifying its estimated costs and fees." 78 Fed. Reg. 8465-66. The final rules are generally the same except that they allow for more flexible arrangements among third-party administrators, insurers and other entities. *See* 78 Fed. Reg. 39,879-80, 39,881, 39,882-86.

V. THE FREE EXERCISE & RELIGIOUS FREEDOM RESTORATION ACT (RFRA) CLAIMS BROUGHT BY ELIGIBLE ORGANIZATIONS

As of March 2013, more than fifty lawsuits had been brought challenging the contraceptive mandate, including thirty cases brought by eligible organizations.[109] The plaintiffs in all of these lawsuits generally claim that the contraceptive mandate compels them to either violate their religious beliefs or face stiff penalties for noncompliance.[110] For organizations that employ hundreds of people, the fine can amount to several million dollars each year.[111]

All but two of the cases that have been brought by religiously-affiliated institutions that arguably qualify as eligible organizations[112] have been dismissed or stayed on ripeness, standing, or other procedural grounds and the decisions in the two remaining cases primarily addressed the procedural issues.[113] The main reason that the courts have not yet addressed

---

[109] *Court Status*, *HHS Mandate Information Central*, THE BECKET FUND, (April 7, 2013, 8:09 pm), *available at* http://www.becketfund.org/hhsinformationcentral. These lawsuits are collected on the website maintained by the Becket Fund for Religious Liberty, a non-profit law firm that claims it is "dedicated to protecting the free expression of all religious traditions." *Id. See* 78 Fed. Reg. 8461, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-02-06/pdf/2013-02420.pdf.

[110] *See* Taylor, *supra* note 19.

[111] *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H (approximately $2,000 per employee annual tax assessment for noncompliance). *See also* Wilson, *supra* note 61, at 1478 ("The penalties for failing to provide the underlying coverage . . . are staggering. If the University of Notre Dame dropped its coverage for all employees rather than violate its religious convictions, under the regulations as they now stand and assuming no change in its number of employees, it would face an annual penalty of $32,830,000."); *id.*, at 1495 & n.312 (A religious university can also terminate its student health insurance plan rather than obey the new requirement that the plan cover birth control, as occurred with respect to The Franciscan University of Steubenville, Ohio. This would still result in a large penalty, but may be cheaper than providing health insurance).

[112] This sentence refers only to the cases that actually have decisions.

[113] In these two cases, the courts have rejected the federal government's standing and ripeness defenses and directed the parties to move forward on the merits. *See* Roman Catholic Diocese of Fort Worth v. Sebelius, Civ. Act. No. 4:12-CV-314-Y (TRM) (N.D. Tex. Jan. 31, 2013) *available at* http://www.clearinghouse.net/chDocs/public/FA-TX-0002-0002.pdf; Roman Catholic Archdiocese of N.Y. v. Sebelius, 907 F. Supp. 2d 310, 325 (holding that a temporary delay in enforcement under the safe harbor provision did "not prevent plaintiffs from establishing imminent injuries for standing purposes").

the merits of the free exercise of religion claims is because the contraceptive mandate does not apply to eligible organizations until August 2013 due to the safe harbor provisions.[114] Because the decisions that have been rendered do not deal with the merits, the rest of this section will review some of the major free exercise arguments that eligible organizations have made–or can be expected to make–and will suggest some responses.

A. Background on The First Amendment & RFRA

The Supreme Court set the standard for deciding First Amendment free exercise of religion claims in *Sherbert v. Verner*[115] and *Wisconsin v. Yoder*,[116] cases that were decided in 1963 and 1972 respectively. In those cases, "the Supreme Court determined that the Free Exercise Clause prevented the government from enforcing a law . . . in a manner that substantially burdened the exercise of religion unless the law was justified by a compelling state interest and was narrowly tailored to meet the government's purpose."[117]

In 1990, the Supreme Court changed this standard in *Employment Division, Dep't of Human Resources of Oregon v. Smith*.[118] In that case, the Court decided that the Free Exercise Clause is not violated by a law that is "neutral and of general

---

[114] 77 Fed. Reg. 8727–28; 77 Fed. Reg. 16,503 (discussing the history of contraceptive services regulations, including "safe harbor."). The safe harbor provisions apply until the next plan year that begins on or after August 1, 2013. *See* 78 Fed. Reg. 8458. A plan year is "[a] 12 month period of benefits coverage under a group health plan. This 12 month period may not be the same as the calendar year." *Glossary*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, http://www.healthcare.gov/glossary/p/plan-year.html. The final rules extended the safe harbor to the next plan year that begins on or after January 1, 2014. 78 Fed. Reg. 39,889.

[115] 374 U.S. 398, 402 (1963) (stating that "the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.").

[116] 406 U.S. 205, 214 (1972) (holding that "a State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.").

[117] SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 622–23 (2011); *see* Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L. J. 1071, 1076–77 (2009); Spencer T. Proffitt, *Gods Behind Bars: How Religious Liberty Has Been Sent Directly to Jail and How to Get Out of Jail Free*, 40 ARIZ. ST. L. J. 1401, 1411–12 (2008).

[118] 494 U.S. 872, 873 (1990).

applicability" even if the law has "the incidental effect of burdening a particular religious practice."[119] This standard substantially altered the protection provided by the Free Exercise Clause, making it much harder for plaintiffs to establish a governmental violation. Under this standard, "laws are only suspect if they target a particular religious group or if the intent of the law is to interfere with the free exercise of religion."[120]

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA)[121] to reinstate the strict-scrutiny standard established in *Sherbert* and *Yoder*.[122] RFRA prohibits the federal government[123] from imposing a "substantial[] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the burden "(1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[124] Congress explicitly designed RFRA to prohibit the government from interfering with First Amendment religious freedoms unless this more exacting standard is satisfied.[125]

B. Applying the Free Exercise Clause

The HHS regulations that establish the contraceptive mandate are facially neutral laws of general applicability that provide a range of preventive services for all women employees and dependents of covered employees, regardless of their faith.[126]

---

[119] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) ("[I]n [*Smith*] this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.").

[120] RICKS & TENENBAUM, *supra* note 117, at 632.

[121] 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*.

[122] *Id.*

[123] As originally enacted, RFRA also applied to the states but the Supreme Court ruled in *City of Boerne v. Flores,* that the application of RFRA to the states exceeded Congress' authority under section 5 of the Fourteenth Amendment. 521 U.S. 507, 533–36 (1997).

[124] *Gonzales*, 546 U.S. at 424, citing 42 U.S.C. § 2000bb-1(b).

[125] RICKS & TENENBAUM, *supra* note 117, at 632 ("Congress expressly stated that the purpose of [RFRA] was to override *Smith* and 'restore the compelling interest test set forth in Sherbert v. Verner and Wisconsin v. Yoder.'"). *See also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b).

[126] Samuel T. Grover, *Religious Exemptions to the PPACA's Health Insurance Mandate*, 37 AM. J. L. & MED. 624, 633 (2011) (noting that a statute was "neutral towards religion in the sense that, on its face, [the statute did] not

Therefore, if the eligible organizations challenge the mandate itself, the courts will apply the standard in *Smith* and are likely to find that the mandate comports with the Free Exercise Clause, even if it incidentally burdens religious freedom when applied to those organizations.

To avoid *Smith*, the plaintiffs could argue that, while the contraceptive mandate itself is a neutral rule of general applicability, the HHS-created accommodation is not neutral since it applies only to organizations that are religious in nature.[127] Because the accommodation targets religious groups, the organizations' claims that the provisions do not go far enough to protect their rights should arguably be reviewed using strict scrutiny.

This argument is not likely to prevail because a law or regulation that provides an accommodation available to all religions retains its character as a neutral rule of general applicability. *Smith* does not require "such extreme neutrality that any religious accommodation at all is non-neutral."[128] If the accommodation is "neutral[] as among religions," strict scrutiny can be avoided.[129]

Using this reasoning, the HHS-created accommodation should not be reviewed using strict scrutiny because it applies to all religions equally and is not "target[ed at] any particular religious group."[130] The accommodation was written to allow any

contemplate religion at all and was not designed to alter the status of any religious group relative to any other religious or nonreligious group.").

[127] *See* Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990). *See also* 78 Fed. Reg. 8462.

[128] *See* United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702, at *34 (10th Cir. Aug. 8, 2001) (unpublished), *vacated by rehearing en banc*, 260 F.3d 1199, *superseded on other grounds*, 297 F.3d 1116 (10th Cir. 2002) (en banc). *See also* 78 Fed. Reg. 39,888 ("The [final] regulations do not violate the Free Exercise Clause because they are neutral and generally applicable. The regulations do not target religiously motivated conduct . . . .").

[129] *See Hardman*, No. 99-4210, 2001 U.S. App. LEXIS 17702 at *35 (unpublished) ("Further, the Supreme Court has specifically held that when religious accommodations are made to a generally applicable statute, 'it is clear that neutrality as among religions must be honored.'"). *See also* 78 Fed. Reg. 39,888 ("The exemption and accommodations set forth in the [final] regulations are not restricted to organizations of a particular denomination or denominations."); Berkowitz v. E. Ramapo Cent. Sch. Dist., 932 F. Supp. 2d 513, 532 (S.D.N.Y. 2013) ("The Supreme Court 'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'").

[130] *See* RICKS & TENENBAUM, *supra* note 117, at 632.

religiously-affiliated organization to avoid directly providing contraceptive coverage.[131] Many religions, especially those with different denominations, have some doctrine opposing contraception.[132] These religions include Catholicism, Eastern Orthodox Christianity, Protestantism, Orthodox Judaism, and Islam.[133] Because the accommodation is neutral with respect to religion and would apply to objectors in all of these religions, the *Smith* standard should apply.

Even if the eligible organizations were able to convince a court that *Smith* does not apply, these organizations are unlikely to succeed under the *Sherbert-Yoder* strict scrutiny analysis because they cannot prove that the activities required of them under the accommodation impose a substantial burden on their free exercise of religion. The substantial burden argument under the Free Exercise Clause is identical to the one that is likely to be made under RFRA and will be discussed below.

C. Substantial Burden on Religious Exercise

Under both the First Amendment and RFRA, plaintiff must make a *prima facie* showing that the challenged regulations substantially burden a sincere religious exercise.[134] Congress did not define the term "substantial burden" in RFRA, but there are many cases interpreting RFRA that give some meaning to the term. Courts have also relied on cases applying a free exercise analysis prior to *Smith* because "RFRA does not purport to create a new substantial burden test."[135] In these cases, substantial burden has been described as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly,"[136] and as a burden that "necessarily bears

---

[131] *See* 78 Fed. Reg. 8462. The religiously-affiliated organizations would, of course, have to meet the requirements to qualify as an eligible organization. These requirements are also neutral with respect to religious affiliation.

[132] *See* Amirrtha Srikanthan & Robert L. Reid, *Religious and Cultural Influences on Contraception*, 30(2) J. OBSTETRICS GYNECOLOGY CAN. 129, 130–33 (2008).

[133] *Id.*

[134] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 428 (2006).

[135] Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

[136] Midrash Shephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). *See also* Guru Nanak Sikh Society of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) ("[A] substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise.").

a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[137] Using a more explicit definition, the Seventh Circuit described "substantial burden" as "forc[ing] adherents of a religion to refrain from religiously motivated conduct, inhibit[ing] or constrain[ing] conduct or expression that manifests a central tenet of a person's religious beliefs, or compel[ing] conduct or expression that is contrary to those beliefs."[138]

Eligible organizations have argued that, despite the proposed accommodation, the rules in the 2013 NPR substantially burden their exercise of religion.[139] These organizations contend that providing contraceptive services is against their religious beliefs and they could argue that certain actions they are required to take under the ACA and the regulations will compel them to act contrary to these beliefs or involve them in facilitating the provision of contraceptive services.[140] At least three actions that the eligible organizations would be required to perform under the ACA and the regulations are likely to be raised.

First, employees of an eligible organization only receive contraceptive coverage from an insurance company if the organization provides health insurance to its employees in the first place.[141] Thus, there is a nexus between deciding to provide employer-funded health insurance and the provision of

---

[137] Grote v. Sebelius, 708 F.3d 850, 855 (7th Cir. 2013) (Rovner, J., dissenting) (citation omitted). *See also* RICKS & TENENBAUM, *supra* note 117, at 642 (under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that has provisions similar to those in RFRA, "substantial burden" essentially means that a government action "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.") (*quoting* Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006)).

[138] Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated on other grounds*, O'Leary v. Mack, 522 U.S. 801 (1997).

[139] *See, e.g.,* Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310, 327 n.9 ("Plaintiffs contend that any possible accommodation that [HHS] provide[s] pursuant to the [Advance Notice of Proposed Rulemaking] will be inadequate."). *See also* Bishops Renew Call to Legislative Action on Religious Liberty, United States Conference of Catholic Bishops (Feb. 10, 2012), *available at* http://www.usccb.org/news/2012/12-026.cfm.

[140] Legislatures have often taken facilitation arguments into account in enacting religious exemptions. For example, a legislature may exempt religious organizations from provisions protecting same-sex couples from discrimination by providing that they can refuse to have same-sex marriage receptions on their premises. *See* Wilson, *supra* note 61, at 1462.

[141] Patient Protection and Affordable Care Act of 2010, § 2713(a)(4); 76 Fed. Reg. 46,623–24 (discussing how the religious exemption only applies to group health plans).

contraceptive coverage without cost sharing by its employees. If the employer decides not to provide health insurance – and decides to pay the substantial penalty instead – the employees who wanted contraceptive coverage would have to purchase health insurance and contraceptive services on their own, for example through the health exchanges.

Second, the religiously-affiliated organization must self-certify to the insurance company or a third party administrator that it qualifies as an eligible organization.[142] Self-certification requires that the organization perform an act that will result in its employees receiving contraceptive services.

Third, in some circumstances, the eligible organization may have to provide the insurer or third-party administrator with "access to information necessary to communicate with the plan's participants and beneficiaries."[143] Without this information, the insurer might not be able to provide the eligible organization's employees and beneficiaries with contraceptive services.

In analyzing whether these actions impose a substantial burden on religious exercise, the courts will likely examine the involvement of the religious institution in the provision of contraceptive services. The more removed the institution's actions are from actually providing contraception, the weaker its claim.[144] The burden will also be attenuated if the actions required of the institution are not strictly religious, but rather are more administrative in nature.[145]

---

[142] 78 Fed. Reg. 8462.

[143] 77 Fed. Reg. 16,505 (Mar. 21, 2012) (HHS Advanced Notice of Proposed Rulemaking on proposed accommodation).

[144] *See* Wilson, *supra* note 61, at 1461 (discussing Prof. John Corvino, *Religious Exemptions and the Slippery Slope*, HUFFINGTON POST, Nov. 1, 2012, *available at* http://www.huffingtonpost.com/john-corvino/the-slippery-slope_b_2060397.html). *See also* 78 Fed. Reg. 39,887 (In the final rules, HHS also addressed the issue of substantial burden, stating that "there is no burden on any religious exercise of the eligible organization [and] even if the accommodation were found to impose some minimal burden on eligible organizations, any such burden would not be substantial . . . because a third party pays for the contraceptive services and there are multiple degrees of separation between the eligible organization and any individual's choice to use contraceptive services.") .

[145] *See e.*g., Catholic High Sch. Assoc. v. Culvert, 753 F.2d 1161, 1170 (1985) ("The Association does not contend that [the mandated actions] are contrary to the beliefs of the Catholic Church . . . . Thus, the constitutionality of the [government's mandate] must only be considered with respect to its direct effect on religious beliefs."). *See also* Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard – Counting Religious Purpose as a Tax-*

Even though the three actions cited above must be performed if the eligible organization is to avoid a penalty, none of them are likely to be considered a substantial burden. First, while it is true that there is a nexus between providing health insurance and having employees receive contraceptive coverage, the requirement that the employer provide health insurance is also independently required under the ACA.[146] Every covered employer must provide health insurance that includes the required preventive services or it will be subject to a financial penalty.[147] Indeed, the religiously-affiliated employers do not object to providing health insurance, only to providing contraceptive coverage.

Second, the religiously-affiliated employer must self-certify that it qualifies as an "eligible organization."[148] The self-certification is merely a written statement explaining that the organization refuses to provide contraceptive services.[149] The statement is used to authorize the insurer to proceed independently to provide the contraceptive coverage.[150] The certification itself is not an unusual activity for the eligible organization and is not a prohibited religious exercise. For example, many religious employers are required to justify their entitlement to tax-exempt status under the Internal Revenue Code.[151]

Exemption Factor for Hospitals, 42 SETON HALL L. REV. 1549, 1585 (2012) (demonstrating the administrative tasks required of religious hospitals by describing how Congress, in Title IX of the ACA, "increased governmental oversight of exempt hospitals, mandated that they report certain information, and tightened the requirements for hospitals to qualify for and retain federal tax-exempt status.").

146 *Penalties for Employers Not Offering Affordable Coverage Under the Affordable Care Act Beginning in 2014*, THE HENRY J. KAISER FAMILY FOUNDATION, http:// healthreform.kff.org (last visited Aug. 2, 2013).

147 See discussion *supra* notes 75, 111 and accompanying text for a description of the financial penalties.

148 78 Fed. Reg. 8462.

149 *Id. See also* note 94 (the final rules do not require the employer to specify the contraceptive services that are contrary to its religious beliefs).

150 *Id.*

151 *See Tax Guide for Churches and Religious Institutions*, I.R.S. Tax Exempt and Government Entities 3, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf. *See also* DeBoer, *supra* note 145, at 1587 (noting that Congress has mandated in § 9007(d)(1) of the ACA, that every hospital, including exempt hospitals, submit to the IRS "how the organization is addressing needs identified through its community health needs assessments, what needs are not being addressed, and why these needs are not being addressed; and . . . provide audited financial statements of the organization."); *Id.* at 1590 ("The new

Third, although an eligible organization may have to provide the insurer with access to information necessary to communicate with the plan's participants, the insurer may already have the necessary information.[152] Many insurers are already serving as the insurer of the eligible organization's group health plan. Even with respect to self-insured plans, the required information is the type of factual information that is regularly turned over to insurance companies or third-party administrators.[153] Thus, performing the actions that are required by the accommodation will not violate the eligible organization's religious beliefs and those actions will be similar to activities that are already being performed by the organization.

The actions required of the eligible organizations are also far removed from the actual provision of contraceptive services to the employees. After the eligible organization self-certifies and provides any necessary information to the insurance company, the insurer must still notify the employees about the nature and scope of the contraceptive coverage and arrange, contract, and pay for contraceptive services.[154] The employees and dependents must also make the very personal and private decision about whether to use these services.[155] Because the actions of the religiously-affiliated institution are "multiple steps from both the [contraceptive] coverage that the company health plan provides

requirements increase the pressure on tax-exempt hospitals to demonstrate their qualifications for tax-exempt status.").

[152] *See* 77 Fed. Reg. 16,505 (The insurer must be given "access to information necessary to communicate with the plan's participants and beneficiaries and to act as a claims administrator and plan administrator with respect to contraceptive benefits.").

[153] *See, e.g.,* Consumer Guide to Group Health Insurance, National Association of Health Underwriters, *available at* http://www.nahu.org/consumer/GroupInsurance.cfm (discussing how group health insurance companies use medical underwriting to determine initial premium rates for small and large group employers, and may obtain health information directly from employees in establishing premium rates). In the final rules, HHS noted that it is unaware of any self-insured plans that do not use a third-party administrator. 78 Fed. Reg. 39,880.

[154] *See* 78 Fed. Reg. 8643 (The "eligible organization" would provide the third party administrator or insurance company with a copy of its self-certification and the third party administrator would then "automatically arrange separate individual health insurance policies for contraceptive coverage from an issuer providing such policies."); 78 Fed. Reg. 39,881 (The final rules direct insurers or third-party administrators to notify insureds about contraceptive coverage and directly pay for these services, but do not require them to issue separate insurance policies.).

[155] Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use," the burden imposed on them is "'likely too remote and attenuated to be considered substantial' for purposes of the RFRA."[156]

VI. THE RFRA CLAIMS BROUGHT BY COMMERCIAL BUSINESSES & THEIR INDIVIDUAL OWNERS OR MANAGERS

The lawsuits brought by for-profit businesses and individual business owners and managers – there are presently twenty-nine of these cases[157] – raise additional free exercise concerns. These employers claim that the contraceptive mandate violates their free exercise rights, but they do not meet the definition of either a "religious employer" or an "eligible organization" and thus cannot qualify for an exemption or the HHS accommodation.[158] They are also not protected by the safe harbor provisions and therefore were required to provide contraceptive coverage for their employees under the rules that went into effect on August 1, 2012.[159]

These employers include for-profit businesses, especially closely-held corporations that have a religious culture and operate based on religious principles that are coterminous with the beliefs of the owners. For example, one case was brought by Roman Catholic individuals and the company they substantially own.[160] The individual plaintiffs claim that they should be able to manage their company in a manner consistent with their faith.[161]

---

[156] Grote v. Sebelius, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) (although Grote involves a for-profit corporation, these principles are directly applicable to eligible organizations). *See also* Briggs, *supra* note 66, at 1260–61 (stating that if employees "obtain prescription contraceptive coverage directly from the insurer, . . . religious employers would not be required to violate their religious beliefs by providing and paying for what they view as sin.").

[157] *See HHS Mandate Information Central*, THE BECKET FUND, http://www.becketfund.org/hhsinformationcentral/ (last visited Aug. 2, 2013).

[158] 78 Fed Reg. 8461, 8462 (to be codified at 45 C.F.R. pt. 147).

[159] 77 Fed. Reg. 8725–26 & 8730.

[160] Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734 at *4 (7th Cir. Dec. 28, 2012) (The Kortes claim that for K & L Contractors, their company, the financial penalties for not providing contraceptive coverage "could be as much as $730,000 per year, an amount that would be financially ruinous for their company and for them personally").

[161] *Id.* at *3 (The plaintiffs in *Korte* "seek to manage their company in a

Another case involves a family-run business, which operates in accordance with the family's religious beliefs.[162]

The employers in this category also include for-profit businesses that are expressly organized for religious purposes. As Judge Rovner of the Seventh Circuit wrote, "[T]here do exist some corporate entities which are organized expressly to pursue religious ends, and I think it fair to assume that such entities may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking."[163] She gave as an example, a for-profit publisher of Christian texts, owned by a not-for-profit religious foundation.[164]

Cases involving for-profit companies and individual businesses have already resulted in substantial federal court litigation and

manner consistent with their Catholic faith, including its teachings regarding the sanctity of human life, abortion, contraception, and sterilization," and challenge the mandate because it allegedly prohibits them from substituting a new insurance plan that prohibits contraceptive services").

[162] Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013) (The plaintiffs include a Catholic family and its privately held, family-run business headquartered in Madison, Indiana, which operates "in accordance with the precepts of their faith." Grote Industries "has 1,148 full-time employees working at various locations and provides a [self-insured] group health insurance plan" for its employees that does not include contraceptive services). For other cases involving for-profit businesses that have reached the Circuit Courts of Appeals, *see* O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); Hobby Lobby Stores, Inc. v. Sebelius, No. 120-6294, 2012 U.S. App. LEXIS 26741, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), *application for injunction denied* by Circuit Justice, 133 S. Ct. 641, 184 L. Ed. 2d 448 (Sotomayor, Circuit Justice Dec. 26, 2012), *rev'd and remanded en banc*, 723 F.3d 1114 (10th Cir. 2013). *See also* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W. D. Okla. 2012), 2013 U.S. Dist. LEXIS 107248 (W.D. Okla., July 19, 2013); Autocam Corp. v. Sebelius, No. 12-2673, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012), *aff'd and remanded* 2013 U.S. App. LEXIS 19152 (6th Cir., Sept. 17, 2013); Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144, 2013 U.S. App. LEXIS 2706 (3rd Cir. Feb. 7, 2013), 724 F.3d 377, 2013 U.S. App. LEXIS 15238 (3d Cir. July 26, 2013); Annex Medical Inc. v. Sebelius, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *see also* Annex Medical Inc. v. Sebelius, No. 12-2804, 2013 U.S. Dist. LEXIS 2699 (D. Minn. Jan. 8, 2013).

[163] Grote v. Sebelius, 708 F.3d at 856 (Rovner, J. dissenting).

[164] *Id.* at 856 (Rovner, J. dissenting) (referring to *e.g.*, Tyndale House Publishers, Inc. v. Sebelius, 2012 U.S. Dist. LEXIS 163965, 2012 WL 5817323, at *6–7 (D.D.C. Nov. 16, 2012) (for-profit publisher of Christian texts, owned by not-for-profit religious foundation and related trusts which directed publisher's profits to religious charity and educational work). *See also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring in the judgment) ("It is . . . conceivable that some for-profit activities could have a religious character.").

conflicting decisions in the Circuit Courts of Appeals.[165] The decisions so far have centered on plaintiffs' claims under RFRA.[166]

A. Determining Whether the Employers' Religious Principles Are Sincerely Held

If an employer raises a free exercise claim, including one brought under RFRA, the employer must establish that its religious beliefs are sincerely held.[167] Without this requirement, the government would become a "toothless tiger" unable to enforce its mandates if an individual or entity merely alleged that complying with a mandate was contrary to its religious beliefs.[168] However, determining sincerity is a difficult undertaking and has been described by the Second Circuit as "an awesome problem."[169] The reason is that the courts are prohibited from inquiring into the "truthfulness or validity of religious beliefs."[170] The courts have recognized that an individual's beliefs are personal and need not be related to any organized religion or

---

165 Through March 18, 2013, the federal courts had ruled on applications for preliminary injunctive relief in eighteen (18) of these cases. The courts granted an injunction or other similar relief, such as a stay of the lower court order pending appeal, in thirteen cases, and denied the injunction in five cases. Five Circuit Courts have issued written orders on appeals seeking a preliminary injunction or stay of the lower court order pending appeal; two Circuit Courts granted injunctive relief (the 7th and 8th) and three Circuit Courts denied injunctive relief (the 3d, 6th and 10th). Most of the Circuit Court orders were issued as split decisions; *see supra* note 162.

166 Some courts have found that commercial businesses lack standing to assert a free exercise claim under RFRA. This article does not address the standing issue, *but see* note 192 *infra.*

167 Wilson, *supra* note 61, at 1450 ("While it is clear what religious is not, the courts have had difficulty finding a precise definition of religion that selects out sham 'religions' designed solely to obtain advantages . . . ."); RICKS & TENENBAUM, *supra* note 117, at 644.

168 *See* Catholic High Sch. Assoc. of the Archdiocese of New York v. Culvert, 753 F.2d 1161, 1168 (2d Cir. 1985) (noting that the State Labor Relations Board would become a "toothless tiger" if an organization could avoid inquiry into whether union activity motivated the discharge of an employee simply by raising a religious defense).

169 Patrick v. Lefevre, 745 F.2d 153, 159 (2d Cir. 1984).

170 DeMarco v. Holy Cross, 4 F.3d 166, 170 (2d Cir. 1993) ("Supreme Court precedents preclude the government from serving as the arbiter of truthfulness or validity of religious beliefs."); *c.f.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause").

even follow all of the dictates of a particular religion.[171] Religious beliefs also "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[172]

To assess sincerity, the courts can determine whether an individual's or entity's actions are consistent with its religious beliefs.[173] In making this assessment, the courts will assume that the professed belief is valid and then focus on whether the plaintiff's actions comport with the alleged religious belief. Thus, "the scope of inquiry [will be] limited to questions concerning the behavior of the [entity] based upon uncontested acceptance of the claimed religious doctrine."[174] These behavioral inquiries could include, for example, whether a particular religious doctrine has been uniformly followed in the past or whether the entity's religious claim is consistent with its rules or policies.[175]

With respect to the contraceptive mandate, determining sincerity will be more of an issue with for-profit businesses than with non-profit religiously-affilitated institutions because generally the non-profit institutions will already have qualified for tax exemptions based on their religious status.[176] In fact, the

---

171 RICKS & TENENBAUM, *supra* note 117, at 645–46. *See* also Ford v. McGinnis, 352 F.3d 582, 590 (2d Cir. 2003) (finding that determining whether a religious belief has objective validity "would require courts to resolve questions that are beyond their competence.").

172 Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

173 Barbara L. Kramer, *Reconciling Religious Rights and Responsibilities,* 30 LOY. U. CHI. L. J. 439, 450 (1999) ("[w]hen the sincerity of an alleged belief is contested, the court examines the consistency with which the employee has acted with respect to that belief and the maintenance of his or her system of beliefs.").

174 *See* Evelyn M. Tenenbaum, *The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry*, 64 ALB. L. REV. 629, 656 (2000). This article dealt with labor relations and discrimination statutes and the Establishment, rather than the Free Exercise, Clause; however, the cited principles from that article apply equally here.

175 For examples of behavioral factors that are used to determine sincerity or pretext, *see* Tenenbaum, *supra* note 174, at 655–59. For another example of a behavioral reason used to determine sincerity, *see* Ford v. McGinnis, 352 F.3d 582, 590 ("The plaintiff claimed that, under the tenets of his religion, it was a sin to take artificial substances into his body. The defendants argued in response that the TB test was derived from natural proteins, rather than artificial substances.").

176 For example, to qualify as an "eligible organization," an entity must, *inter alia*, be organized and operate as a nonprofit entity and hold itself out as a religious organization. 78 Fed. Reg. 8462. Not-for-profit religious organizations, such as religious hospitals and schools, must demonstrate their entitlement to

Seventh Circuit has already confronted a situation in which the sincerity of a for-profit employer's religious objection to the contraceptive mandate was at issue. In that case, the plaintiffs' health care plan, which the company voluntarily selected, already covered the contraceptive services required by the HHS regulations.[177] The plaintiffs claimed that they were unaware that their insurance covered these services until shortly before they filed their lawsuit challenging the contraceptive mandate.[178]

In her opinion dissenting from the grant of an injunction pending appeal, Circuit Judge Rovner wrote:

> I accept that their prior, inadvertent failure to act in compliance with their professed religious beliefs does not necessarily defeat the claims that they are pursuing in this litigation . . . but the fact that the [plaintiffs'] company is already voluntarily (if inadvertently) paying for the type of insurance coverage to which they object – for at least the past year, and possibly longer – suggests that they will not be irreparably harmed by continuing to pay for the same coverage in compliance with the Affordable Care Act while this appeal is being resolved.[179]

Because the underlying appeal in that case was from the denial of a preliminary injunction, the record was necessarily "limited."[180] If the lawsuit proceeds to trial on the merits, the parties can present further evidence to assist the trier of fact in determining whether the company has consistently applied religious principles in the conduct of its business that support its assertion of a religious objection to providing contraceptive care.

---

tax exemptions to the Internal Revenue Service. *See, e.g.*, Exemptions for 501(c)(3) Organizations, *available at* http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements-Section-501(c)(3)-Organizations.

177 Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *3 (7th Cir. Dec. 28, 2012) ("In August 2012 [plaintiffs] discovered that the company's current health-insurance plan include[d] coverage for contraception. . . . The Kortes want to terminate this coverage and substitute a health plan (or a plan of self-insurance) that conforms to the requirements of their faith. The ACA's preventive-care provision and implementing regulations prohibit them from doing so.").

178 *Id.* at *17–18.

179 *Id.* at *18 (Rovner, J., dissenting).

180 *Id.* at *2, *17. *See also* Korte v. U.S. Dep't of Health & Human Servs., No. 3:12-CV-01072, 2012 U.S. Dist. LEXIS 177101, at *30 (S.D. Ill. Dec. 14, 2012) ("[T]he Court again notes that Plaintiffs' current health insurance plan covers the very preventive health services they seek to enjoin. There is a palpable inconsistency in claiming the ACA contraception mandate substantially burdens their religious beliefs while they currently maintain the same coverage in their existing pre-ACA health plan.").

Inquiring into the company's conduct would not implicate RFRA or the First Amendment because it would not involve questioning doctrine, but rather focus on whether the company behaved in a manner consistent with its claim for a religious exemption.

B. Determining Whether a For-Profit Business Can Establish a Substantial Burden on the Exercise of Its Religious Beliefs

In order to prevail on their claims under RFRA, for-profit employers must also establish that the contraceptive mandate imposes a "substantial burden" on their rights to freely exercise their religious beliefs. Most of these businesses will have difficulty convincing a court that their burden is substantial[181] for the following reasons.

First, the individuals controlling the business do not provide the employees with insurance coverage; rather, under the ACA, it is the for-profit entity that is responsible for providing group health insurance. Thus, a for-profit business cannot base its religious objection on the religious values of the owners or other responsible managers, but rather must show that the religious principles of the business itself have been burdened.[182]

---

[181] *See, e.g.,* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Sup. Ct. Minn. 1985) (finding that the burden on business owners' religious interests was justified by the State's interest in eradicating discrimination. "Sports and Health is not a religious corporation – it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise their religious beliefs.").

[182] *See* Grote v. Sebelius, 708 F.3d 850, 856 (Rovner, J., dissenting) ("Grote Industries . . . is a secular, for-profit business engaged in the manufacture of vehicle safety systems. So far as the limited record before us reveals, it has stated no religious goals as part of its mission, it does not select its employees, vendors, or customers on the basis of their religious beliefs, and it does not require its employees to conform their behavior to any particular religious precepts. As such, I cannot imagine that the company, as distinct from the Grotes, has any religious interests or rights to assert here."). *See also* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."), *rev'd and remanded en banc*, 723 F.3d 1114 (10th Cir. 2013); Gilardi v. Sebelius, 926 F. Supp. 2d 273, 281 (D.D.C. 2013) ("[U]nder the facts of this case, the Freshway Corporations do not exercise religion and therefore cannot succeed on the merits of a claim that the regulations substantially burden their exercise of religion.").

Second, by choosing to operate in the commercial arena, for-profit businesses are often required to comply with generally applicable laws that are in conflict with the religious principles of their owners, such as laws that prohibit discrimination on the basis of marital status.[183] As the Supreme Court wrote in *United States v. Lee*, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[184]

Third, for-profit businesses do not directly provide their employees with contraceptive services. "Instead, [the] company will be required to purchase insurance which covers a wide range of health care services. It will be up to an employee and [sometimes] her physician [to determine] whether she will avail herself of contraception, and if she does, it will be the insurer, rather than the [owners of the company], which will be funding those services."[185] As the Tenth Circuit wrote, "[s]uch an indirect and attenuated relationship appears unlikely to establish the necessary 'substantial burden.'"[186]

The burden on the employer will generally be attenuated even where the employer self-funds the health insurance for its

---

[183] *See* Wilson, *supra* note 61, at 1462–63 & n.175. *See also* Grote v. Sebelius, 708 F.3d at 860 (Rovner, J., dissenting) ("Requiring a secular business over the religious objection of its owner to do something in the commercial sphere that is required of nearly all such businesses ordinarily does not require the owner to abandon his religious tenets, to endorse conduct or express an opinion that is contrary to his religious beliefs, or to modify his private conduct as a religious observant."); Gilardi v. Sebelius, 926 F. Supp. 2d at 278 ("Plaintiffs argue that 'requiring the two corporations [that they own] to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage.' . . . The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability. They cannot simply disregard that same corporate status when it is advantageous to do so.").

[184] 455 U.S. 252, 261 (1982).

[185] Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *15 (7th Cir. Dec. 28, 2012) (Rovner, J., dissenting).

[186] Hobby Lobby Stores, Inc. v. Sebelius, No. 120-6294, 2012 U.S. App. LEXIS 26741, at *9 (10th Cir. Dec. 20, 2012) (*quoting* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d at 1294) ("[T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion.") (emphasis in original), *rev'd and remanded en banc*, 723 F.3d 1114 (10th Cir. 2013).

employees.[187] As Judge Rovner explained:

> The situation may seem different when the employer chooses instead to self-fund the health care plan, in that the employer rather than an insurer is paying the bills and there is thus a more direct monetary link between the employer and whatever medical care that the employee is choosing for herself. But is the difference material? Either way, the employee is making wholly independent decisions about how to use an element of her compensation.[188]

Finally, a ruling that an employer is substantially burdened by the contraceptive mandate may lead down the slippery slope of allowing employers to object to providing a host of other medical services on religious grounds:

> [C]ontraceptive care is by no means the sole form of health care that implicates religious concerns. To cite a few examples: artificial insemination and other reproductive technologies; genetic screening, counseling, and gene therapy; preventative and remedial treatment for sexually-transmitted diseases; sex reassignment; vaccination; organ transplantation from deceased donors; blood transfusions; stem cell therapies; end-of-life care, including the initiation and termination of life support; and, for some religions, virtually all conventional medical treatments.[189]

If the individuals controlling a company can choose the services to provide under their health plans based on their own personal religious beliefs, the employers will have the ability "to interfere with [many] intimate, personal medical decisions of their employees."[190]

For these reasons, the only for-profit employers that might be able to show a substantial burden would be smaller, closely-held family businesses where there is an overlap between the religious values of the owners and the values of the business itself,[191] and businesses that have a religious mission.[192] If the for-

---

[187] Grote v. Sebelius, 708 F.3d at 858 (Rovner, J., dissenting). *See also* Gilardi v. Sebelius, 926 F. Supp. 2d at 283 ("The Court finds that self-insurance, as is the case here, is not dispositive. The Freshway Corporations are providing the insurance, not the Gilardis.").

[188] Grote v. Sebelius, 708 F.3d 861 (Rovner, J., dissenting).

[189] *Id.* at 866.

[190] *Id.* ("If the RFRA entitles the controlling shareholder of a corporation to exclude coverage for contraceptive care from the company's health plan on the basis of his religious beliefs, then . . . I can see no reason why coverage for any number of medical services could not also be excluded from a workplace health plan on the same basis.").

[191] *See, e.g.*, Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *8–9 (7th Cir. Dec. 28, 2012) ("Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they

profit business owners or businesses in these categories can establish a substantial burden on their free exercise of religion,[193] the federal government will have the burden of persuading the court that the mandate serves a compelling governmental interest and that it does so in the least restrictive manner.[194] Because of the broad exemptions that currently exist to the preventive services provisions in the ACA – especially the exemptions for grandfathered plans[195] and small businesses[196] –

manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it.").

[192] *See supra* note 164 and accompanying text. *Compare* Autocam Corp. v. Sebelius, 2013 U.S. App. LEXIS 19152 at *22 (6th Cir. Sept. 17, 2013) (finding that Congress did not intend the term "person" to cover for-profit secular corporate entities like Autocam when it enacted RFRA) *and* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't. of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) (finding that a for-profit secular corporation "cannot exercise religion [and therefore] it cannot assert a RFRA claim") *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013) (holding with respect to a closely-held family business with an explicit religious mission, that "Congress did not exclude for-profit corporations from RFRA's protections").

[193] Even in these situations, the courts would have good reason to find that there is no substantial burden, because the determination to access contraceptive services is still being made by an individual employee, whose relationship to the business' religious exercise is attenuated. *See* O'Brien v. U.S. Dep't of Health & Human Services, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (describing the burden as consisting of the "funds, which plaintiffs will contribute to a group health plan, [that] might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion," and concluding that such burden is simply too attenuated to qualify as substantial); *c.f.* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 123 (D.D.C. 2012) (distinguishing *O'Brien* on the basis, *inter alia*, that the plan in Tyndale was self-insured: "This difference in the manner in which coverage is provided is significant because while the company in *O'Brien* contributes to a health insurance plan which ultimately pays for the services used by the plan participants, Tyndale itself directly pays for the health care services used by its plan participants, thereby removing one of the 'degrees' of separation that the court deemed relevant in *O'Brien,* . . .").

[194] 42 U.S.C. § 2000bb-1(b).

[195] Grandfathered plans are those plans that existed on March 23, 2010, when the ACA was enacted, have continuously covered at least one person, and have not undergone any of the changes outlined in 45 C.F.R. § 147.140(g)(2). Grandfathered plans are not required to comply with the preventive services

the government would be hard-pressed to satisfy either the compelling interest or least restrictive alternative requirements.[197]

Thus, these limited categories of for-profit employers may be

statute. *See* 42 U.S.C. § 18011 (a)(3)–(4) (specifying those provisions of the ACA that apply to grandfathered health plans). *See also* Newland v. Sebelius, 881 F. Supp. 2d 1287, 1297 n.11 (D. Colo. 2012) ("[H]ealth plans may retain their grandfathered status indefinitely. Most damaging to the government's alleged compelling interest, even though Congress required grandfathered health plans to comply with certain provisions of the ACA, it specifically exempted grandfathered health plans from complying with the preventive care coverage mandate.").

[196] S*ee* Annex Medical v. Sebelius, No. 12-2804, 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013) ("Although employer-sponsored health care plans must comply with the Mandate, the ACA only requires entities with fifty or more employees to provide health care coverage. *See* 26 U.S.C. § 4980H. As a result, employers need not comply with the Mandate if they have less than fifty employees and choose to discontinue their group health plan. *See id.* § 4980H(c)(2)(A).").

[197] *See* Geneva College v. Sebelius, 929 F. Supp. 2d 402, 434 (W.D. Pa. 2013) ("[O]ver 190 million individuals have already been exempted from the mandate's requirements as a result of the grandfathering provisions in the ACA . . . . [T]he mere fact that defendants granted such a broad exemption in the first place severely undermines the legitimacy of defendants' claim of a compelling interest . . . . As a small employer, [plaintiff Seneca Hardwood Lumber Company] is exempt from the requirement that it provide health insurance to its employees at all. 26 U.S.C. § 4980H(c)(2)(A) (requiring that employers with fifty or more full-time employees provide health coverage) . . . . In light of the myriad exemptions, the '[requirement] cannot be regarded as protecting an interest 'of the highest order," particularly in a case like this where 'it leaves appreciable damage to that supposedly vital interest unprohibited.") (citation and internal quotations omitted). *See also* Newland v. Sebelius, 881 F. Supp. 2d at 1295, 1297–98 (finding that government's asserted interested in improving the health of women and children, and equalizing access to preventive care, is "undermined" by the exceptions for religious and small employers, and grandfathered plans, and by the temporary enforcement of the safe harbor); Tyndale House Publishers v. Sebelius, 904 F. Supp. 2d at 128–29 (holding that the government's grant of exemptions to other employers, and grandfathered plans renders their purported interests insufficient to move on to the next step of the RFRA test, giving the plaintiffs a strong probability of being victorious on the RFRA claim); Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *13 (7th Cir. Dec. 28, 2012) (noting that the government had not "advanced an argument that the contraception mandate is the least restrictive means of furthering these [asserted compelling] interests."). After this article was submitted, but before it was published, the Tenth Circuit en banc also concluded that the statute's broad exemptions demonstrate that the government's interests in enforcing the contraceptive mandate are not compelling. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143–44; *but see* 78 Fed. Reg. 39,887 at n.49 (HHS's final rules note, *inter alia*, that the ACA's grandfathering provisions will apply only for a short period of time and therefore do not undercut the government's compelling interests).

able to demonstrate that the contraceptive mandate violates RFRA as applied to them.[198] If the courts agree that these limited groups are entitled to an accommodation, the courts would then have to determine an appropriate remedy.

C. The Appropriate Remedy in Cases Where For-Profit Employers Demonstrate a Substantial Burden on Their Free Exercise of Religion

Courts that uphold RFRA claims by these categories of for-profit businesses could enjoin enforcement of the mandate – which would be equivalent to granting them an exemption – or they could order that the same accommodation that is available to eligible religiously-affiliated organizations also be available to these for-profit businesses. Ordering that the same accommodation apply to these categories of for-profit businesses is a more appropriate alternative because they are more similar to religiously-affiliated entities than they are to churches and the accommodation would allow the employees of these companies to obtain contraceptive services if they chose to do so.

The courts have the authority to order that the accommodation be applied to these narrow categories of for-profit entities. An injunction is an equitable remedy[199] and, unless Congress has expressly directed that specific relief be awarded,[200] the court is "not *required* to grant any specific equitable relief."[201] The courts have the discretion to tailor their remedies to the parties' particular circumstances.[202]

---

198 *See, e.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287 (granting injunctive relief to Plaintiffs, which include a for-profit, secular corporation, in light of the government's failure to meet its burden of demonstrating that it used the least restrictive means of achieving its goals).

199 *See e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982).

200 *Id.* at 313 (Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles."); *see, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'").

201 Woerner v. United States 934 F.2d 1277, 1279 (D.C. Cir. 1991); s*ee* Meredith v. Winter Haven, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity.").

202 *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity

The HHS accommodation will not impose a substantial burden on the for-profit companies' free exercise rights for the same reasons that it does not impose a substantial burden on religiously-affiliated institutions.[203] The only difference is that, under the accommodation, religiously-affiliated organizations can self-certify that they qualify as an eligible organization.[204] The for-profit companies in these categories could argue that, by contrast, they would be required to bring a lawsuit or pay a penalty in order to preserve their religious principles. Although the courts may order equitable relief, the courts may not direct HHS to include these subsets of for-profit businesses within the scope of the proposed accommodation.[205] HHS may want to be proactive and amend its accommodation to allow this small group of employers to apply for the accommodation.[206]

VII. CONCLUSION

The symposium held at Albany Law School demonstrated that there are many strong and thoughtful views held by scholars, practitioners, and clergy on both sides of the debate concerning the free exercise of religion and the provision of contraceptive services. This article was intended to serve as a foundation for this debate. Ultimately, reaching a solution that respects both the needs of women and the sincerely-held beliefs of religious groups will best serve the long-term goals of the health care system. The HHS accommodation – while not perfect – is a strong positive step in this direction.

---

has distinguished it.").

[203] *See supra* Part V(C).

[204] *See supra* notes 148–51 and accompanying text.

[205] *See, e.g.,* Swan v. Clinton, 100 F.3d 973, 976–77 n.1 (D.C. Cir. 1996) (noting that "the courts do not have authority under the mandamus statute to order *any* government official to perform a discretionary duty" (internal citations omitted), and indicating that the same rule would apply to a request for an injunction under the general federal question statute, 28 U.S.C. § 1331, as well as a request for declaratory relief under 28 U.S.C. §§ 2201–2202).

[206] HHS may also want to consider whether it should modify the self-certification for these categories of for-profit employers to ensure that the businesses' asserted claims of a sincere religious objection to the contraceptive mandate are consistent with past behavior. *See supra* notes 148–49 (discussing how the self-certification process is a mere written statement to be verified by the insurance carrier alone). HHS can argue that the government can impose a greater–but less than substantial–burden on for-profit businesses, as opposed to non-profit institutions, because the for-profit companies have voluntarily entered into the commercial sphere. *See supra* notes 183–84 and accompanying text.