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# With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate

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Frederick Mark Gedicks\*

**T**he “contraception mandate” of the Patient Protection and Affordable Care Act of 2010 (the “ACA”) poses a straightforward question for religious liberty jurisprudence: Must government excuse religious persons from complying with a law they find burdensome, when doing so would violate the liberty of others by imposing on them the consequences of religious beliefs and practices that they do not share and which interfere with their own religious and other fundamental liberties? To pose this question is to answer it: One’s religious liberty does not include the right to interfere with the liberty of others.

The contraception mandate strikes a careful and sensible balance of competing liberty interests by exempting religious persons and organizations who do not externalize the costs of their religious beliefs and practices onto others who do not share them. It exempts churches that largely employ and serve persons of their own faith, but not religious employers who hire and serve large numbers of employees who do not belong to the employer’s religion or who otherwise reject its anti-contraception values.

That religious liberty is a fundamental constitutional value is not in doubt.<sup>1</sup> Access to contraceptives is also a fundamental constitutional liberty.<sup>2</sup> Constitutionally guaranteed access to contraception, moreover, is a critical component of the well-being and advancement of women. Control over reproduction has enabled women to time and space their pregnancies, thereby preserving and enhancing their health and that of their new-born children,<sup>3</sup> and enabling them to enter the workforce on more equal terms with men.<sup>4</sup>

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<sup>1</sup> See U.S. Const. art. VI, cl.3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); *id.*, amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

<sup>2</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 380 U.S. 947 (1965).

<sup>3</sup> See, e.g., Sylvia Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 369-70 (1998); Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies without Cost-Sharing*, 14 GUTTMACHER POL. REV. 7, 7-8 (Winter 2011).

<sup>4</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); Sonfield, *supra* note 3, at 9 (Access to oral contraception allowed women to “invest in higher education and a career with far less risk of an unplanned pregnancy,” and resulted in “fewer first births to high school- and college-aged women, increased age at first marriage, increased participation by women in the workforce and more children born to mothers who were married, college-educated and had pursued a professional career.”).

Contraception nevertheless remains a significant expense beyond the reach of many women, because most health insurance plans and policies do not cover them,<sup>5</sup> or cover them only with substantial patient cost-sharing.<sup>6</sup> The most effective oral contraceptive drugs cost between \$180 and \$960 per year, depending on the drug prescribed and the area of the country where the prescription is filled, in addition to the prescribing doctor's examination fees which can range from \$35 to \$250 per visit.<sup>7</sup> Many women experience side effects from the cheapest oral contraceptives (which are usually generic brands) or find that these are less effective for them in preventing pregnancy.<sup>8</sup> Some of the most inexpensive contraception, such as intrauterine devices ("IUDs") and anti-contraceptive drug implants, have high up-front costs ranging from \$500 to \$800, in addition, again, to one or more examination fees.<sup>9</sup> Such costs are a significant financial obstacle to the use of contraception by working-class and lower-income women,<sup>10</sup> and simple economics suggests that women of all but the highest income classes are likely to use contraceptives more often and more consistently when they can obtain them at no cost.

The ACA seeks to reduce health care costs and improve public health and well-being by encouraging the use of preventive health care services. It thus requires that group health plans and individual insurance policies cover a range of preventive services without "cost-sharing"—that is, without copayments, coinsurance, deductibles, or other amounts paid by the patient.<sup>11</sup> It is widely agreed that contraception use substantially reduces health care costs.<sup>12</sup> Accordingly, administrative rules adopted by the Departments of Health and Human Services, Labor, and the Treasury (collectively, the "Departments") following enactment of the ACA define "preventive health care services" to include FDA-approved contraceptive methods and counseling, including

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<sup>5</sup> See, e.g., Law, *supra* note 3, at 369-70 ("Except for health maintenance organizations (HMOs), about two-thirds of private insurance plans exclude coverage for contraceptive pills, even though virtually all private insurance plans include coverage for other prescription drugs."); C. Keanin Loomis, *A Battle over Birth "Control": Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 WM. & MARY BILL RTS. J. 463 (2002) ("[I]t is estimated that forty-nine percent of all health care plans still do not offer prescription contraceptives.")

<sup>6</sup> See, e.g., Sonfield, *supra* note 3, at 10 ("A 2010 study found that women with private insurance that covers prescription drugs paid 53% of the cost of their oral contraceptives," and that this expense amounted to "29% of their annual out-of-pocket expenditures for all health services.")

<sup>7</sup> E.g., PLANNED PARENTHOOD, BIRTH CONTROL METHODS—BIRTH CONTROL OPTIONS, <http://www.plannedparenthood.org/health-topics/birth-control-4211.htm> (last visited Oct. 1, 2012) [hereinafter "Birth Control Costs"]; Ctr. for Am. Progress, *The High Costs of Birth Control: It's Not As Affordable As You Think* (Feb. 15, 2012), <http://www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/>.

<sup>8</sup> Cf. Sonfield, *supra* note 3, at 9 ("[O]ne-third of women using reversible contraception would switch methods if they did not have to worry about cost; these women were twice as likely as others to rely on lower-cost, less effective methods.")

<sup>9</sup> "Birth Control Costs," *supra* note 7; James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTIVES 5, 5-6, 9-10, 13 (2009).

<sup>10</sup> See Law, *supra* note 3, at 392-93.

<sup>11</sup> Pub. L. No. 111-148 § 2713, 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13(a)) (2010).

<sup>12</sup> See, e.g., Law, *supra* note 3, at 366-67 & n.13, 394-95; Loomis, *supra* note 5, at 477-78; Sonfield, *supra* note 3, at 10; Trussell, *supra* note 9, at 5.

“emergency contraception” which can prevent pregnancy after intercourse or fertilization, such as Plan B (the “morning-after pill”), Ella (the “week-after pill”), and IUDs.<sup>13</sup>

Some religious organizations and persons objected to the mandate on theological grounds. Roman Catholic teaching, for example, condemns the use of all “artificial” methods of contraception. Catholic universities, hospitals, charities, and other non-profit organizations thus objected to the requirement that their group health plans comply with the mandate, even though they employ and serve large numbers of non-Catholics. Nonprofits affiliated with Protestant denominations and other religions that do not generally condemn contraceptive use objected to the mandated coverage of emergency contraception, which their affiliated religions teach is morally equivalent to aborting a pregnancy—again, even though they employ and service large numbers who do not object to emergency contraception. Finally, a few private for-profit employers engaged in commercial businesses have objected to the mandate on the grounds that it violates the personal religious beliefs of their owners.

The Departments accommodated the objections of religious employers by exempting from the mandate tax-exempt organizations whose mission is the teaching of religious values primarily to members of their own faith through employees of their own faith.<sup>14</sup> In effect, this definition exempted churches and their integrated auxiliaries. Some religious nonprofit and commercial employers continued to object to the mandate because their provision of secular or commercial products and services to persons outside their affiliated faith, and their employment of large numbers of people who do not belong to the faith, left them outside the proposed religious-employer exemption.<sup>15</sup> When the government declined to enlarge the exemption, a number of these religious employers filed suit, arguing that the contraception mandate violated their rights under the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>16</sup>

The rhetoric of religious employers challenging the mandate loosely frames the issue as an unwarranted federal violation of the religious liberty of nonexempt religious employers, and generally fails even to mention the federal government’s weighty

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<sup>13</sup> Section 2713 of the Public Health Act, enacted as part of the ACA, included within the definition of preventive health care services “such additional preventive care and screenings” not otherwise covered, “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration” (the “HRSA”). 42 U.S.C. § 300gg-13(a)(4) (West 2012). The HRSA subsequently adopted women’s coverage guidelines which include “contraceptive methods and counseling,” defined as “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” HRSA, Women’s Preventive Services: Required Health Plan Coverage Guidelines, <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 1, 2012).

<sup>14</sup> The implementing rules define a “religious employer”, as any employer that

- (1) “Has the inculcation of religious values as its purpose”;
- (2) “[P]rimarily employs persons who share its religious tenets”;
- (3) “[P]rimarily serves persons who share its religious tenets”; and
- (4) “[I]s a non-profit organization” under enumerated sections of the Internal Revenue Code which generally refer to “churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.”

76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (citing and describing I.R.C. §§ 6033(a)(1), - (a)(3)(A)(i) & - (a)(3)(A)(iii)).

<sup>15</sup> For a summary of comments for and against the religious-employer exemption, see 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, 8726-27 (Feb. 15, 2012).

<sup>16</sup> A link to the various lawsuits, which as of the date of this Paper numbered over thirty, is maintained by the Becket Fund for Religious Liberty at <http://www.becketfund.org/hhsinformationcentral/>.

interests in protecting the religious liberty and enlarging the access to contraceptives of employees who do not share the religious values of their employers.

This Issue Brief demonstrates that the contraception mandate does not violate the Religion Clause or RFRA rights of religious employers.<sup>17</sup> The mandate is a “religiously neutral, generally applicable” law that does not discriminate against religious employers, does not entangle courts or government generally in disputes about theology or internal church governance, and does not “substantially burden” religious exercise. The mandate is additionally justified as the least restrictive means of protecting compelling government interests. Finally, while all these conclusions apply fully to religious nonprofit organizations, they apply with special force to religious owners of secular businesses engaged in for-profit commercial markets.

## I. RELIGION CLAUSES

### A. FREE EXERCISE CLAUSE

It is well-established that burdens on individual religious exercise imposed by “religiously neutral, generally applicable” laws do not violate the Free Exercise Clause.<sup>18</sup> A free exercise exemption from the societal obligation to obey the law is generally compelled only when the law violates neutrality and generality by discriminating against or targeting religious conduct while leaving comparable secular conduct alone.<sup>19</sup> As a religiously neutral, generally applicable law, the contraception mandate cannot plausibly be challenged under the Free Exercise Clause.

#### 1. *Religious Neutrality*

A law lacks religious neutrality if it restricts religious practices because they are religious—that is, if it discriminates on the basis of religion.<sup>20</sup> Such discrimination occurs when a law defines the class it regulates in religious terms or applies only to certain religious people or to religion generally.<sup>21</sup> A set of health and animal protection laws, for example, whose effect was to prohibit the animal-sacrifice rituals of a

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<sup>17</sup> One federal district court recently rejected Religion Clause and RFRA challenges to the mandate, concluding that religious employers have no right to impose their religious beliefs on employees who reject them, *O’Brien v. U.S. Dep’t Health & Human Servs.*, No. 4:12-CV-476 (E.D. Mo. Sept. 28, 2012), slip op. at 9-22, and two influential state supreme courts have rejected Religion Clause challenges to state contraception mandates identical to that of the ACA on the same ground. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004) and *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007). On the other hand, one federal district court has temporarily restrained enforcement of the mandate on RFRA grounds against a single for-profit employer. *Newland v. Sebelius*, Civ. No. 1:12-cv-1123-JLK (D. Colo. July 27, 2012).

<sup>18</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879-80 (1990). The Court has repeatedly affirmed this doctrine in the decades since *Smith* was decided. *See, e.g.*, *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971, 2993 n.24 (2010); *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997); *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *cf. Hosanna-Tabor Church & Sch. v. EEOC*, 132 S.Ct. 694, 706-07 (2012) (distinguishing *Smith* in recognizing ministerial exception to federal anti-discrimination laws).

<sup>19</sup> *E.g., Lukumi*, 508 U.S. 520 (1993) (invalidating municipal ordinances whose net combined effect permitted virtually all secular and religious killings of animals except those by minority religious sect).

<sup>20</sup> *Id.* at 533.

<sup>21</sup> *Id.* (“[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”); *id.* at 534, 535 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. [] Apart from the text, the effect of a law in its real operation is strong evidence of its object.”).

minority sect while exempting hunting, fishing, and kosher slaughter from that prohibition, constituted a “religious gerrymander” that is not religiously neutral.<sup>22</sup>

Some of the anti-mandate plaintiffs argue that the mandate’s religious exemption is not religiously neutral because it burdens the teachings, practices, or beliefs of religious employers that oppose contraception on religious grounds but do not fall within the exemption. The mandate obviously has a greater impact on Catholic and other religious institutions that oppose some or all of the mandated contraception coverage than it has on secular organizations and religious institutions that do not oppose any of the mandated coverage. This religiously disproportionate impact of the mandate, however, does not constitute religious discrimination or gerrymandering. Free exercise doctrine condemns only *intentional* religious discrimination, not religious burdens occurring as the incidental effect of a neutral and general law.<sup>23</sup>

The Departments determined that employees of exempt religious employers were likely to adhere to their church’s anti-contraceptive orthodoxy regardless of the cost of the contraceptives, so that exempting such employers from the mandate would enhance religious liberty without significantly intruding upon the religious liberty of employees or undermining the mandate’s regulatory goal of affording women access to no-cost contraception.<sup>24</sup> Nonexempt religious employers that oppose contraception, but are participating in a secular or commercial market that delivers goods or services to those outside as well as within the faith largely through employment of persons who are not members of the faith, will almost always have a large number of employees who do not share their employer’s opposition to contraception and would likely use contraceptives (or use them more consistently) if they were available without cost-sharing.<sup>25</sup> With respect to such employers, the Departments determined to minimize “religious externalities”—that is, a religious organization’s use of the economic leverage that inheres in an employment relationship to impose its religious anti-contraception beliefs on unbelievers, members of other faiths, and members of the employer’s faith who do not share its understanding of the faith’s requirements. As the Departments observed, exempting religious organizations that participate in secular markets and employ large numbers of nonmember employees “would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.”<sup>26</sup>

There is little doubt that the contraception mandate is religiously neutral. Neither the text of the ACA nor that of the implementing regulations facially discriminates on the basis of religion. Both apply the mandate to covered group health plans and health insurance carriers that are defined in purely secular terms. Nor are the ACA or its implementing regulations religiously gerrymandered or susceptible to discriminatory application that would impose them on only some religious organizations, but not others.<sup>27</sup> The only religious language in the regulations relates to the definition of

<sup>22</sup> See *id.* at 535.

<sup>23</sup> See *Smith*, 494 U.S. at 878 (The Free Exercise Clause is not violated where a burden on religious practice “is not the object... but merely the incidental effect of a generally applicable and otherwise valid” law.”).

<sup>24</sup> 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> A religiously discriminatory pattern of enforcing the mandate and the exemption differently against religious employers could violate religious neutrality, *cf.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating race-neutral ordinance applied in racially discriminatory manner), but any challenge on this ground will obviously have to await actual application and enforcement of the mandate and the exemption.

“religious employers” who are exempt from the mandate. Finally, as a matter of constitutional policy, it would make little sense to invalidate a religious exemption as “too narrow” when the free exercise doctrine relieves the government of the obligation to provide any exemption at all. Invalidating religious exemptions that relieve some but not all conceivable free exercise burdens would create the perverse governmental incentive not to allow any exemptions in the first place.<sup>28</sup>

## 2. *General Applicability*

The requirement of “general applicability” is an additional protection against religious discrimination or “targeting”—that is, a protection against laws that pursue legitimate secular objectives only against religious conduct.<sup>29</sup> A law satisfies this requirement if it does not focus its burdens solely or mostly on religious organizations or religious individuals.<sup>30</sup> A large number of exemptions for secular but not religious conduct often signals a law’s lack of general applicability.

The vast majority of employers subject to the contraception mandate are secular. The mandate contains no secular exemptions, only the “religious employer” exemption. The mandate is thus generally applicable because it pursues its goal of providing widespread no-cost contraceptive coverage through all employers, not just religious ones. The ACA does exempt certain “grandfathered” group insurance plans from the no-cost preventive-care mandate of which the contraception mandate is a part, and also exempts certain religious persons from the entire ACA. Some of the anti-mandate plaintiffs have erroneously argued that when combined with these broader exemptions, the contraception mandate exempts so many persons or institutions that its refusal to exempt *all* religious employers violates the principle of general applicability. However, these exemptions do nothing to undermine the general applicability of the mandate.

### a. THE INDIVIDUAL INSURANCE-PURCHASE MANDATE EXEMPTIONS

The ACA exempts certain classes of persons from the mandate to purchase health insurance, such as those who belong to religions that reject the use of health insurance, undocumented aliens, those incarcerated in federal or state prison, those who cannot afford coverage, members of federally recognized Indian tribes, and those granted a hardship exception by HHS.<sup>31</sup> These exemptions to the “individual insurance-purchase mandate” are irrelevant to analyzing the general applicability of the contraception mandate. Exemptions from the individual-purchase mandate excuse

<sup>28</sup> *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006) (“To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than to promote, freedom of religion.”), *cert. denied*, 552 U.S. 816 (2007).

<sup>29</sup> *See Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“[L]aws burdening religious practice must be of general applicability. [I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”).

<sup>30</sup> Since a law that pursues legitimate government objectives only against religious organizations or individuals is not religiously neutral, it is not clear that general applicability has any independent doctrinal significance. The Court itself sees neutrality and generality as merely mutually reinforcing tests: A law that religiously discriminates is usually not generally applicable, and vice versa. *Lukumi*, 508 U.S. at 531; *see also id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the terms “substantially overlap”: Religious neutrality invalidates laws that facially discriminate on the basis of religion, whereas general applicability invalidates facially neutral laws that discriminate on the basis of religion “through their design, construction, or enforcement.”)

<sup>31</sup> 42 U.S.C. § 5000A(d)-(e) (West 2012).

one from the obligation to *purchase* health insurance coverage, whereas exemption from the contraception mandate excuses one from the obligation to *provide* no-cost contraception coverage in an insurance plan; the one has nothing to do with the other. An exemption from the insurance-purchase mandate would not exempt a person from the contraception mandate (if he or she happened also to be an employer or insurer), and employers or insurers exempted from the contraception mandate would not automatically be exempted from the individual-purchase mandate (if they happened to be individuals). Indeed, the failure of the ACA to provide any exemptions at all from the individual-purchase mandate would not have impacted the contraception or preventive-care mandates, and vice versa.<sup>32</sup> The goals of the individual-purchase mandate differ substantially from the goals of the contraception and preventive-coverage mandates. Accordingly, religious employers that are not exempt from the contraception mandate cannot use the exemptions from the individual-purchase mandate to argue that the contraception mandate violates general applicability.

#### b. THE “GRANDFATHERED PLAN” EXEMPTION

The ACA allows individuals who are satisfied with their existing health care coverage to keep it. Accordingly, the ACA exempts from many of its provisions, including the contraception mandate, group health insurance plans existing on the date on which the ACA was enacted, as long as such plans do not significantly change the coverage they offered as of that date.<sup>33</sup> This exemption is also generally applicable. Religiously sponsored group-insurance plans in existence when the ACA was enacted are as eligible as secularly sponsored plans to maintain their then-existing coverage and preserve their grandfathered-plan exemption from the ACA, including the contraception mandate. Nothing in the text of the relevant statutory and regulatory provisions imposes any greater burdens or requirements on religiously sponsored plans for obtaining and maintaining grandfathered status. Thus, like the individual-mandate exemptions, the grandfathered-plan exemption is also irrelevant to the analysis of the contraception mandate’s general applicability analysis.

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Neither the “religious-employer” exemption to the contraception mandate, the individual exemptions to the individual-purchase mandate, nor the grandfathered-plan exemption to the ACA offers any benefits or advantages to secular employers that are not also available to religious employers. Taken together, the exemptions do not result in the contraception mandate’s being imposed solely or primarily on religious employers. To the contrary, employers subject to the mandate remain overwhelmingly secular notwithstanding these exemptions. Accordingly, none of these exemptions cause the contraception mandate to violate the principle of general applicability.

<sup>32</sup> Cf. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Exemption of undercover officers from police force’s no-beard policy did not violate principle of general applicability, because exemption of persons not identifiable as police officers had no effect on the policy’s goals of uniformity, morale, and *esprit de corps*.).

<sup>33</sup> Pub. L. No. 111-148 § 1251, 124 Stat. 131 (codified at 42 U.S.C. § 18011) (2010). The Departments view the grandfathered-plan exemption as transitional. Over time, they expect that the sponsors of most grandfathered plans will decide either to abandon grandfathered status and become fully subject to the ACA, or to cease offering group health insurance altogether. 75 Fed. Reg. 34538, 34547, 34548.



## B. ESTABLISHMENT CLAUSE

The Establishment Clause prohibits “theological entanglement”—the government’s deciding questions of religious doctrine, intervening on one side or the other of a dispute about such questions, or interfering in the internal governance of religious congregations.<sup>34</sup> Some of the mandate-litigation plaintiffs have argued that deciding whether a religious organization has the “inculcation of religious values” as its purpose and applying the other elements of the “religious-employer” exemption violate this anti-entanglement norm. The mandate, however, does not cause theological entanglement.

Courts may not decide religious questions, but they possess full power to decide whether and how the law applies to religious organizations and individuals. Legislative accommodations of religion would be impossible if government were “forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not.”<sup>35</sup> Thus, the “ministerial exception” from federal antidiscrimination laws prohibits courts from deciding whom a congregation must accept as its minister, but courts are nevertheless empowered to decide who is a “minister” for the purpose of determining whether the exception applies to a congregational employment decision.<sup>36</sup> Similarly, courts may not decide whether an organization’s decision to call itself a “religion” is theologically justified, but it may decide whether the organization is “religious” for the purpose of applying Internal Revenue Code laws that define charitable income tax deductions.<sup>37</sup>

The Establishment Clause prohibits a court from telling any religious employer what its values are with respect to contraception use and whether or how it must exercise them, but the Clause does not prohibit a court from deciding whether a religious organization qualifies for the “religious-employer” exemption as an organization that exists to inculcate religious values.<sup>38</sup> The exemption, therefore, does not entangle federal courts or the federal government generally in religious doctrine or religious disputes.

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Neither the Free Exercise Clause nor the Establishment Clause provides any plausible basis on which to challenge the contraception mandate. The contraception mandate lies fully within the constitutional limits that these Clauses place on government action.

## II. RELIGIOUS FREEDOM RESTORATION ACT

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<sup>34</sup> See, e.g., *Hosanna-Tabor Evangel. Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

<sup>35</sup> *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79 (Cal.), *cert. denied*, 543 U.S. 816 (2004).

<sup>36</sup> Compare *Hosanna-Tabor Church & Sch. v. EEOC*, 132 S.Ct. 694, 706 (2012) (holding that Religion Clauses encompass a “ministerial exception” that prohibits the application of the Americans with Disabilities Act to a church’s decision to terminate a minister), *with id.* at 707-09 (analyzing whether plaintiff was a “minister” for purposes of the exception).

<sup>37</sup> See *Hernandez v. Comm’r*, 490 U.S. 680, 696-97 (1989).

<sup>38</sup> *Cf. Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982) (explaining that the Establishment Clause does not preclude government from requiring that organization claiming religious exemption prove that it is religious).

RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a law of general applicability,” unless the government demonstrates that the burden furthers “a compelling government interest” using “the least restrictive means.”<sup>39</sup> This section discusses “substantial burden” under RFRA, while Part III following immediately after, discusses the compelling-interest test, which applies to both free exercise and RFRA claims.

Nonexempt religious employers claim that the contraception mandate violates RFRA because their beliefs and teachings prohibit the use of some or all of the contraceptive coverage that the mandate requires. What follows concludes that (A) the simple addition of mandated contraception coverage to a plan sponsored by a nonexempt religious employer, without any other changes, does not constitute a “substantial burden” on the religious exercise of such employers under RFRA; and (B) even assuming that it did, various alternative means of satisfying the mandate do not constitute burdens on religious practice at all, let alone “substantial” ones.

#### A. ADDITION OF CONTRACEPTIVE COVERAGE

The government imposes a “substantial burden” on religious exercise when it compels a person or group “to engage in conduct proscribed by their religious beliefs,” or forces them “to abstain from any action which their religion mandates they take.”<sup>40</sup> Literal compulsion is not necessary for a burden to be “substantial;” “substantial pressure” on a person or group to modify their behavior in a way that violates their beliefs constitutes a substantial burden.<sup>41</sup>

The purported burden on nonexempt religious employers consists of requiring them to make contraceptives available through their health care plans, which, it is argued, violates their religious liberty to oppose a practice which they believe to be sinful or immoral. The simple act of adding mandated coverage to an employer’s existing health plan, however, does not substantially burden an employer’s ability to oppose contraception, because it neither requires the employer to use contraceptives, nor to endorse, encourage, or pay any meaningful amount for such use.

##### 1. Use

Nothing in the mandate requires or pressures any employer to use contraceptives. After complying with the mandate, a religious employer remains as free as before to refrain from using contraceptives.<sup>42</sup> The mandate, therefore, does not burden at all a religious employer’s practice of the anti-contraception tenets of his or her religion.

<sup>39</sup> 42 U.S.C. § 2000bb-1(a)-(b) (West 2012). RFRA has been declared unconstitutional as applied to the states, but continues to be fully applicable against federal government action like the contraception mandate. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>40</sup> *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001); *Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995). There is some question whether a secular for-profit business is a “person” who might “exercise” religion within the meaning of RFRA. *Newland v. Sebelius*, Civ. No. 1:12-cv-1123-JLK (D. Colo. July 27, 2012).

<sup>41</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

<sup>42</sup> *O’Brien v. U.S. Dep’t Health & Human Servs.*, No. 4:12-CV-476 (E.D. Mo. Sept. 28, 2012), slip op. at 11 (“[P]laintiffs remain free to exercise their religion, by not using contraceptives....”); cf. *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (Mandatory state university student fee that subsidized health insurance covering abortion did not burden religious exercise of anti-abortion students under RFRA because they “are not required to accept, participate in, or advocate in any manner for the provision of abortion services.”), *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (RFRA unconstitutional as applied to state action).

## 2. Endorsement

The mandate does not require any employer to endorse the use of the mandated contraception coverage.<sup>43</sup> Nonexempt religious employers who oppose contraception are free to preach against the use of some or all of the covered services and otherwise to urge employees not to make use of them.<sup>44</sup> Nor is there any implicit endorsement. Under the mandate, employers do not make any decision about the use of mandated contraceptives by their employees; all such decisions are made by each individual employee, who may not even be a member of the employer's faith. It is hard to see, therefore, how employee decisions to use contraceptives constitute a "substantial burden" on the employer's religious liberty right to avoid endorsing contraception use. This is particularly true because medical privacy laws make it impossible to know whether any employees are using contraceptives, and the employer remains free to speak out against contraceptives and to disassociate itself from their use.<sup>45</sup>

## 3. Facilitation

Nonexempt religious employers also object that the mandate requires them to "facilitate" conduct to which they religiously object. This is true in the sense that the mandate makes contraceptive use cheaper and more accessible; that is, after all, its goal. The relevant question, however, is not whether the mandate makes contraception use by employees of religious employers more likely, but whether any such effect constitutes a substantial burden on the employer's religious exercise.

It is axiomatic that religious employers have no religious liberty right to limit the spending of employee compensation to conform to the employer's religious sensibilities. Health care insurance coverage is simply employee compensation. Instead of compensating employees entirely in wages or salary, the employer pays a reduced wage or salary plus a health insurance benefit. As with other employee compensation, decisions about whether or how to spend one's health care benefit rest entirely with the employee. Compensating an employee with health care insurance that allows her to choose to use contraceptives does not facilitate contraception any more than paying wages or salary that the employee uses to purchase contraceptives outright.<sup>46</sup>

## 4. Subsidy

Whether the mandate in fact forces nonexempt religious employers to subsidize contraceptive use to which they religiously object may not be answerable in the

<sup>43</sup> Cf. *Goehring*, 94 F.3d at 1300.

<sup>44</sup> *O'Brien*, slip op. at 11 ("[P]laintiffs remain free to exercise their religion ... by discouraging employees from using contraceptives.").

<sup>45</sup> A useful analogy to this question exists in Establishment Clause doctrine. See Caroline Mala Corbin, *Contraception Mandate* (Sept. 2012) (unpublished manuscript, copy in possession of author, cited with permission). In analyzing use of government funds and in-kind aid by religious organizations, the Court has repeatedly held that government aid that finds its way to religious organizations or individuals as the result of the genuinely independent choices of individuals is not attributable to the government and thus does not violate the Clause. E.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993); *Witters v. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). For example, private school voucher programs generally do not violate the Establishment Clause even if the primary beneficiaries are religious schools, because the decision to use the voucher at a religious school is made by individual parents on behalf of their children, and not by the government. *Zelman*, 536 U.S. at 649-51. Similarly, a religious employer's inclusion of contraceptives in health plan coverage cannot reasonably be viewed as an endorsement of their use, when the decision to use them rests solely with individual employees and not with the employer.

<sup>46</sup> See *O'Brien*, slip op. at 12-13.

abstract.<sup>47</sup> Even if such a subsidy were found to exist, however, it would not constitute a substantial burden under RFRA. The courts have long held that compelled payment of a neutral and general tax does not burden the taxpayer's religious free exercise even if a portion of the tax funds activities to which the taxpayer objects,<sup>48</sup> concluding that in such cases the burden on the taxpayer's religious exercise is insignificant because the amount of the taxpayer's funds is minimal and is allocated to the objectionable activities indirectly as the result of the decisions of third parties.<sup>49</sup> The analysis for compelled employer payment for health plan coverage of mandated contraceptives is virtually the same. The amount allocable to contraception coverage will be a tiny percentage of a plan's reimbursable costs,<sup>50</sup> and will be incurred indirectly as the result

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<sup>47</sup> There is a broad consensus that the addition of contraception coverage would reduce the net reimbursable costs of any health insurance plan. Coverage of contraception does not appreciably increase the reimbursable costs of a health insurance plan, but substantially reduces substantial reimbursable costs from prenatal care, childbirth, and medical treatment of newborns. *See, e.g.,* Law, *supra* note 3, at 366-67 & n.13, 394-95; Loomis, *supra* note 5, at 477-78; Sonfield, *supra* note 3, at 10. *See generally* Trussell, *supra* note 9, at 5 ("Contraceptive use saves nearly US\$19 billion in direct medical costs each year."). Accordingly, the premiums charged to employers by third-party insurers are not likely to increase and could be even lower when plans add no-cost contraception coverage. *See* 77 Fed. Reg. at 8727-28. For any particular plan, then, its savings in net reimbursable costs avoided by addition of contraception coverage are likely to equal or exceed the costs of mandated contraception coverage. If a nonexempt religious employer sees its health insurance premiums remain the same or decline after adoption of mandated contraception coverage, then the marginal cost to the employer of adopting such coverage is zero or less. In an economic sense, the employer has not "paid" for the addition of the mandated coverage because it has not cost the employer any additional premium. In another sense, however, nonexempt religious employers who include mandated no-cost contraceptive coverage to their health plans are obviously paying for it: They pay a negotiated premium to a third party insurer for employee health care coverage that includes no-cost contraceptive services; some portion of the premium paid would logically seem to be allocable to the provision of contraception services. The subsidy is even more obvious in case of employers who self-insure their health care plans: Such employers will directly reimburse health care providers for the cost of the contraception services they would provide under the mandate. Whether a religious-employer subsidy of contraceptive use in fact exists with respect to the any such employer's health care insurance plan can only be answered by discovery and analysis of the plan in litigation.

<sup>48</sup> *See, e.g.,* United States v. Lee, 455 U.S. 252 (1982) (mandatory payment of social security and unemployment insurance taxes did not burden employer whose Amish tenets prohibited payment for or acceptance of government benefits); *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (holding that use of portion of mandatory student registration fee to subsidize student health insurance program that covered abortion did not substantially burden religious exercise of students whose beliefs forbid participation in abortions), *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding RFRA unconstitutional as applied to state action); *cf. Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (holding that ACA's individual insurance-purchase mandate did not substantially burden religious exercise of persons whose beliefs "God will provide for their medical and financial needs" when they had historically paid medicare, social security, and unemployment insurance taxes), *aff'd on other grounds*, *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012).

<sup>49</sup> *Goehring*, 94 F.3d at 1300 (burden is "minimal"); *Mead*, 766 F. Supp. 2d at 42 (burden is "*de minimis*").

<sup>50</sup> Loomis, *supra* note 5, at 465 & n.8 ("[When the expenses of contraception are pooled, the increase in cost to employers and employees is negligible . . . ] 'The added cost for employers providing [contraception] coverage corresponds to \$1.43 per month, which represents a mean increase of less than 1% in employers' costs of providing employees with medical coverage.'") (quoting JACQUELINE E. DARROCH, COST TO EMPLOYER HEALTH PLANS OF COVERING CONTRACEPTIVES (1998)).

of the private and independent choices of employees.<sup>51</sup> If this is a burden on the employer's religious exercise at all, it certainly is not "substantial."

#### 5. Existing Off-Label Coverage

Oral and other hormonal contraceptives are often prescribed for reasons other than preventing pregnancy.<sup>52</sup> Many nonexempt religious employers who oppose the contraception mandate have actually covered the mandated contraceptive services for many years, so long as they are prescribed for a reason other than preventing pregnancy. Roman Catholic "double-effect doctrine," for example, permits the use of contraceptives to treat a variety of conditions unrelated to preventing pregnancy,<sup>53</sup> and even some self-insured plans by nonexempt Roman Catholic employers reimburse health care providers for filling contraceptive prescriptions written to treat such conditions. The burden that the contraception mandate imposes on the anti-contraception beliefs of nonexempt religious employers is reduced when such employers already cover the mandated contraceptives for treatment of conditions unrelated to preventing pregnancy. In such circumstances, the mandate does not require the addition of contraceptive coverage in the first place, but only addition of a basis for provider reimbursement when contraception is prescribed.

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The contraception mandate does not require any religious employer to use, endorse, facilitate, or directly pay any meaningful amount for the use of contraceptives. When combined with the fact that many nonexempt religious employers already cover many mandated contraceptives when prescribed for reasons other than preventing pregnancy, any burden the mandate imposes on a religious employer's exercise of its religious anti-contraception tenets approaches the vanishing point.

#### B. NON-BURDENSOME ALTERNATIVES

As a general matter, religious organizations and individuals may not dictate to the government the conditions on which they will comply with the law. The broad

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<sup>51</sup> *O'Brien*, slip op. at 11, 13.

The 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 [plaintiff]'s plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion. This Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

... Under plaintiff's interpretation of RFRA, a law substantially burdens one's religion whenever it requires an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values. This is at most a de minimis burden on religious practice.

*Id.*

<sup>52</sup> See Rachel K. Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* (Guttmacher Inst., Nov. 2011), at 3.

<sup>53</sup> Cf. Alison McIntyre, *Doctrine of Double Effect*, pt. 2, ex. 3, STAN. ENCYC. PHIL. (July 28, 2004, rev. Sept. 7, 2011), <http://plato.stanford.edu/entries/double-effect/> ("A doctor who believed that abortion was wrong, even in order to save the mother's life, might nevertheless consistently believe that it would be permissible to perform a hysterectomy on a pregnant woman with cancer. In carrying out the hysterectomy, the doctor would aim to save the woman's life while merely foreseeing the death of the fetus.").

religious pluralism of American society makes it impractical, if not impossible, to exempt or accommodate every variant of religious practice that might be burdened by neutral and general laws.<sup>54</sup> Accordingly, it is well established that religiously neutral, generally applicable laws that merely make religious exercise more difficult or expensive without prohibiting it do not violate the Free Exercise Clause.<sup>55</sup> Thus, when government imposes a religiously neutral, generally applicable obligation that can be satisfied in multiple ways, some of which do not substantially burden religious exercise, the obligation does not constitute a “substantial burden” even if the nonburdened alternatives are more difficult, more expensive, or less preferred by the religious organization or individual. In other words, a religious employer may not claim a “substantial burden” under RFRA simply because government action interferes with the employer’s preferred manner of operating, so long as other more difficult or expensive ways of complying with the action do not interfere with the employer’s religious exercise.<sup>56</sup> Applying this analysis, three alternatives to adding mandated contraception coverage do not burden employer religious exercise: the grandfathered-plan exemption, provision of the mandated contraceptives by third-party insurers, and termination of health care coverage.

### 1. Grandfathered-Plan Exemption

As explained above, subject to certain conditions, the ACA allows health care plans to continue the coverage in existence at the time the ACA was enacted. If a non-exempt religious employer offered a plan without contraceptive coverage as of the day the ACA was enacted, it may continue that plan without adding the mandated contraception coverage. The contraception mandate, therefore, does not constitute a substantial burden on any nonexempt religious employer whose plan qualifies for the grandfathered-plan exemption.

### 2. Third-Party Insurers

The final interim regulations affirming the religious-employer exemption also announced a one-year enforcement safe harbor for religious organizations that do not qualify as “religious employers” under the exemption, during which the Departments indicated their intention to “work with stakeholders to develop alternative ways of providing contraceptive coverage without cost-sharing” for employees of nonexempt religious employers that object to the mandate.<sup>57</sup> Specifically, the Departments intend to develop regulations allowing a religious organization to contract with third-party insurers to offer health insurance that does not cover contraception to which they object, so long as the third-party insurer provides the uncovered contraception directly

<sup>54</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

<sup>55</sup> *See, e.g., Hernandez v. Comm’r*, 490 U.S. 680, 699 (1980); *Bowen v. Roy*, 476 U.S. 704, 706 (1986) (plurality opinion); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *Braunfeld*, 366 U.S. at 606.

<sup>56</sup> *See, e.g., Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (finding that individual insurance-purchase mandate was not substantial burden under RFRA where plaintiffs could make a “shared responsibility payment” instead of actually obtaining health insurance); *cf. Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (finding that village’s refusal to allow construction of church in industrial zone was not a substantial burden under RLUIPA where many alternative locations within village were available).

<sup>57</sup> 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). The Departments also announced their intention to pursue alternatives for self-insured religious organizations that object to the mandate, but did not identify any potential alternatives. *Id.*

to the organization's employees at no cost.<sup>58</sup> This alternative should eliminate any conceivable substantial burden for nonexempt religious employers who provide health care coverage through a third-party insurer. The employer is not explicitly or implicitly endorsing or facilitating contraception use, since it is not providing contraceptives. The employer also is not subsidizing contraception use: since contraception coverage does not raise the net health care costs, the premium should be the same whether contraception is covered or not.<sup>59</sup>

Third-party provision of the mandated contraception will not relieve any burdens imposed by the mandate on nonexempt religious employers who self-insure. Self-insurance means that there is no third-party insurer available to such employers with the financial ability and incentive to supply the mandated contraception services without cost-sharing; self-insured employers would have to supply the contraceptives themselves. Self-insurers, however, are free to implement their health insurance plans through third-party insurers who supply mandated contraceptives without cost-sharing. There is no constitutional right to self-insure; indeed, in most states self-insurance is a privilege governed by statute. Switching to a third-party insurer will probably cost the religious employer more and may be undesirable in other ways, but Supreme Court precedent is clear that such burdens are not substantial.

### 3. *Termination of Plan*

Some comments by nonexempt religious employers on the proposed interim final regulations threatened termination of their health care plans if the religious-employer exemption were not expanded.<sup>60</sup> For religious employers with less than 50 employees, termination of health insurance coverage constitutes a means of complying with the mandate without burdening such employers' religious anti-contraception beliefs.<sup>61</sup> Employers who feel a religious obligation to provide their employees with health care insurance could supply them with additional salary compensation sufficient to purchase adequate health care insurance on the individual-policy market that the ACA is creating.<sup>62</sup>

It would be ironic if the effect of a statutory initiative designed to extend health care insurance coverage to the uninsured population resulted in termination of group insurance plans by some nonexempt religious employers. Whether this possibility is an acceptable trade-off for extended contraception coverage, however, is a legislative

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<sup>58</sup> *Id.*

<sup>59</sup> For a discussion of why the premium should be the same whether contraception is covered or not, see sources cited *supra* note 48 and accompanying text. A nonexempt religious employer can ensure that it is not paying for its insurers' separate provision of no-cost contraceptives by instructing the insurer to calculate the employer's premium as if its employees do not have access to contraceptives.

<sup>60</sup> 77 Fed. Reg. at 8727.

<sup>61</sup> Employers with less than 50 employees are not required by the ACA to offer health insurance coverage. See 26 U.S.C. § 4980(H)(c)(2)(A) (West 2012). *Cf.* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91-92 (Cal.) ("Catholic Charities may ... avoid this conflict by not offering coverage for prescription drugs. The [state contraception mandate] applies only to employers who choose to offer insurance coverage for prescription drugs; it does not require any employer to offer such coverage."), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468 (N.Y. 2006) (The state contraception mandate "does not literally *compel*" religious employers "to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all."), *cert. denied*, 552 U.S. 816 (2007).

<sup>62</sup> *Cf. Serio*, 859 N.E.2d at 468 ("[I]t is surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.").

policy choice that does not affect the conclusion that termination of one's health care plan would remove an employer from the contraception mandate, and thus constitutes a non-burdensome way to comply with the mandate.

### III. THE COMPELLING INTEREST TEST

A law does not violate the Free Exercise Clause even if it lacks neutrality or generality, so long as it is narrowly tailored to the protection of compelling government interests.<sup>63</sup> Similarly, a law does not violate RFRA even if it substantially burdens religious exercise, if it satisfies the compelling interest test.<sup>64</sup> The contraception mandate satisfies both requirements.

#### A. GOVERNMENT INTERESTS

The Departments identified multiple government interests implemented by the contraception mandate, including better treatment of conditions unrelated to pregnancy for which contraceptives are often prescribed,<sup>65</sup> improvement of the health of pregnant women and newborn children,<sup>66</sup> reduction in the cost of employer-sponsored health care plans,<sup>67</sup> reduction in workplace inequalities between men and women,<sup>68</sup> and reduction in the disparate health care costs borne by men and women.<sup>69</sup> Some of these interests have been held to be individually "compelling,"<sup>70</sup> or have been found individually to outweigh personal free exercise or other constitutional rights even though not formally labeled "compelling."<sup>71</sup> Any of these interests would individually satisfy the requirement of a compelling government interest. Courts have also

<sup>63</sup> *E.g.*, *Lukumi*, 508 U.S. at 546.

<sup>64</sup> 42 U.S.C. § 2000bb-1(b) (West 2012).

<sup>65</sup> 77 Fed. Reg. at 8727 ("Contraceptives also have medical benefits for women who are contraindicated for pregnancy, and there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (e.g., treatment of menstrual disorders, acne, and pelvic pain).").

<sup>66</sup> *Id.* ("[W]omen experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may not be as motivated to discontinue behaviors that pose pregnancy-related risks (e.g., smoking, consumption of alcohol). Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned.").

<sup>67</sup> *Id.* ("[T]here are significant cost savings to employers from the coverage of contraceptives.").

<sup>68</sup> *Id.* at 8728 ("Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force.").

<sup>69</sup> *Id.* ("[O]wing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for women. The Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services.").

<sup>70</sup> *E.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972) ("[P]ublic health needs" are "compelling" government interests."); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir.1998) ("[P]ublic health is a compelling government interest....").

<sup>71</sup> *E.g.*, *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (upholding against Speech Clause challenge government restrictions on anti-abortion protests designed to protect unimpeded access to pregnancy-related services); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding against free exercise challenge state restrictions on child labor).



found related interests individually “substantial,” “important,” or “significant.”<sup>72</sup> Together these related interests might additionally constitute a collectively “compelling” government goal that would outweigh a nonexempt employer’s interest in personal or group free exercise.

## B. ALTERNATIVE MEANS

### 1. Exemption

*Wisconsin v. Yoder* held that the Amish were entitled to an exemption from a state statute requiring school attendance until age sixteen.<sup>73</sup> Acknowledging that the state had an undeniably compelling interest in generally requiring a minimum level of education in its citizens, the Court held that the state nevertheless lacked a compelling interest in applying the statute to the Amish. The Court noted both the strong vocational education that Amish children received from their families and community, as well as the small number and insularity of Amish communities as factors suggesting that exempting them from the minimum attendance requirement would have little effect on the state’s overall goal of an educated citizenry properly equipped to support itself economically and participate in voting and other acts of self-government. Thus, when religiously burdensome government action is subjected to strict scrutiny, an exemption may be the least restrictive alternative if the number of persons exempted is so small that the effect on the government’s regulatory purposes is negligible. The Court has applied this same principle to application of the compelling-interest test under RFRA.<sup>74</sup>

The mandate exists to extend no-cost contraceptive services to as many women as possible. Data are hard to find, but employees of nonexempt nonprofit religious employers in the United States number at least in the hundreds of thousands, if not the millions, while employees of for-profit religious employers engaged in commercial markets number at least in the tens of millions. Enlarging the religious employer exemption to include all religious organizations and all secular for-profit employers owned by persons who object to contraception would substantially undermine the government’s compelling goals due to the very large numbers of employees who would be denied contraception coverage by such an exemption.<sup>75</sup>

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<sup>72</sup> E.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (State’s “compelling interest in eradicating discrimination against its female citizens” justified infringement of associational freedom); *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 277 (2d Cir. 2010) (States “have substantial interest in both lowering health care costs and protecting public health.”), *overruled on other grounds*, 131 S.Ct. 2653 (2011) (statute not least restrictive means); *United States v. Gregg*, 226 F.3d 253, 268 (2000) (Protecting “a woman’s right to seek reproductive health services” is “important government interest.”); *United States v. Wilson*, 154 F.3d 658, 664 (7th Cir. 1998) (“[P]rotecting women who are in need of reproductive health services” is “significant government interest.”); *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C. Cir. 1996) (“[E]nsuring access to lawful health services and protecting the constitutional right of women seeking abortions and other pregnancy-related treatment” are “important government interests.”); cf. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”).

<sup>73</sup> 406 U.S. 205 (1972).

<sup>74</sup> *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429-31 (2006).

<sup>75</sup> Cf. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal.) (“Catholic Charities argues the Legislature could more widely exempt employers from the [state contraception mandate] without increasing the number of affected women by mandating public funding of prescription contraceptives for the employees of exempted employers. [] But Catholic Charities points to no authority requiring the state to subsidize private religious practices.”), *cert. denied*, 543 U.S. 816 (2004).

## 2. Direct Government Subsidy

Some nonexempt religious employers have argued that the government could ensure the availability of no-cost contraceptive coverage to women who lack such coverage in their religious-employer group health plans by paying for such coverage itself. Such employers argue that this alternative is inexpensive, and thus a less restrictive alternative to application of the mandate to nonexempt religious employers. However, even if the cost of government provision of no-cost contraception were low, which is doubtful,<sup>76</sup> a religious person's right to an exemption does not include the right to demand that the government pay for the exemption. The government may do this if it chooses, but it is not constitutionally required to do so. Having the government pay more money to implement the contraception mandate solely to exempt a larger range of religious employers is thus not a constitutionally required less-restrictive alternative.

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The government has multiple interests which individually and together are “compelling” and which are implemented in the least restrictive manner by the mandate. Accordingly, regardless of whether the mandate is found to be a neutral and general law or to substantially burden religious exercise, it still satisfies the doctrinal requirements of the Free Exercise Clause and RFRA.

## IV. FOR-PROFIT COMMERCIAL RELIGIOUS EMPLOYERS

The principles and conclusions discussed above apply equally to non-profit and for-profit religious employers. They apply with particular force, however, to for-profit employers. Federal laws prohibiting religious discrimination in employment incorporate national values that condemn an employer's use of the economic leverage of current or prospective employment to penalize employees for their religious practices or to compel them involuntarily to conform to the religious practices of others. Accordingly, it is well established that neutral and general laws that regulate public or commercial markets do not generally constitute “substantial burdens” on religious exercise when the burdened persons or groups have voluntarily entered those markets.<sup>77</sup> This is particularly the case when exemption from such laws would impose the costs of the employer's religious practices on nonadherents or the government.<sup>78</sup>

<sup>76</sup> See *supra* text accompanying notes 5-9.

<sup>77</sup> *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (Application of federal minimum wage standards to a religion's commercial activities held not a burden on religion's free exercise rights.); *Braunfeld*, 366 U.S. at 605-06 (Sunday closing law that “imposed some financial sacrifice” on Orthodox Jewish business owner who observed the Jewish Sabbath did not violate Free Exercise Clause because law “regulates a secular activity” and merely “operates to make the practice of [the owner's] religious beliefs more expensive.”).

<sup>78</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.”); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) (“[W]hen a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit.”), *cert. denied*, 552 U.S. 816 (2007); *cf.* *Estate of Thornton v. Calder*, 472 U.S. 703 (1985) (finding state statute giving employees absolute right to time off on their Sabbath violated Establishment Clause because of burden statute imposed on others); *TWA v. Hardison*, 432 U.S. 63 (1977) (holding Title VII of the Civil Rights Act of 1964 did not give employee right to religious exemption from seniority system because of burden this would impose on other employees).

Churches and other nonprofit religious organizations enjoy narrow exemptions from religious antidiscrimination laws,<sup>79</sup> but such exemptions have never been granted to for-profit commercial enterprises.<sup>80</sup> There is good reason for this. Compliance with employment laws is complex and burdensome, and exempting for-profit commercial religious employers from such laws will often result in competitive advantage. More fundamentally, it would enable the use of employment to encourage and even to compel involuntary employee conformance with the employer's religious practices. Finally, the potential number of for-profit commercial religious employers who might claim this exemption is huge; recognizing it would fundamentally distort employment markets in favor of religious employers.

Exempting for-profit commercial religious employers from the contraception mandate would have precisely this effect. Such employers are prohibited from making employment decisions on the basis of an applicant's or employee's religious affiliation or lack thereof, and thus virtually always employ large numbers of people who do not share the religious anti-contraception values of their employer. Granting such employers an exemption from the mandate forces employees to bear the costs of observing the tenets of their employer's religion even when they do not belong to it or interpret those tenets differently.

Just as religious employers may not dictate to the government the conditions on which they will obey the law, they may not dictate the conditions on which government may regulate their participation in public and commercial markets on a for-profit basis.

## V. CONCLUSION: RELIGIOUS LIBERTY IS NOT THE RIGHT TO IMPOSE ONE'S RELIGION ON OTHERS

One might argue that the public's interest in the admittedly extensive public nonprofit services provided by religious universities, hospitals, charities, and other religious employers justify exempting them from the contraception mandate. But the mandate also provides important public services and protects considerable government interests, notably the enhancement of women's health and the elimination of gender inequities. The resolution of conflicts between such interests and values are properly entrusted to the political branches.

In accordance with the authority granted it by Congress in the ACA, the Executive Branch has crafted regulations appropriate to constitutional and other national values, by generally exempting religious employers from the mandate when doing so does not impose the employers' religious values and practices on employees who do not share them. This is all that religious employers can reasonably expect. To paraphrase one court, religious liberty is a shield, not a sword; it is not to be used to impose one's religion on others.<sup>81</sup> Religious liberty simply does not entail a right in religious employers to force their employees to observe and to pay the costs of anti-contraception beliefs that the employees do not share.

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<sup>79</sup> See, e.g., Civil Rights Act of 1964, Pub. L. 88-352, § 702 (codified at 42 U.S.C. § 2000e-1) (exempting religious employers from the Act "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the religious employer's activities); *Hosanna-Tabor Church & Sch. v. EEOC*, 112 S.Ct. 694 (2012) (upholding judicially created exemption from Civil Rights Act as applied to ministerial employment decisions).

<sup>80</sup> E.g., *Tony & Susan Alamo*, 471 U.S. at 303-05; *cf. Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding § 702 against Establishment Clause challenge, but only as to nonprofit activities).

<sup>81</sup> See *O'Brien v. U.S. Dep't Health & Human Servs.*, No. 4:12-CV-476 (E.D.Mo. Sept. 28, 2012), slip op. at 12 ("RFRA is a shield, not a sword. [I]t is not a means to force one's religious practices on others.").