

# NO GOOD DEED: THE IMPROPRIETY OF THE RELIGIOUS ACCOMMODATION OF CONTRACEPTIVE COVERAGE REQUIREMENTS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

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## INTRODUCTION

On March 23, 2010, the 111th Congress enacted the Patient Protection and Affordable Care Act (PPACA),<sup>1</sup> dramatically expanding Americans' access to health insurance coverage. Along with other provisions, the PPACA requires employers with fifty or more employees to provide health insurance benefits to their employees.<sup>2</sup> Under the Women's Health Amendment (WHA),<sup>3</sup> these group health plans must provide a minimal level of coverage, including certain "preventive care and screenings" for women.<sup>4</sup> The covered preventive care services are delineated in comprehensive guidelines promulgated by the Health Resources and Services Administration.<sup>5</sup> These guidelines include well-woman visits, screening for gestational diabetes, breastfeeding support and counseling, and screening and counseling for interpersonal and domestic violence.<sup>6</sup>

More controversially, plans must include coverage for all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and associated counseling.<sup>7</sup> In response to public outcry from groups that oppose contraceptive and sterilization services for religious reasons, the Department of

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011).

3. 42 U.S.C. § 300gg-13(a) (Supp. 2011).

4. *Id.* § 300gg-13(a)(4). More comprehensively, regarding preventive care, § 300gg-13(a) provides:

"[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force; . . .

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."

5. *Id.*

6. *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, U.S. DEP'T OF HEALTH & HUMAN SERV. (Aug. 1, 2011), <http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html> [hereinafter *Affordable Care Act Rules*].

7. *Id.*

Health and Human Services (HHS) adopted a narrow religious exemption to the contraceptive services coverage provision.<sup>8</sup> However, numerous non-exempt religious employers have challenged the HHS rule requiring coverage of contraception in employer group health plans on the grounds that the regulation violates the First Amendment and the Religious Freedom and Restoration Act by requiring employers to violate their religious beliefs.<sup>9</sup>

This Note argues that HHS's religious exemption was unnecessary and misguided. First, the broad requirement that all employers provide health insurance benefits that include contraception services in the minimum level of coverage does not violate the Free Exercise clause of the First Amendment or the Religious Freedom and Restoration Act. Second, the exemption makes the regulation vulnerable to the very First Amendment challenges it seeks to avoid. As the saying goes, no good deed goes unpunished.

## I. BACKGROUND: THE RELIGIOUS EXEMPTION, CONCEPTION TO BIRTH

### A. *The Women's Health Amendment*

On December 3, 2009, the U.S. Senate passed by a 61-39 vote Senator Barbara Mikulski's (D-Md.) Women's Health Amendment (WHA),<sup>10</sup> which expanded the PPACA's minimum insurance coverage requirements.<sup>11</sup> The WHA requires an employer's group health plan to provide a minimal level of coverage—without any cost-sharing—for women's preventive care and screenings.<sup>12</sup> The WHA does not specify which preventive care and screenings are covered.<sup>13</sup> Rather, it designates the Health Resources and Services Administration (HRSA), an HHS agency, to identify the covered preventive services.<sup>14</sup> Senators debating the WHA expressly contemplated including contraception and family planning among the covered services.<sup>15</sup> However, the

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8. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012). (The language referenced in this citation has since been amended, but it is still accessible at <http://www.law.cornell.edu/cfr/text/45/147.130>.)

9. See Laurie Goodstein, *Bishops Sue Over Contraception Mandate*, N.Y. TIMES, May 22, 2012, at A17.

10. Press Release, Senator Barbara A. Mikulski, Senate Approves Mikulski Amendment Making Women's Preventive Care Affordable and Accessible (Dec. 3, 2009), <http://www.mikulski.senate.gov/media/pressrelease/12-03-2009.cfm>.

11. See Chad Brooker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 184 (2012).

12. 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011).

13. *Id.*

14. *Id.* (stating that additional preventive care and screenings are “provided for in comprehensive guidelines supported by the Health Resources and Services Administration”).

15. Brooker, *supra* note 11, at 186-88.

extent of the covered services remained unclear for nearly twenty months.<sup>16</sup>

### *B. The Department of Health & Human Services Rule*

On July 19, 2010, HHS issued an interim final rule (IFR),<sup>17</sup> which stated that guidelines for required women's preventive services would be issued by August 1, 2011.<sup>18</sup> For input on additional preventive services for women, the HRSA turned to the Institute of Medicine (IOM).<sup>19</sup> IOM is an independent, nonprofit organization founded in 1970 to advise Congress, federal agencies, and other organizations on medical issues.<sup>20</sup> In a July 2011 report, IOM issued recommendations that HHS should include, among other services, the "full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."<sup>21</sup> HHS adopted IOM's recommendations, including the contraception recommendations, on August 1, 2011.<sup>22</sup>

### *C. The Religious Exemption*

When HHS adopted IOM's recommendations, HHS also amended the IFR to provide a narrow religious exemption to the contraception coverage requirements.<sup>23</sup> The amended regulations created an automatic exemption for certain categories of employers with religious objections to contraceptive use.<sup>24</sup> A qualifying 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 section 6033(a)(1) and section

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16. *See infra* Part I.B.

17. *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010). The proposed rule was issued by HHS, in conjunction with the departments of the Treasury and Labor. For simplicity, this Note refers to the rules as originating from HHS.

18. *Id.* at 41728.

19. *Affordable Care Act Rules*, *supra* note 6.

20. *About the IOM*, INST. OF MED., <http://www.iom.edu/About-IOM.aspx> (last updated Nov. 4, 2013).

21. *Recommendations for Preventive Services for Women that Should be Considered by HHS*, INST. OF MED. (July 19, 2011), <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Recommendations.aspx>.

22. *Affordable Care Act Rules*, *supra* note 6.

23. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) [hereinafter Interim Final Rules].

24. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012).

6033(a)(3)(A)(i) or (iii) of the Code.<sup>25</sup>

Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.<sup>26</sup>

In adopting the religious employer definition, HHS's stated goal was "to reasonably balance the extension of any coverage of contraceptive services . . . to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions."<sup>27</sup> Moreover, HHS explicitly modeled this definition of religious employer on existing state laws that require employer-sponsored health plans to cover contraceptive services.<sup>28</sup> Although the IFR fails to specify which states provided the model, the highest courts in New York and California have upheld the constitutionality of nearly identical exemptions to contraceptive coverage laws in their respective states.<sup>29</sup> Comments regarding the amendment were accepted through September 30, 2011.<sup>30</sup>

#### *D. Response & Criticism*

HHS received more than 200,000 responses to the request for comments on the interim regulations.<sup>31</sup> The narrowness of the exemption drew criticism from a variety of groups, particularly organizations that, although affiliated with a church or other religious sect, would not likely be considered a religious organization under the rule.<sup>32</sup> One commentator speculated that "Catholic

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25. *Id.*

26. 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii) (2006); *see also* Interim Final Rules, *supra* note 23, at 46,623.

27. Interim Final Rules, *supra* note 23, at 46623.

28. *Id.* ("The definition of religious employer, as set forth in the amended regulations, 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.")

29. *See Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 521 (2006) (holding that the religious freedoms of plaintiffs of eight Catholic and two Baptist organizations that did not qualify for a narrow religious exemption from a New York law requiring employers to provide insurance coverage for contraception, were not violated); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 10 Cal. Rptr. 3d 283, 290 (2004) (holding that a California law requiring employer-sponsored health plans to cover contraceptive services did not violate the religious freedoms of a large Catholic employer that did not qualify for a narrow religious exemption).

30. Interim Final Rules, *supra* note 23, at 46,621.

31. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) [hereinafter Final Rule].

32. *See, e.g.*, Press Release, Rev. Larry Snyder, President, Catholic Charities USA (Jan. 20, 2012), <http://www.scribd.com/doc/111046521/Statement-From-CCUSA-on-Health-Care-Contraception-1-20-12> ("With the existing restrictive definition in this mandate, the ministry of

hospitals, food banks, homeless shelters, most Catholic schools, and . . . Catholic business owners” (as well as non-Catholic but similar organizations associated with a religious group) likely would not qualify for the exemption.<sup>33</sup> Specifically, large religious non-profit hospitals, though religious in ownership or management, do not qualify as “churches, their integrated auxiliaries, and conventions or associations of churches,” thus violating section four.<sup>34</sup>

#### *E. The Final Rule*

In February 2012, HHS adopted the IFR without change to the religious exemption criteria, effective for all non-grandfathered plans on August 1, 2012.<sup>35</sup> HHS noted that it “carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer,” but decided to retain the four-pronged religious employer definition from the August 2011 ruling.<sup>36</sup>

However, despite HHS’s claims that the February regulations “finalize, without change, [the] interim final regulations,”<sup>37</sup> HHS simultaneously created a temporary safe harbor for certain non-exempt employers.<sup>38</sup> The safe harbor extends the compliance deadline to August 1, 2013, for those non-exempted, non-profit employers that object for religious reasons to contraceptive services but do not meet the religious employer definition.<sup>39</sup> During this time, HHS pledged to “work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing.”<sup>40</sup> HHS’s expressed goals for the safe harbor period were two-fold: “providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations’ religious objections to covering contraceptive services.”<sup>41</sup>

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Jesus Christ himself would not be considered a religious entity.”).

33. Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2180 (2012).

34. 26 U.S.C. § 6033(a)(3)(A)(i) (2006); 45 C.F.R. § 147.130(a)(1)(iv)(B)(4) (2012).

35. Final Rule, *supra* note 31, at 8725.

36. *Id.* at 8727.

37. *Id.*, at 8725.

38. *Id.* at 8727.

39. Bulletin, Dep’t Health & Human Serv., Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (June 28, 2013), <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf>.

40. Final Rule, *supra* note 31, at 8728.

41. *Id.* at 8727.

### *F. Proposed Accommodation*

On March 21, 2012, HHS issued an advance notice of proposed rulemaking (ANPRM) and requested comment until June 19, 2012.<sup>42</sup> In the ANPRM, HHS delineated an accommodation designed to maintain employees' access to contraception while protecting religious organizations "from having to contract, arrange, or pay for contraceptive coverage."<sup>43</sup> The compromise permits the issuer of a non-exempt religious employer's insurance plan (i.e. the employer's insurance company) to exclude contraception from covered services.<sup>44</sup> The issuer would then issue directly to the employee, without additional cost, a separate plan to cover contraceptive services.<sup>45</sup> As the proposal explains:

This means that contraceptive coverage would not be included in the plan document, contract, or premium charged to the religious organization. Instead, the issuer would be required to provide participants and beneficiaries covered under the plan separate coverage for contraceptive services, potentially as excepted benefits, without cost sharing, and notify plan participants and beneficiaries of its availability. The issuer could not charge a premium to the religious organization or plan participants or beneficiaries for the contraceptive coverage.<sup>46</sup>

Essentially, the proposed compromise shifts the cost of contraceptive coverage from the employer to the insurance company that issues the employer's plan. HHS reasons that costs can reasonably be shifted to insurance carriers because "[a]ctuaries and experts have found that coverage of contraceptives is at least cost neutral, and may save money, when taking into account all costs and benefits for the issuer."<sup>47</sup> Contraceptive coverage is theoretically cost-neutral for insurance companies because the up-front cost of providing contraceptive coverage is offset by long-term savings in the cost of covering pregnancy and birth.<sup>48</sup> However, financial experts dispute the cost-neutrality of contraceptive coverage.<sup>49</sup>

### *G. Response to Proposed Compromise & Current Litigation*

HHS's February 2012 rule and March 2012 proposed compromise were met with resistance. On May 21, 2012, forty-three Catholic organizations filed a total of twelve lawsuits challenging the inclusion of coverage for contraception within

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42. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012).

43. *Id.* at 16,503.

44. *Id.* at 16,505.

45. *Id.*

46. *Id.*

47. *Id.* at 16,503.

48. *Id.*

49. Ben Finley, *Cloudy Contraception Costs*, FACTCHECK.ORG (Feb. 24, 2012), <http://www.factcheck.org/2012/02/cloudy-contraception-costs/>.

the HHS guidelines.<sup>50</sup> The suits contend that HHS's rule violates the plaintiffs' Free Speech, Free Exercise, and Establishment Clause rights under the First Amendment, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedure Act.<sup>51</sup> The Catholic cases joined eleven complaints previously filed on behalf of religious organizations and employers.<sup>52</sup> At the time this Note was written, forty-eight cases representing more than 140 plaintiffs have been filed,<sup>53</sup> many supported by non-profit organizations such as The Becket Fund for Religious Liberty and the Thomas More Law Center (a non-profit law firm dedicated in part to defending religious freedom).<sup>54</sup> These cases—in which the plaintiffs include both non-profit religious organizations and for-profit business owners whose religious beliefs do not permit the use of contraceptives—are progressing through the federal court system with mixed results.<sup>55</sup> Of the twelve Catholic cases filed on May 21, 2012, courts dismissed two cases for lack of standing because HHS announced an intention to work with religious employers during the safe harbor period.<sup>56</sup> In cases brought by for-profit plaintiffs (who were not granted safe harbor and thus subject to the IFR beginning August 1, 2012), court opinions have also diverged.<sup>57</sup> In the Seventh and Eighth circuits, courts have granted the for-profit employers injunctive relief from compliance with the regulation, while courts in the Sixth and Tenth circuits denied it.<sup>58</sup> Most recently, the U.S. Supreme Court denied Hobby Lobby, an

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50. See Goodstein, *supra* note 9.

51. See, e.g., Complaint & Demand for Jury Trial, *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253, 2012 WL 1859163 (N.D. Ind. May 21, 2012) [hereinafter *Notre Dame Complaint*]. The same law firm, Jones Day, represents the plaintiffs in all twelve lawsuits filed by Catholic entities on May 21, 2012; thus, the complaints are substantially similar in structure and content. See *HHS Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited May 12, 2014) [hereinafter *HHS Information Central*].

52. *HHS Information Central*, *supra* note 51 (comprehensively mapping and tracking current lawsuits challenging the IFR).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at \*1, \*4 (N.D. Ind. Dec. 31, 2012) (holding that, because “HHS announced that it would amend the regulations before the end of the safe harbor to accommodate those entities by requiring their insurers to provide cost-free coverage for the contraceptive and abortion-related services,” *Notre Dame* lacked standing to attack the regulatory requirement); *Zubik v. Sebelius*, 911 F. Supp. 2d 314, 318 (W.D. Pa. 2012) (same).

57. *HHS Information Central*, *supra* note 51.

58. *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 642 (2012) (“the Court of Appeals for the Tenth Circuit denied the applicants’ motion for an injunction pending resolution of the appeal”); Order, *O’Brien v. U.S. Dep’t Health & Human Servs.*, No. 4:12-CV-00476-CEJ (8th Cir. Nov. 28, 2012), available at <http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/8th-circuit-order-granting-temporary-injunction-in-obrien-v-hhs.pdf> (granting, without opinion, plaintiff’s motion for stay pending appeal); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*4-5 (7th

Eleventh Circuit for-profit plaintiff, application for an injunction pending appellate review.<sup>59</sup>

*H. 2013 Proposed Changes—New Definition & Accommodation*

On February 6, 2013, HHS proposed two changes to the contraceptive coverage requirement: amendment of the religious employer definition and adoption of the cost-sharing compromise.<sup>60</sup> First, HHS proposed to strike the first three criteria from the religious employer exemption.<sup>61</sup> No longer would a religious organization need to show that it (1) has “the inculcation of religious values as its purpose,” (2) “primarily employs persons who share the religious tenets of the organization,” or (3) “serves primarily persons who share the religious tenets of the organization.”<sup>62</sup> As a result, a religious employer “that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the Code would be considered a religious employer for purposes of the religious employer exemption.”<sup>63</sup> Again, the applicable code sections refer to “churches, their integrated auxiliaries, and conventions or associations of churches.”<sup>64</sup>

As HHS notes, however, the change would not “expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules.”<sup>65</sup> Rather, HHS states that the exemption was always intended to apply to “group health plans of houses of worship that provide educational, charitable, or social services to their communities.”<sup>66</sup> These organizations, such as “a church [that] maintains a soup kitchen that provides free meals to low-income individuals irrespective of their religious faiths,” likely would have failed the third prong of the test (primarily serves persons who share

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Cir. Dec. 28, 2012) (holding that plaintiffs, Catholic owners of a construction company, demonstrated reasonable likelihood of success on their claims and irreparable harm such that “the balance of harms tips strongly in the [plaintiffs’] favor” for granting an injunction pending appeal); Order, *Autocam Corp. v. Sebelius*, No. 12-2673, at 2 (6th Cir. Dec. 28, 2012), available at <http://www.becketfund.org/wp-content/uploads/2012/05/order-denying-injunctionAutocam-CA6.pdf> (denying plaintiffs’ motion for injunction pending appeal because “plaintiffs have not demonstrated more than a possibility of relief”).

59. *Hobby Lobby*, 133 S. Ct. at 643 (holding that plaintiffs, operators of for-profit corporations with Christian leadership, “do not satisfy the demanding standard for the extraordinary relief they seek”).

60. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8456-57 (Feb. 6, 2013) [hereinafter Proposed Rules].

61. *Id.* at 8461.

62. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(3) (2012).

63. Proposed Rules, *supra* note 60, at 8461.

64. 26 U.S.C. § 6033(a)(3)(A)(i) (2006).

65. Proposed Rules, *supra* note 60, at 8461.

66. *Id.*



its religious tenets).<sup>67</sup> Because that was not the intention, HHS proposed to strike the first three criteria.<sup>68</sup> As a result, organizations operated directly by a church, such as the soup kitchen or a church-run parochial school, would be automatically exempt.<sup>69</sup> But large religiously-affiliated organizations, such as non-profit Catholic hospitals, still no longer qualify under the preserved fourth prong. The proposed definition would still “focus the religious employer exemption on the unique relationship between a house of worship and its employees in ministerial positions.”<sup>70</sup>

Second, HHS officially proposed that it establish an “accommodation” for non-exempt religious employers who object for religious reasons to contraceptive services.<sup>71</sup> The accommodation, first outlined in the March 2012 ANPRM, creates an arrangement in which a non-exempt religious employer’s insurance company offers directly to employees a separate contraceptive services plan.<sup>72</sup> This insulates the employer from “contracting, arranging, paying, or referring” for contraceptive coverage.<sup>73</sup> Although the February 2013 proposed rules give additional detail beyond the ANPRM, the accommodation essentially operates the same way; it shifts the cost of contraceptive coverage from the employer to the insurance company.<sup>74</sup>

## II. THE DEBATE

### A. Contraception—Use, Benefits, and Costs

The WHA was introduced “to guarantee women access to preventive health care screenings and care at no cost.”<sup>75</sup> In introducing the WHA, Senator Mikulski expressed concern about the large gender disparities in health care services costs:

Women are often confronted by the punitive practices of insurance companies. We face gender discrimination. We pay more and get less . . . A 40-year-old woman is charged anywhere from two to 140 percent more than a 40-year-old man with the same health status for the same insurance policy. A 25-year-old woman is charged up to 45 percent more than a 25-year-old man.<sup>76</sup>

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (internal quotation marks and citation omitted).

71. *Id.*

72. *Id.*

73. *Id.* at 8462.

74. *Id.* at 8463.

75. Press Release, Senator Barbara A. Mikulski, Mikulski Puts Women First in Health Care Reform Debate (Nov. 30, 2009), <http://www.mikulski.senate.gov/media/pressrelease/11-30-2009-2.cfm> [hereinafter Mikulski Press Release].

76. *Id.*

As HHS notes, “owing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for women.”<sup>77</sup> The HHS rule and the WHA aim to eliminate these gender-based cost disparities.<sup>78</sup>

For consumers of contraception, the cost of coverage varies widely by the type of contraception used.<sup>79</sup> One article found that the cost of common contraception methods varied from \$60 to \$600 per year.<sup>80</sup> Another study found that the highest potential cost of the most commonly used contraceptive methods ranges from \$200 to \$1210 per year for consumers without insurance.<sup>81</sup> The same study estimates that costs with insurance are considerably lower and more uniform, ranging from \$100 to \$215 per year.<sup>82</sup> Partly because of contraceptive costs, women of reproductive age spend sixty-eight percent more than men on out-of-pocket health care costs.<sup>83</sup>

Contraceptive use is very common among American women—ninety-eight percent of all women who have had intercourse have used at least some form of contraception at some time.<sup>84</sup> In addition to common use, IOM included contraceptives in the recommended covered services to help “reduce the rate of unintended pregnancies.”<sup>85</sup> Studies show that:

Women with unintended pregnancies are more likely to receive delayed or no prenatal care and to smoke, consume alcohol, be depressed, and experience domestic violence during pregnancy. Unintended pregnancy also increases the risk of babies being born preterm or at a low birth weight, both of which raise their chances of health and developmental problems.<sup>86</sup>

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77. Final Rule, *supra* note 31, at 8728.

78. *Id.* at 8729 (“The contraceptive coverage requirement is . . . designed to serve . . . compelling public health and gender equity goals . . .”).

79. Kimberly Palmer, *The Real Cost of Birth Control*, U.S. NEWS & WORLD REP. ALPHA CONSUMER BLOG (Mar. 5, 2012), <http://money.usnews.com/money/blogs/alpha-consumer/2012/03/05/the-real-cost-of-birth-control>.

80. *Id.*

81. *The High Costs of Birth Control*, CENTER FOR AM. PROGRESS (Feb. 15, 2012) [http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC\\_costs.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC_costs.pdf).

82. *Id.* at 2.

83. *Id.* at 1.

84. WILLIAM D. MOSHER, PH.D. ET AL., CTNS. FOR DISEASE CONTROL & PREVENTION, USE OF CONTRACEPTION & USE OF FAMILY PLANNING SERVICES IN THE UNITED STATES: 1982-2002, at 1 (2004), <http://www.cdc.gov/nchs/data/ad/ad350.pdf> (based on the 1982, 1995, and 2002 National Surveys of Family Growth).

85. News Release, National Academies, IOM Report Recommends Eight Additional Preventive Health Services to Promote Women's Health (July 19, 2011), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13181> [hereinafter National Academies News Release].

86. *Id.*

In addition, many women use oral contraceptive pills at least in part for health benefits other than pregnancy prevention.<sup>87</sup> A 2011 report found that more than half of pill users, fifty-eight percent, use the pill for health conditions such as cramps or menstrual pain, menstrual regulation, acne, and endometriosis.<sup>88</sup>

Women also use contraception because it helps them achieve their life goals.<sup>89</sup> A 2011 survey found that women reported using contraception because it allows them to better care for themselves or their families, support themselves financially, complete their education, or find or maintain work.<sup>90</sup> In the United States, the introduction of safe, effective birth control helped open economic doors for women in the 1960s and 1970s.<sup>91</sup> As *New York Times* columnist Gail Collins explains:

Young women did not have widespread access to the Pill until the early 1970s—which not coincidentally was the same time they began to apply to medical, law, dental, and business schools in large numbers. This was an enormous shift. . . .

Once young women had confidence that they could make it through training and the early years in their profession without getting pregnant, their attitude toward careers that required a long-term commitment changed.<sup>92</sup>

In addition to economic freedom, widespread access to birth control has also enhanced women's sexual freedom and equality.<sup>93</sup> Although HHS frames the

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87. RACHEL K. JONES, GUTTMACHER INST., BEYOND BIRTH CONTROL: THE OVERLOOKED BENEFITS OF ORAL CONTRACEPTIVE PILLS 3 (2011), <http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf>.

88. *Id.*

89. *See generally* JENNIFER J. FROST & LAURA DUBERSTEIN LINDBERG, GUTTMACHER INST., REASONS FOR USING CONTRACEPTION: PERSPECTIVES OF US WOMEN SEEKING CARE AT SPECIALIZED FAMILY PLANNING CLINICS 2 (2012), <http://www.guttmacher.org/pubs/journals/j.contraception.2012.08.012.pdf>.

90. *Id.* at 2.

91. GAIL COLLINS, WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT 102 (2009) (“The [birth control] Pill, which went on the market in 1960, not only gave women more confidence about their ability to plan a career; it gave employers more confidence that when a woman said she wasn’t planning to get pregnant, she meant it.”).

92. *Id.*

93. *Id.* at 102-03 (“And the sexual revolution, which arrived at the same time as widespread Pill use, reassured [young women] that even if they delayed marriage, they would have the same opportunities as unmarried young men for a satisfying sexual life.”); *see also* Linda Greenhouse, *Doesn’t Eat, Doesn’t Pray and Doesn’t Love*, N.Y. TIMES, Nov. 27, 2013, [http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html?\\_r=0](http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html?_r=0). She writes:

To the extent that the “contraceptive project” changes anything on the American

contraception requirement exclusively in terms of health benefits, the economic and social benefits women derive from widespread access to effective birth control should not be ignored.<sup>94</sup>

*B. Religious Concerns and the Cost of Non-Compliance*

Some religious sects object on moral and religious grounds to the use of contraception and sterilization procedures. Most prominently, the Roman Catholic Church has long opposed the use of artificial birth control.<sup>95</sup> The Church's teachings condemn abortion, sterilization, and "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation."<sup>96</sup> The United States Conference of Catholic Bishops (USCCB), an "assembly of the hierarchy" of the Catholic Church in the United States,<sup>97</sup> objects strongly to the characterization of contraception and sterilization as "preventive" services because pregnancy is "not a disease."<sup>98</sup> In addition, the USCCB believes that at least one form of FDA-approved contraception is an abortifacient.<sup>99</sup>

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reproductive landscape, it will be to reduce the rate of unintended pregnancy and abortion. The objection, then, has to be not to the mandate's actual impact but to its expressive nature, its implicit endorsement of a value system that says it's perfectly O.K. to have sex without the goal of making a baby. While most Americans surely share this view, given the personal choices they make in their own lives, many nonetheless find it uncomfortable to acknowledge.

*Id.*

94. Greenhouse, *supra* note 93 ("From the Obama administration's point of view, of course, the contraception mandate is about health care. . . . But there's a missing piece. One of the failures of the Affordable Care Act saga, it seems to me, has been the president's unwillingness or inability to present universal health care as a moral issue, a moral right in a civilized society.").

95. See CHARLES E. CURRAN, CATHOLIC MORAL THEOLOGY IN THE UNITED STATES 45-50 (2008) (summarizing the history of the Church's teachings on artificial contraception).

96. Pope Paul VI, *Humanae Vitae*, § 14 (July 25, 1968), [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html); see also CURRAN, *supra* note 95, at 85 ("Pope Paul VI's encyclical *Humanae vitae*, written in 1968, reaffirmed the teachings of the hierarchical magisterium that condemned artificial contraception for spouses."); MARTIN RHONHEIMER, ETHICS OF PROCREATION AND THE DEFENSE OF HUMAN LIFE: CONTRACEPTION, ARTIFICIAL FERTILIZATION, AND ABORTION 33-38 (2010) (summarizing the philosophical underpinnings of the Roman Catholic Church's moral teachings on contraception, as expressed in the *Humanae Vitae*).

97. *About USCCB*, U.S. CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/about/index.cfm> (last visited May 12, 2014).

98. Comments on Interim Final Rules Imposing Contraceptive Mandate, Office of the General Counsel, U.S. Conference of Catholic Bishops 1 (Aug. 31, 2011) [hereinafter USCCB Comments], available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf>.

99. *Id.* at 5 (claiming that "studies show that at least one drug approved by the FDA for

Due to its long-standing objection to contraception and sterilization use, Church leaders assert that “selling, buying, or brokering the coverage” violates the Church’s moral precepts.<sup>100</sup> One Catholic organization asserts that the purchase of insurance plans that cover contraceptive services violates its conscience because it would require the organization to “provide, pay for, and/or facilitate those services to others.”<sup>101</sup> The USCCB speculates that “it seems entirely probable that many individuals and organizations, instead of purchasing and sponsoring [insurance] plans, will feel obligated in conscience . . . [to drop] coverage altogether, rather than compromising their religious and moral beliefs.”<sup>102</sup>

Not all religious organizations that oppose the inclusion of contraception and sterilization procedures in the IFR are affiliated with the Catholic Church. The Becket Fund for Religious Liberty lists seven cases brought by non-Catholic employers, all Protestant or non-denominational Christian organizations.<sup>103</sup> In addition, the cases brought by secular businesses with religious owners or directors represent both Catholic and non-Catholic religious traditions.<sup>104</sup>

Under the PPACA, employers may abstain from providing employees with the “minimum essential coverage.”<sup>105</sup> These employers, however, face large tax penalties equal to the number of employees multiplied by an “applicable payment amount” of about \$167 per month.<sup>106</sup> Thus, even the smallest qualifying “large employer” with fifty employees would incur fines of approximately \$8350 per month.<sup>107</sup> A recent news report suggested that Hobby Lobby, a nationwide arts and crafts retailer founded by evangelical Christians, faces fines of \$1.3 million per day for failing to comply with the IFR.<sup>108</sup> As a result, the cost of non-compliance is likely cost-prohibitive for most religious organizations.

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‘contraceptive use,’ a close analogue to the abortion drug RU-486 (mifepristone), can cause an abortion when taken to avoid pregnancy”).

100. *Id.* at 8.

101. Notre Dame Complaint, *supra* note 51, ¶ 1.

102. USCCB Comments, *supra* note 98, at 11.

103. *HHS Information Central*, *supra* note 51 (listing the non-Catholic organizations as East Texas Baptist University, Houston Baptist University, Hobby Lobby, Wheaton, Colorado Christian University, Geneva College, and Louisiana College).

104. *Id.*

105. 26 U.S.C. § 4980H(a) (Supp. 2011).

106. *Id.* § 4980H(a), (c)(1) (“The term ‘applicable payment amount’ means, with respect to any month, 1/12 of \$2,000.”).

107. *Id.* § 4980H(c)(1)(A) (“The term ‘applicable large employer’ means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.”).

108. Eric Marrapodi, *Hobby Lobby Finds Way Around \$1.3-Million-a-Day Obamacare Hit—for Now*, CNN (Jan. 11, 2013), <http://religion.blogs.cnn.com/2013/01/11/hobby-lobbys-1-3-million-obamacare-loophole/>.

### III. THE CONSTITUTIONALITY OF CONTRACEPTIVE COVERAGE

Imagine that the IFR did not include a religious exemption at all. Further imagine that the IFR requires all group health plans sponsored by large employers to cover contraceptive and sterilization procedures. Proceeding under these assumptions, this Note argues that a contraceptive services coverage requirement does not violate an employer's religious freedoms under the Free Exercise Clause or the Religious Freedom and Restoration Act. This Note first looks to the U.S. Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>109</sup> as well as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>110</sup> to examine the constitutionality of a broad contraceptive coverage requirement. Second, this Note examines the impact of the Religious Freedom and Restoration Act (RFRA) on whether a religious exemption is necessary to protect the religious freedom of employers.<sup>111</sup>

#### A. *Neutral and Generally Applicable—The Smith Standard*

The First Amendment provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ,”<sup>112</sup> but the Constitution does not describe the extent to which laws may impair religious exercise. In *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>113</sup> the Court considered whether laws penalizing the consumption of peyote, a controlled substance, interfered with the free exercise of religion.<sup>114</sup> Smith and Black, members of the Native American Church, were fired from their jobs after using peyote for sacramental purposes.<sup>115</sup> Despite their claim that their drug use was religiously-motivated, Oregon denied Smith and Black unemployment benefits because they were fired for work-related misconduct.<sup>116</sup> The Court upheld Oregon's denial of benefits,<sup>117</sup> in part because “an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>118</sup> The Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>119</sup> The primary inquiry, therefore, as to whether a law unconstitutionally burdens religious exercise is whether the law is neutral and

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109. 494 U.S. 872 (1990).

110. 508 U.S. 520 (1993).

111. 42 U.S.C. § 2000bb (2006 & Supp. 2011).

112. U.S. CONST. amend. I.

113. 494 U.S. 872.

114. *Id.* at 874.

115. *Id.*

116. *Id.*

117. *Id.* at 890.

118. *Id.* at 878-79.

119. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

generally applicable.<sup>120</sup>

Three years later, the Court applied the *Smith* test in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>121</sup> In *Lukumi*, members of the Santeria religion—a sect that sacrifices animals as a form of worship—announced plans to build a house of worship, school, cultural center, and museum in the city of Hialeah, Florida.<sup>122</sup> In response to concerns raised by citizens, the city enacted several ordinances specifically restricting ritual animal sacrifice.<sup>123</sup> The Court ultimately found the city ordinances were neither neutral nor generally applicable and invalidated the laws.<sup>124</sup>

*Lukumi* and *Smith* hold that the law may incidentally burden the free exercise of religion, so long as it does not specifically discriminate against a religious group or exercise.<sup>125</sup> Some employers argue that the IFR specifically targets religious employers.<sup>126</sup> Because many secular employers provided contraceptive coverage to employees prior to the WHA, the WHA disparately impacts the religious employers that did not provide contraceptive coverage due to religious and moral objections.<sup>127</sup> However, this Note argues that the WHA and the IFR’s contraceptive coverage requirement do not violate the standards of neutrality and general applicability articulated in *Smith* and *Lukumi*. Therefore, the contraceptive coverage requirement does not violate the First Amendment by unfairly targeting or discriminating against a particular religious group.

*I. Neutrality.*—Because *Lukumi* closely examines neutrality and general applicability, *Lukumi* is helpful to determine whether the WHA violates the *Smith* standard. Under *Lukumi*, “the minimum requirement of neutrality is that a law not discriminate on its face.”<sup>128</sup> Without the religious exemption, the relevant sections of the PPACA,<sup>129</sup> the WHA,<sup>130</sup> and the IFR<sup>131</sup> all appear facially neutral, making no reference to religious groups or activities. In contrast, the ordinances in *Lukumi* used words with “with strong religious connotations,” which the Court found were consistent with, though not conclusive proof of, facial

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120. *Id.*

121. 508 U.S. 520, 531 (1993).

122. *Id.* at 526.

123. *Id.* at 528-29.

124. *Id.* at 524.

125. *Id.* at 531.

126. *See, e.g.*, USCCB Comments, *supra* note 98, at 8 (“Moral opposition to all artificial contraception and sterilization is a minority and unpopular belief, and its virtually exclusive association with the Catholic Church is no secret. Thus, although the mandate [to provide contraceptive coverage] does not expressly target Catholicism, it does so implicitly by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics . . .”).

127. *Id.*

128. *Lukumi*, 508 U.S. at 533.

129. 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011).

130. 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011).

131. *Affordable Care Act Rules*, *supra* note 6.

discrimination.<sup>132</sup>

The *Lukumi* Court did not stop at facial neutrality. The Court then looked to the “record” in the case, including the prior city council enactments, to determine the “object of the ordinances.”<sup>133</sup> The Court found that the city enacted the ordinances specifically to target the Santeria religion.<sup>134</sup> In contrast, nothing in the legislative history of the WHA suggests that the amendment passed specifically to target religious employers. Senator Mikulski introduced the WHA “to guarantee women access to preventive health care screenings and care at no cost” and eliminate gender disparities in health care costs.<sup>135</sup> Moreover, by basing preventive services on guidelines supported by HHS, Mikulski noted “all women will have access to similar preventive services that we women in Congress and federal employees have.”<sup>136</sup> To determine which preventive services to cover, HHS turned to IOM, which made eight recommendations “based on a review of existing guidelines and an assessment of the evidence on the effectiveness of different preventive services.”<sup>137</sup> That HHS adopted IOM’s recommendations without modification leaves little room to argue that the HHS regulations were religiously, or politically, motivated.<sup>138</sup>

After examining facial neutrality and the record, the *Lukumi* Court considered “the effect of a law in its real operation.”<sup>139</sup> After examining the ordinances, the Court concluded that the “net result” of the carefully drafted laws was that “few if any killings of animals [were] prohibited other than Santeria sacrifice.”<sup>140</sup> The Court concluded that “Santeria alone was the exclusive legislative concern,” and therefore the law was not neutral.<sup>141</sup>

Perhaps the most persuasive argument against the neutrality of the IFR is that its operative effect is to discriminate against Catholic religious organizations. Although the WHA and the IFR apply broadly to all large employers,<sup>142</sup> the USCCB argues that “the class that suffers under the mandate is defined precisely by their beliefs in objecting to these [contraceptive and sterilization] ‘services.’”<sup>143</sup> That is, because most non-religious organizations provided coverage for contraception and sterilization procedures before PPACA’s enactment, the operative effect of the law is to target groups that were not

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132. *Lukumi*, 508 U.S. at 534.

133. *Id.*

134. *Id.* at 535.

135. Mikulski Press Release, *supra* note 75.

136. *Id.*

137. National Academies News Release, *supra* note 85.

138. See Final Rule, *supra* note 31, at 8729 (“The contraceptive coverage requirement is generally applicable . . . , and is in no way specially targeted at religion or religious practices.”).

139. *Lukumi*, 508 U.S. at 535.

140. *Id.* at 536.

141. *Id.*

142. 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011); 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011).

143. USCCB Comments, *supra* note 98, at 8.



previously providing coverage for religious reasons.<sup>144</sup> Because “[m]oral opposition to all artificial contraception and sterilization is a minority and unpopular belief, and its virtually exclusive association with the Catholic Church is no secret,” the law therefore implicitly targets Catholics “by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics.”<sup>145</sup>

However, as one commentator has observed, “[e]mployers associated with the Catholic Church are not the only employers impacted by the mandate.”<sup>146</sup> “[I]ndeed, several secular employers did not provide contraceptive coverage prior to the federal mandate and must also conform their conduct accordingly.”<sup>147</sup> Moreover, the litigation currently in progress involves employers of various religious faiths, not only Catholics.<sup>148</sup> Thus, the operative effect here does not mimic the operative effect of the ordinances in *Lukumi*, where the city ordinances affected only a specific group of Santeria worshipers.<sup>149</sup>

2. *General Applicability*.—In addition to neutrality, *Lukumi* discussed and applied the second prong of the *Smith* test: general applicability.<sup>150</sup> The *Lukumi* Court noted that “[a]ll laws are selective to some extent.”<sup>151</sup> However, “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.”<sup>152</sup> Therefore, like “operative effect,” general applicability looks closely to the affected class to determine whether the law has “every appearance of a prohibition that society is prepared to impose upon [the class] but not upon itself.”<sup>153</sup>

The HHS regulation is part of a much larger statutory scheme: specifically, the portion of the PPACA that regulates employer-sponsored group health insurance plans.<sup>154</sup> Thus, the affected class is defined broadly by statute.<sup>155</sup> The PPACA requires all large employers to provide “minimum essential [insurance] coverage under an eligible employer-sponsored plan.”<sup>156</sup> The WHA merely clarifies “minimum essential coverage” by delineating a spectrum of required services.<sup>157</sup> Without the religious exemption, the WHA applies to all employers

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144. *Id.*

145. *Id.*

146. Destyn D. Stallings, Comment, *A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligates Catholic Organizations to Cover Their Employees' Prescription Contraceptives*, 48 TULSA L. REV. 117, 132 (2012).

147. *Id.*

148. *See supra* Part II.B.

149. *Lukumi*, 508 U.S. at 536.

150. *Id.* at 542.

151. *Id.*

152. *Id.* at 543.

153. *Id.* at 545 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

154. 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011).

155. *Id.*

156. *Id.* § 4980H(a)(1).

157. 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011).

that meet the “large employer” criterion, regardless of the employer’s religious affiliation.<sup>158</sup>

Again, the USCCB’s argument that “the class that suffers under the mandate is defined precisely by their beliefs” fails because the statute defines the class by size.<sup>159</sup> Moreover, by defining a “minimum” standard, the WHA necessarily imputes new obligations upon groups whose plans did not previously cover the newly required services.<sup>160</sup> The guidelines require a full “package” of women’s health services—including not only contraception and sterilization, but well-woman visits, screening for gestational diabetes, breastfeeding support and counseling, and screening and counseling for interpersonal and domestic violence.<sup>161</sup> The requirements suggest neutral standardization of basic women’s health services much more than invidious targeting of religiously affiliated employers. Because the WHA and HHS’s definitions of preventive services are neutral and generally applicable, the regulation does not require any exemption or accommodation to be constitutional.

### *B. The Religious Freedom and Restoration Act*

In addition to the constitutional challenges under *Smith*, non-exempt religious employers and other opponents of the IFR have challenged the IFR for violating the Religious Freedom and Restoration Act (RFRA).<sup>162</sup> Historically, RFRA and *Smith* are inextricably intertwined. In 1993, Congress enacted RFRA in response to the *Smith* decision.<sup>163</sup> After the decision was handed down, Congress sharply criticized *Smith* for “virtually [eliminating] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”<sup>164</sup> Congress saw *Smith* as a shift away from the Supreme Court’s previous free exercise jurisprudence in landmark cases such as *Sherbert v. Verner*,<sup>165</sup> as well as *Wisconsin v. Yoder*.<sup>166</sup> Both cases interpreted religious freedom broadly and held that only a compelling state interest may justify any incidental burden on religious exercise.<sup>167</sup> In both *Sherbert* and *Yoder*, the Supreme Court strictly scrutinized the laws at issue and found that the compelling state interests advanced did not justify the substantial burdens to religious exercise.<sup>168</sup>

In *Sherbert*, a Seventh-day Adventist’s employer fired her for refusing to

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158. *Id.*; 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011).

159. USCCB Comments, *supra* note 98, at 8.

160. Final Rule, *supra* note 31, at 8725.

161. *Affordable Care Act Rules*, *supra* note 6.

162. 42 U.S.C. § 2000bb (2006 & Supp. 2011).

163. *Id.* § 2000bb(a)(4).

164. *Id.*

165. 374 U.S. 398 (1963).

166. 406 U.S. 205 (1972).

167. *Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 214.

168. *Sherbert*, 374 U.S. at 407; *Yoder*, 406 U.S. at 228-29.

work on Saturday, a day of religious observation.<sup>169</sup> Sherbert was unable to find new work that accommodated her religious practice.<sup>170</sup> South Carolina denied Sherbert unemployment benefits because the state did not consider her inability to find new work for religious reasons good cause to refuse employment opportunities.<sup>171</sup> The Supreme Court found the state's denial of benefits a substantial burden on Sherbert's religious practice.<sup>172</sup> The state argued that its blanket denial of benefits in religious cases served the compelling state interest of preventing fraudulent unemployment benefit claims.<sup>173</sup> However, because the state allocated benefits on a case-by-case basis, the Court held that the state's denial of Sherbert's application, despite infringement on her religious practice, served no compelling state interest.<sup>174</sup>

In *Yoder*, Wisconsin imposed a five-dollar fine on a member of the Old Order Amish for refusing to send his teenage children to public school past eighth grade, as required by state law.<sup>175</sup> Yoder believed that his children's attendance at any public or private high school violated his Amish values and beliefs.<sup>176</sup> The Court held that Wisconsin's requirement substantially burdened Yoder's religious exercise.<sup>177</sup> Moreover, the Court held that the compelling state interests advanced, that compulsory education is necessary to create an informed electorate and that it creates self-reliant and self-sufficient members of society,<sup>178</sup> did not justify the burden.<sup>179</sup>

Congress specifically enacted RFRA "to restore the compelling interest test as set forth in" *Sherbert* and *Yoder* and "to guarantee its application in all cases where free exercise of religion is substantially burdened."<sup>180</sup> RFRA explicitly prohibits the government from burdening "a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows the burden 1) "is in furtherance of a compelling governmental interest" and 2) "is the least restrictive means of furthering that compelling governmental interest."<sup>181</sup> RFRA provides a person claiming violation of RFRA an avenue for judicial relief.<sup>182</sup> Although the Supreme Court held RFRA unconstitutional as

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169. *Sherbert*, 374 U.S. at 399.

170. *Id.*

171. *Id.* at 401.

172. *Id.* at 404.

173. *Id.* at 407.

174. *Id.* at 410.

175. *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972).

176. *Id.* at 209.

177. *Id.* at 219.

178. *Id.* at 221.

179. *Id.* at 228-29.

180. 42 U.S.C. § 2000bb(b)(1) (2006 & Supp. 2011).

181. *Id.* §§ 2000bb-1(a)-(b).

182. *Id.* § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

applied to the states,<sup>183</sup> the Court has applied RFRA to federal law.<sup>184</sup>

RFRA therefore sets up a multi-level inquiry to determine whether a law impermissibly burdens religious exercise. First, in order to raise a prima facie case under RFRA, a plaintiff must show that the law at issue would substantially burden a sincere religious exercise.<sup>185</sup> Second, if burdened, the court must then determine (a) whether there is a compelling state interest that justifies the substantial burden of religion, and (b) whether the state has adopted the least restrictive means to achieve its interest.<sup>186</sup>

1. *Applicability of RFRA.*—As an initial matter, RFRA may not apply to challenges brought by non-exempt religious employers. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court held “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”<sup>187</sup> Indeed, RFRA prohibits burdens to “a person’s exercise of religion.”<sup>188</sup> Moreover, the two cases that RFRA references, *Sherbert* and *Yoder*, deal with burdens to individual exercise.<sup>189</sup> In the recent challenges to HHS’s regulations, most claims are brought by religious employers—schools, hospitals, businesses—not individuals.<sup>190</sup> It is unclear if RFRA applies in these cases.<sup>191</sup>

2. *Religious Exercise.*—Assuming that a court may apply RFRA to an employer’s free exercise claim, a court must first determine whether the law

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183. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (holding that RFRA exceeds Congress’s powers to enforce provisions of the Enforcement Clause of the Fourteenth Amendment by creating “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”)

184. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (applying RFRA to the Controlled Substances Act when determining whether federal law impermissibly burdened a religious sect that used banned hallucinogens in a sacramental tea).

185. *See id.* at 428 (noting that “the Government conceded the [religious sect’s] prima facie case under RFRA” because “application of the Controlled Substances Act would (1) substantially burden (2) a sincere (3) religious exercise”).

186. 42 U.S.C. §§ 2000bb-1(a)-(b) (2006 & Supp. 2011); *Gonzales*, 546 U.S. at 424.

187. *Gonzales*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b) (2006 & Supp. 2011)).

188. 42 U.S.C. § 2000bb-1(a) (2006 & Supp. 2011) (emphasis added).

189. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

190. *See generally HHS Information Central*, supra note 51.

191. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \* 3 (7th Cir. Dec. 28, 2012) (“[T]he government’s primary argument is that because K & L Contractors [the plaintiff challenging the IFR] is a secular, for-profit enterprise, no rights under RFRA are implicated at all. This ignores that Cyril and Jane Korte [the business owners] are also plaintiffs.” Accordingly, the court permitted the individuals to pursue the RFRA claim.); *O’Brien v. U.S. Dep’t of Health & Human Serv.*, 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (questioning RFRA’s application, but ultimately declining “to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment”).

substantially burdens the free exercise of religion.<sup>192</sup> This Note argues that a non-exempt religious organization opposed to the IFR cannot raise a prima facie case under RFRA because there is no religious exercise at stake. Specifically, the purchase of insurance coverage that includes services with which the employer—but not the ultimate third-party consumer—may disagree does not qualify as “religious exercise.”

*a. Deference.*—Under RFRA, religious exercise “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>193</sup> RFRA fails, however, to further define “exercise.”<sup>194</sup> As one scholar notes:

The First Amendment of the Constitution is the source of protection for religious liberty . . . . But the Constitution does not define the operative terms—“religion,” “exercise,” or “free.” Courts and scholars, legal and otherwise, have all wrestled with the definitional problem. To date, there has been little consensus.<sup>195</sup>

By questioning the exercise purportedly burdened, a court risks endorsing a particular religious belief or questioning the religious value of a sect’s beliefs.<sup>196</sup> In *Smith*, Justice Scalia noted that “[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”<sup>197</sup> The result is that courts often defer to a party’s claim that his religious beliefs are implicated.<sup>198</sup>

*b. Deference and third parties.*—In the forty-eight lawsuits pending at the time this Note was written, religious organizations and businesses are suing federal government agencies and directors for alleged violations of their religious freedoms.<sup>199</sup> And yet, Americans typically conceptualize the debate over insurance coverage for contraception as pitting religious freedoms against women’s rights.<sup>200</sup> As such, the parties to the suits (religious organizations and

192. See *Gonzales*, 546 U.S. at 428 (noting that “the Government conceded the [religious sect’s] prima facie case under RFRA” because “application of the Controlled Substances Act would (1) substantially burden (2) a sincere (3) religious exercise”).

193. 42 U.S.C. § 2000bb-2(4) (2006 & Supp. 2011); *id.* § 2000cc-5(7)(A).

194. *Id.* § 2000cc-5.

195. Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 595-96 (2000) (citations omitted).

196. *Id.* at 601-02 (“The delicacy of the definitional task appears to reflect at least two related concerns, one constitutional, the other institutional. The constitutional concern is the legitimate fear that the mere act of definition will ‘establish’ a religion, or prefer one denomination to another. . . . At the institutional level, courts defer because they view themselves as lacking the expertise to define religion. . . . The anxiety of entanglement reflects this healthy reluctance.”).

197. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 887 (1990).

198. Lipson, *supra* note 195, at 600-01.

199. *HHS Information Central*, *supra* note 51.

200. See Jim Rutenberg & Marjorie Connelly, *Obama’s Rating Falls as Poll Reflects*

the federal government) do not align with the harms on each side of the debate (religious freedoms and women's health). On the one hand, a religious organization or business owner bringing a suit in this case is the party harmed when its religious freedoms are restricted. On the other side, the people harmed when access to contraception coverage is limited are third parties—the employees of these organizations who wish to access contraceptive and sterilization services without paying additional premiums or out-of-pocket costs that insurance does not subsidize.

The WHA was passed and HHS's regulations were promulgated to secure for women broader insurance coverage for health care services they frequently access.<sup>201</sup> In general, the individuals directly benefiting from the coverage of the WHA's preventive services, including contraceptive services, are female employees of businesses and organizations that fall within the PPACA's definition of "large employer."<sup>202</sup> Although these women may share the religious beliefs of their employers, they may not. For example, the University of Notre Dame, one of the employers challenging the HHS regulation, claims it "employs over 5,000 full- and part-time employees and is the largest employer in St. Joseph County [Indiana]".<sup>203</sup> However, "Notre Dame does not know how many of its employees are Catholic," and it is "unclear whether a simple majority of Notre Dame's employees are Catholic."<sup>204</sup> Therefore, Notre Dame likely employs non-Catholic women who would use the group insurance plan to access contraceptive and sterilization procedures if covered. Moreover, Notre Dame may employ Catholic women who, despite the religious tenets of their employer, would still access these services.<sup>205</sup>

Because the IFR affects third-party employees, courts should closely scrutinize the claim that the IFR implicates a religious exercise. In his article *On*

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*Volatility*, N.Y. TIMES, Mar. 13, 2012, at A1, A15 (including, among a presidential approval poll, results from a poll on "The Birth Control Debate" in which respondents were asked whether the debate was "more about" religious freedom, women's health and their rights, both, or no answer).

201. See discussion *supra* Parts I and III.

202. Final Rule, *supra* note 31, at 8728 ("The Departments aim to reduce these disparities [in insurance coverage] by providing women broad access to preventive services, including contraceptive services.").

203. Notre Dame Complaint, *supra* note 51, ¶ 25.

204. *Id.* ¶ 45.

205. See GUTTMACHER INST., SUPPLEMENTAL TABLES ON RELIGION AND CONTRACEPTIVE USE (2011), <http://www.guttmacher.org/media/resources/Religion-FP-tables.html> (showing that ninety-eight percent of sexually experienced women of child-bearing age who self-identify as Catholic have used an artificial method of contraception at some point in their lives, but also, eleven percent of self-identifying Catholic women currently at risk of unintended pregnancy were using no form of birth control at all). Based on this study, news reports widely stated that ninety-eight percent of Catholic women use birth control, but these statements were not accurate. Glenn Kessler, *The Claim That 98 Percent of Catholic Women Use Contraception: A Media Foul*, WASH. POST (Feb. 17, 2012, 6:02 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-98-percent-of-catholic-women-use-contraception-a-media-foul/2012/02/16/gIQAkPeqIR\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-98-percent-of-catholic-women-use-contraception-a-media-foul/2012/02/16/gIQAkPeqIR_blog.html).

*Balance: Religious Liberty and Third-Party Harms*, Professor Lipson argues “deference is unsound when defining an activity as a religious exercise would have the effect of harming third parties.”<sup>206</sup> Moreover, “the [Supreme] Court has not deferred deeply to claims that conduct is a religious exercise where third parties would be harmed.”<sup>207</sup> On the contrary, “the continuum of deference suggests that deference declines, and judicial scrutiny increases, in proportion to the likelihood of third-party harm.”<sup>208</sup> Cases on the less deferential end of the spectrum “involve the overlap of the seemingly disparate worlds of religion and commerce, where churches seek competitive, tax or other ‘commercial’ advantages not available to secular citizens or groups engaged in the same conduct.”<sup>209</sup> Professor Lipson reviews a series of cases and finds “[i]n most of these cases, the Court has not deferred to the claim of religious exercise, but instead independently characterized the transaction that occurred as, for example, a taxable sale or an employment relationship.”<sup>210</sup>

*c. Economic transaction.*—The IFR regulates only an economic transaction between an employer and its insurance provider for the health benefit of third-party employee. The PPACA creates a regulatory scheme that requires employers that generally employ fifty or more individuals to provide employees with minimum insurance coverage.<sup>211</sup> The WHA added an additional requirement that employers provide “additional preventive care and screenings” without cost sharing.<sup>212</sup> By Congress’s directive, it was incumbent on HHS to define these terms.<sup>213</sup> What exactly must an employer provide? The contraception coverage requirement is only one of eight services IOM defined and HHS adopted as part of a package of preventive services.<sup>214</sup> In this way, the regulation serves only to define the minimal coverage and services that every employer must offer.

Under Professor Lipson’s economic transaction theory, the contraceptive coverage requirement is precisely the type of commercial transaction a court should examine closely before exempting an employer for religious reasons. The Supreme Court examined similar claims of religious exemption in *Tony and Susan Alamo Foundation v. Secretary of Labor*.<sup>215</sup> In that case, the petitioner was a nonprofit religious organization that derived its income from several

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206. Lipson, *supra* note 195, at 595.

207. *Id.* at 615.

208. *Id.*

209. *Id.* at 616 (citing *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680 (1989); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985); *United States v. Lee*, 455 U.S. 252 (1982); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

210. *Id.*

211. 26 U.S.C. § 4980H(a)(1) (Supp. 2011).

212. 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011).

213. *Id.*

214. *Affordable Care Act Rules*, *supra* note 6.

215. 471 U.S. 290 (1985).

commercial businesses it operated.<sup>216</sup> The businesses were staffed by associates—“drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation who were compensated in food, clothing, shelter, and other benefits rather than cash salaries.”<sup>217</sup> The Secretary of Labor filed an action against the Foundation for failing to comply with the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act.<sup>218</sup> The Foundation argued that it was not subject to the Act because its businesses were “infused with a religious purpose.”<sup>219</sup> The Court held that because “businesses serve the general public in competition with ordinary commercial enterprises,”<sup>220</sup> no religious exercise was implicated and the Foundation was not exempt.<sup>221</sup> In sum, the “Foundation’s commercial activities, undertaken with a ‘common business purpose,’ [were] not beyond the reach of the Fair Labor Standards Act because of the Foundation’s religious character . . . .”<sup>222</sup>

Similarly, the religious character of a large employer under the PPACA should not exempt the employer from regulations designed to advance the health of its employees. There is no logical reason to distinguish between the health needs of employees of religious institutions and those of secular institutions. Moreover, like *Alamo*, exempting religious employers from the IFR would create unfair competitive advantage. An employer’s overall cost of providing coverage for contraceptive services is relatively minimal.<sup>223</sup> However, when the law sets the “minimum” coverage threshold at different levels for similarly-situated employers, a lower minimal coverage requirement creates a competitive advantage for employers not required to cover the full range of services.<sup>224</sup> From the perspective of a non-religious employer that may not want to provide insurance coverage for contraceptive services for a non-religious reason such as cost, the exemption seems competitively unfair. For these reasons, an economic transaction made in furtherance of an employment relationship should not be characterized as a religious exercise.

*d. Employee action & tenuous connection.*—Because the IFR regulates an

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216. *Id.* at 292.

217. *Id.*

218. *Id.* at 293.

219. *Id.* at 298.

220. *Id.* at 299.

221. See also Lipson, *supra* note 195, at 617-18 (discussing *Alamo* and its implication for third-party harms).

222. *Alamo*, 471 U.S. at 306.

223. Jacqueline E. Darroch, GUTTMACHER INST., *Cost to Employer Health Plans of Covering Contraceptives: Summary, Methodology and Background* (June 1998), [http://www.guttmacher.org/pubs/kaiser\\_0698.html](http://www.guttmacher.org/pubs/kaiser_0698.html) (finding in 1998 the average annual cost to an employer to provide contraceptive coverage was an estimated \$21.40 per employee).

224. See *Alamo*, 471 U.S. at 299 (“[T]he payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of ‘unfair method of competition’ that the [Fair Labor Standards] Act was intended to prevent . . . and the admixture of religious motivations does not alter a business’s effect on commerce.”).



economic transaction between an employer and its insurance company for the benefit of a third-party employee, the link between the employer's religious exercise and the employee's benefit is particularly tenuous. That is, before any employer "subsidizes" an employee's use of contraception or sterilization procedures, an employee must first choose to access those services. The U.S. District Court for the Eastern District of Missouri took this position in *O'Brien v. United States Department of Health & Human Services*.<sup>225</sup> O'Brien, a Catholic business owner, brought suit in the Eastern District of Missouri challenging the HHS regulations.<sup>226</sup> The court described the HHS regulation as one that "requires an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values."<sup>227</sup> The court remarked that "[t]he challenged regulations are several degrees removed from imposing a substantial burden on [the business], and one further degree removed from imposing a substantial burden on [the owner]."<sup>228</sup> In other words, "[t]he 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 business's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion."<sup>229</sup> The court held the regulation was "at most a de minimus [sic] burden on religious practice."<sup>230</sup>

The district court's definition of the HHS rule as several degrees removed from plaintiffs' religious beliefs supports the idea that religious exercise is not implicated at all. The link between the third-party's medical needs and the employer's religious convictions is simply too tenuous. Because the decision to engage in contraceptive use is entirely employee-driven, there is no appreciable difference between the employee purchasing birth control using her insurance plan and the employee using her own salary to purchase birth control pills over the counter,<sup>231</sup> or donating her salary to Planned Parenthood.

*e. The "cost" of religious belief.*—Finally, recall that under the PPACA, employers may abstain from providing employees with the minimum essential coverage.<sup>232</sup> These employers, however, are subject to large tax penalties.<sup>233</sup> Although these fines are extremely expensive, the Supreme Court has held constitutional in at least one instance a law that burdens only the *cost* of religious belief.<sup>234</sup> In *Braunfeld v. Brown*, the court held "the statute at bar [mandating that all businesses close on Sundays] does not make unlawful any religious practices

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225. 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

226. *Id.* at 1154.

227. *Id.* at 1160.

228. *Id.*

229. *Id.* at 1159.

230. *Id.* at 1160.

231. *Id.* ("Already, [the business and owner] pay salaries to their employees—money the employees may use to purchase contraceptives or to contribute to a religious organization.")

232. 26 U.S.C. § 4980H(a) (Supp. 2011).

233. *Id.*

234. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.”<sup>235</sup> Similarly, because the HHS rule only regulates a secular activity—the parameters of an employer-sponsored health insurance plan—and the alternative to compliance only increases an employer’s costs, it is unlikely that a court would find the law unconstitutional.

3. *Conclusion.*—The IFR does not burden a religious exercise because an economic transaction between an employer and insurance company on behalf of an employee does not qualify as religious exercise under RFRA. This characterization does not require a court to deny that an individual holds a sincere religious belief about a medical service. Under the IFR, religious employees may still abstain from using contraception.<sup>236</sup> And an organization under religious management is free to express disapproval of those who use contraception.<sup>237</sup> However, holding a religious belief about a service does not mean purchasing (or not purchasing) insurance coverage on an employee’s behalf is a religious exercise. As a result, the IFR may impose upon an employer an obligation to provide employees with coverage for preventive medical services as part of an employee benefit package without violating RFRA.

#### IV. THE RELIGIOUS EXEMPTION—A PANDORA’S BOX

Now assume, as it does, that the IFR contains a religious exemption. The amended regulations specify that a religious employer objecting to contraceptive use for religious reasons is automatically exempt from providing contraceptive coverage if 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 section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.<sup>238</sup> Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.<sup>239</sup> Because all four criteria must be met before the exemption applies, the exemption is notably narrow.<sup>240</sup> On February 6, 2013, HHS proposed rules to strike the first three criteria of the

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235. *Id.* at 605.

236. *See O’Brien*, 894 F. Supp. 2d at 1159 (noting that “Frank O’Brien [the business owner] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives.”).

237. *Id.*

238. Interim Final Rules, *supra* note 23, at 46,623

239. 26 U.S.C. § 6033(a)(3)(A)(i) (2006); Interim Final Rules, *supra* note 23, at 46,623.

240. *See Stanley W. Carlson-Thies, Which Religious Organizations Count as Religious? The Religious Employer Exemption of The Health Insurance Law’s Contraceptives Mandate*, 13 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 58, 59 (2012).

definition.<sup>241</sup> Although these changes have not taken effect at the time this Note was written, HHS claims that the group of qualifying religious employers remains largely unchanged.<sup>242</sup> This Note argues that because HHS chose to include a narrow exemption, the previously constitutional regulation becomes vulnerable under *Smith* and RFRA.

#### A. Problems Under *Smith*

1. *Neutrality & General Applicability*.—Both *Smith* and *Lukumi* hold that a neutral and generally applicable law may incidentally burden religious exercise, provided the law does not unfairly target a particular religion.<sup>243</sup> In Part III, this Note argues that without the religious exemption, the WHA and the IFR are neutral and generally applicable. However, this Note argues that the religious employer exemption negates the neutrality and general applicability of these laws.

Again, the *Lukumi* Court breaks its neutrality inquiry into three factors—facial discrimination, the record, and operative effect.<sup>244</sup> On its face, the religious exemption uses “words with strong religious connotations.”<sup>245</sup> The IFR makes specific reference to “religious values,” “religious tenets,” and “churches.”<sup>246</sup> These words, however, are not dispositive proof of discriminatory intent.<sup>247</sup>

*Lukumi* also examines the record in the case to find evidence of discriminatory intent.<sup>248</sup> HHS adopted both the religious employer exemption and the contraceptive coverage requirement when it amended the July 2010 IFR in August 2011.<sup>249</sup> HHS adopted the religious exemption concurrently with the contraceptive coverage requirement. Beyond the text of the amended IFR, there is little record to examine. In the amendment, HHS notes that it “received considerable feedback regarding which preventive services for women should be considered for coverage.”<sup>250</sup> HHS briefly summarized the range of comments it received.<sup>251</sup> HHS concluded that HHS should “provide HRSA additional discretion to exempt *certain* religious employers from the Guidelines where contraceptive services are concerned.”<sup>252</sup> HHS then adopted a deliberately narrow

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241. Proposed Rules, *supra* note 60, at 8456-57.

242. *Id.* at 8461.

243. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

244. *Lukumi*, 508 U.S. at 533-35.

245. *Id.* at 534.

246. 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii) (2006); 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012).

247. See *Lukumi*, 508 U.S. at 534.

248. *Id.*

249. Interim Final Rules, *supra* note 23, at 46,623.

250. *Id.*

251. *Id.*

252. *Id.* (emphasis added).

exemption aimed at “a house of worship and its employees in ministerial positions.”<sup>253</sup> By exercising this discretion, HHS thus abandoned the broad neutrality of the WHA to create a targeted religious exemption.

The third prong of *Lukumi*’s neutrality inquiry is operative effect.<sup>254</sup> The operative effect of the exemption is two-fold. First, the law divides the large employers subject to the WHA into two classes based on religious belief. Large employers that do not have religious objections to contraception must provide their employees with insurance plans that cover contraceptive services.<sup>255</sup> These employers must bear the cost of these services.<sup>256</sup> On the other hand, only religious employers that object for religious reasons to contraception are relieved of this obligation.<sup>257</sup> In practice, this creates unfair competitive advantage among similarly-situated employers, based exclusively on religious belief.<sup>258</sup>

Although the operative effect initially appears to benefit (rather than unfairly burden) religious employers, the narrow exemption also creates an arbitrary and discriminatory distinction between religious organizations. For example, two religious employers—a church and a religiously-affiliated hospital—may share the same religious objections to contraceptive coverage. Yet, the IFR exemption protects only the one that meets all four criteria of the religious definition. While the church is “religious enough” to qualify for exemption under the fourth prong of the religious definition, the hospital is not.<sup>259</sup> The IFR exemption is therefore under-inclusive of religious groups that hold sincerely-held religious objections to contraception. In light of the *Lukumi* factors, the religious exemption fails to be neutral because it unreasonably discriminates between similarly-situated religious employers, as well as between religious and secular organizations.

Like operative effect, an inquiry into a law’s general applicability looks to the affected class to determine the law’s scope.<sup>260</sup> Prior to the IFR exemption, the WHA applied to all employers with at least fifty full-time employees.<sup>261</sup> After the exemption, large employers no longer have to provide the same coverage to meet the “minimum essential coverage” standard. The exemption creates a new class of exempt employers, while subjecting secular employers to additional insurance coverage minimums.<sup>262</sup> The law simply ceases to treat all large employers the same.

Thus, the IFR likely fails the *Smith* test for neutrality and general applicability because it carves out an arbitrary exemption for specific religious groups, while excluding other religious organizations. While religious beliefs can

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253. *Id.*

254. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

255. *Affordable Care Act Rules*, *supra* note 6.

256. *See* discussion *supra* Part II.B.2.c.

257. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012).

258. *See* discussion *supra* Part II.B.2.c.

259. 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii) (2006); 45 C.F.R. § 147.130(a)(1)(iv)(B)(4) (2012).

260. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993).

261. 26 U.S.C. § 4980H(c)(2)(A) (Supp. 2011).

262. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012).

be accommodated when religious liberties are at stake, the narrow exemption is under-inclusive because it fails to include all religious organizations that share the same religious belief. Overall, the WHA is less neutral and less generally applicable after HHS promulgated the IFR.

2. *System of Individualized Exemptions.*—The IFR exemption is also vulnerable under *Smith* because it creates a system of individualized exemptions. In *Smith*, the Court declined to apply the *Sherbert* balancing test, in which only a compelling government interest can justify a substantial burden on religious exercise.<sup>263</sup> The Court noted that the *Sherbert* test “was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.”<sup>264</sup> While *Smith* did not present such a case because it involved “an across-the-board criminal prohibition on a particular form of conduct,” the Court noted that the *Sherbert* test is appropriate where the state has instituted a system of individual exemptions.<sup>265</sup>

The religious exemption in the existing IFR contains three qualifications that invite individual assessment.<sup>266</sup> The organization must first have “the inculcation of religious values [a]s [its] purpose.”<sup>267</sup> In addition, it must both primarily employ and primarily serve persons who share its religious tenets.<sup>268</sup> As one commentator has noted, “[t]he terms ‘purpose’ and ‘primarily’ are so amorphous that a court could easily view the exemption provision as a grant of unchecked discretion.”<sup>269</sup> The inclusion of the exemption thus potentially triggers the strict scrutiny of the *Sherbert* balancing test, discussed below.

### B. Problems under RFRA

1. *Religious Exercise.*—In Part III, this Note argues that the IFR is not vulnerable under RFRA because the IFR regulates only commercial activity and thus does not burden religious exercise.<sup>270</sup> However, existence of the religious exemption substantially weakens the argument that an employer’s purchase of insurance for a third-party employee is not a religious exercise. The religious exemption suggests implicitly—if not explicitly—that, in the government’s view,

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263. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 884 (1990); *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

264. *Smith*, 494 U.S. at 884.

265. *Id.* Recall that in *Sherbert*, because the state allocated unemployment benefits on a case-by-case basis, the Court held that the state’s denial of *Sherbert*’s unemployment benefits, despite infringement on her religious practice, served no compelling state interest. *Sherbert*, 374 U.S. at 407.

266. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(3) (2012). The fourth qualification refers to definitions in separate sections of the Code.

267. *Id.* § 147.130(a)(1)(iv)(B)(1).

268. *Id.* §§ 147.130(a)(1)(iv)(B)(2)-(3).

269. Stallings, *supra* note 146, at 135.

270. *See supra* Part III.B.

the purchase of insurance benefits burdens some religious groups.<sup>271</sup> After all, if there is no religious freedom at stake, why make an exemption at all?

HHS carved out an exemption for only those religious groups that meet the narrow definition of religious employer.<sup>272</sup> The absurd result of the narrow exemption is that it fails to exempt all religious employers that share the same, sincerely-held religious beliefs. Perhaps nothing concedes this point more clearly than HHS's own response to the criticism of the religious exemption. In response to more than 200,000 comments it received from the March 2012 ANPRM,<sup>273</sup> in February 2013, HHS announced its intention to provide a new "accommodation" for non-exempt religious employers.<sup>274</sup> The accommodation would create yet another class of religious employer.<sup>275</sup> The class includes an employer that (1) "opposes providing coverage for [contraceptive and sterilization procedures] on account of religious objections," (2) "is organized and operates as a nonprofit entity," and (3) "holds itself out as a religious organization."<sup>276</sup> These employers would be eligible for an accommodation that relieves the employer of "contracting, arranging, paying, or referring" employees for such coverage.<sup>277</sup> Instead, the employer's insurance provider would provide a separate contraceptive coverage plan directly to the employees.<sup>278</sup>

The proposed accommodation makes abundantly clear the shortcomings of the narrow religious exemption. The definition of religious employer simply does not include the full range of religious employers HHS now seeks to "insulate" from providing insurance coverage for contraceptive services.<sup>279</sup> Together, HHS's religious employer exemption and the proposed accommodation implicitly concede that the contraceptive coverage requirement imposes substantial constraints on the free exercise of religion. Therefore, because the IFR substantially burdens the free exercise of religion, the regulation triggers RFRA's strict scrutiny test.

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271. Final Rule, *supra* note 31, at 8727 ("In response to these comments [on the IFR], the Departments carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer, including whether the exemption should be extended to a broader set of religiously-affiliated sponsors of group health plans and group health insurance coverage. For the reasons discussed below, the Departments are adopting the definition in the amended interim final regulations for the purposes of these final regulations while also creating a temporary enforcement safe harbor, discussed below.")

272. 45 C.F.R. §§ 147.130(a)(1)(iv)(B)(1)-(4) (2012).

273. Proposed Rules, *supra* note 60, at 8459.

274. *Id.* at 8461. The accommodation would also apply to student health insurance plans arranged by qualifying religious institutions of higher education.

275. *Id.* at 8462.

276. *Id.*

277. *Id.*

278. *Id.* at 8462-63. HHS also proposes an accommodation for self-insured employer plans, in which the employer does not purchase insurance from an insurance company, but uses only a third-party to administer a group plan fully funded by the employer. *Id.* at 8463-64.

279. *Id.* at 8462.

2. *Strict Scrutiny*.—RFRA prohibits the government from substantially burdening a person’s exercise of religion unless the government shows the burden (1) “is in furtherance of a compelling governmental interest” and (2) “is the least restrictive means of furthering that compelling governmental interest.”<sup>280</sup>

Senator Mikulski’s remarks when introducing the WHA reveal a number of arguably compelling interests the government seeks to advance—expanding women’s access to preventive care, eliminating gender disparities in health care costs, and standardization of covered insurance services.<sup>281</sup> More specific to contraceptive services, the government might cite the detrimental health effects the medical community attributes to unintended pregnancies.<sup>282</sup> Indeed, HHS states that the IFR is “designed to serve . . . compelling public health and gender equity goals.”<sup>283</sup> But what is “compelling” to one court may not seem so to another. As Justice Scalia warned in *Smith*, “[i]f ‘compelling interest’ really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.”<sup>284</sup> There is no guarantee that a court would find the interests the WHA advances compelling.<sup>285</sup>

Regardless of whether these interests are compelling, the HHS rule does not employ the least restrictive means to achieve them. The IFR suggests that an exemption for some religious employers is necessary to protect those employers’ religious beliefs. Nevertheless, the exemption is so narrow that it fails to include all similarly-situated employers with the same religious objection. It seems that if the least restrictive means to further the compelling interest is to exempt one religious employer, the least restrictive means would be to exempt any employer with a religious objection. The under-inclusiveness of HHS’s exemption draws an illogical line between these categories of religious employers. “Very” religious employers are exempt from the contraceptive coverage requirement because the regulation is otherwise too burdensome. On the other hand, “only somewhat” religious employers must bear the burden.

Because the exemption ultimately affects a third-party employee, all religious exemptions will always fail to achieve the interest advanced. Imagine two employees of religious institutions: Anna, an employee of Faithful Church (which qualifies for an exemption), and Betty, who works at Holy Hospital (which likely does not qualify). In both employment situations, the compelling state interests

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280. 42 U.S.C. §§ 2000bb-1(a)-(b) (2006 & Supp. 2011).

281. *See supra* Part III.

282. *See supra* Part II.

283. Final Rule, *supra* note 31, at 8729.

284. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 888 (1990).

285. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*4 (7th Cir. Dec. 28, 2012) (Plaintiffs, Catholic owners of a construction company, appealed the district court’s denial of their motion for preliminary injunction, which would have prevented enforcement of the contraceptive coverage requirements. The Seventh Circuit, in granting their motion for injunction pending appeal, noted that “[w]hether these interests qualify as ‘compelling’ remains for later in this interlocutory appeal; the government has not advanced an argument that the contraception mandate is the least restrictive means of furthering these interests.”).

and the religious objections are the same. Anna's insurance does not cover the full range of services IOM deemed important for women's health because HHS exempts Faithful Church due to its religious beliefs. In essence, HHS has determined that Anna's employer's religious beliefs outweigh the compelling interest of providing her with expanded insurance coverage. On the other hand, Betty's employer also sincerely rejects coverage of contraceptive and sterilization services for religious reasons. But Betty's insurance will cover the full range of women's health services required, because the compelling government interest of providing Betty with insurance coverage apparently outweighs Holy Hospital's religious objections. Why leave Anna uncovered if the compelling interest is women's health?

The HHS rule reveals the misguided and damaging assumption on which HHS based the exemption. On February 15, 2012, HHS wrote that the narrowness of the exemption is appropriate because "the employees of employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans."<sup>286</sup> HHS explicitly assumes that women like Anna who work for "more religious" institutions are themselves "more religious." Thus, HHS reasons, these employees are less likely to need insurance coverage for contraceptive services. But we know nothing about Anna's religious convictions or her medical needs. No matter what they are, Anna will not receive the same "minimum essential coverage" as a result of her employer's religious beliefs.<sup>287</sup> Where HHS's goal is to promote women's health, this is an impermissible assumption. HHS should not evaluate a woman's religious conviction or medical needs based on her employer's religious beliefs. And HHS should not relieve her employer of an obligation to provide benefits that an independent medical body has deemed minimal and essential to her health.

#### CONCLUSION

The framework of the PPACA, which expands employer-sponsored insurance programs in order to improve Americans' access to health care services, presents unique and interesting legal challenges. The Women's Health Amendment and the HHS regulation require employers to provide insurance coverage for specific medical services, including contraceptives. For some employers, the purchase and use of contraceptives conflicts with their religious beliefs. Therefore, in an effort to accommodate the religious beliefs of some employers, the Department of Health and Human Services crafted a narrow exemption to the contraceptive services requirement.

However, the poorly-crafted exemption fails to protect adequately the healthcare needs of women in the workplace *and* the sincerely held religious beliefs of some employers. By excluding a woman from coverage based on her employer's beliefs, the HHS exemption denies the woman access to services based on religious convictions she may not share. It is unfair to deny an

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286. Final Rule, *supra* note 31, at 8728.

287. 26 U.S.C. § 4980H(a) (Supp. 2011).



employee benefits because of her employer's religious beliefs, particularly if employees of large employers categorically receive those benefits. In addition, the narrowness of the exemption insulates some religious employers from the requirement, while denying an exemption to employers that share the very same religious convictions. If the religious exemption truly seeks to protect the free exercise of religious employers, the exemption should be available to any organization that shares the same religious convictions.

The religious exemption neither protects women's health interests nor ensures employers' religious freedoms. More importantly, the exemption undermines the goals of the Women's Health Amendment. Congress passed the Women's Health Amendment to provide women greater access to preventive care and to decrease gender-based disparities in health care costs. To fulfill the promise of the Amendment, HHS should abandon the exemption and require all employers to cover the services that the Institute of Medicine recommends as necessary for women's health. In this way, HHS can refocus its attention on advancing the health of American women.