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Rebecca Hall

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THE WOMEN'S HEALTH AMENDMENT AND RELIGIOUS FREEDOM: FINDING A SUFFICIENT COMPROMISE

REBECCA HALL*

The recent contraceptive mandate, one provision of the Patient Protection and Affordable Care Act of 2010 (PPACA),¹ has been the subject of much controversy and has been challenged by numerous religious groups.² In response, the Obama Administration proposed a compromise solution that would enable objecting employers to opt out of this coverage, while ensuring that all female employees have access to these services.³ The controversial mandate and resulting compromise, which will allow certain employers to exclude contraception from their employee health plans, will likely withstand the numerous legal challenges to its validity.⁴ The compromise is not only legally defensible, but sufficient to meet the ambitious goals of the Women's Health Amendment (WHA) if it is implemented in such a way as to guarantee coverage for all women regardless of whether they work for a religious, exempted employer or not.⁵

This article will analyze whether the final religious exemption to the Health Resources and Services Administration's (HRSA) rule and the evolving compromise is sufficient to protect religious freedom and accomplish the goals of PPACA and the WHA and will suggest clarifications that would render such a compromise more effective in meeting the goals of the WHA. Part I provides background information on the controversy surrounding the WHA, specifically the contraceptive coverage requirement and the religious exemption from that requirement. Part II explains the coverage mandate and its legislative history, as

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*J.D. Candidate, 2013, University of Maryland Francis King Carey School of Law (Baltimore, MD). B.A., English Language and Literature, 2007, University of Maryland (College Park, MD). I greatly appreciate the insightful and conscientious work of the editorial board and staff of this Journal and I am incredibly thankful for the support of my family and friends. I am especially grateful for my husband, Matt, and his unwavering encouragement.

1. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.).

2. *See infra* note 21 and accompanying text.

3. *See infra* notes 14-19 and accompanying text.

4. *See infra* Part IV.B.

5. *See infra* notes 164-65 and accompanying text.

well as the final exemption issued by the U.S. Department of Health and Human Services (HHS) and the subsequent compromise. Part III examines states' existing coverage mandates and challenges to those mandates. Part IV examines the religious beliefs of employers objecting to the use of contraception and the resulting challenges to the mandate stemming from these beliefs, as well as how such challenges are likely to be viewed by courts based on precedent. Part V examines the options HHS had for balancing the coverage goals of the WHA with religious freedoms and recommends safeguards to ensure that those goals are met going forward.

I. CONTROVERSY AND COMPROMISE

The first Senate amendment to PPACA, the WHA, required the promulgation of an evidence-based rule to ensure that preventative care for women would be covered once the final health care reform bill has been fully implemented.⁶ On August 3, 2011, HRSA, which was charged with developing these comprehensive regulations,⁷ published its recommended guidelines for required preventative coverage.⁸ This coverage included contraceptive services, which were recommended by the Institute of Medicine (IOM) for all women with no exceptions.⁹

As an interim final rule, HRSA's recommendation went into effect immediately in order to ensure access for women matriculating at universities across the country in the fall of 2011, but was open to comments until September 30, 2011.¹⁰ On August 3, 2011, the interim final rule was amended to provide HRSA "with the discretion to exempt" certain religious employers.¹¹ A religious employer was defined as one whose purpose is "the inculcation of religious values," whose employees primarily follow those religious values, whose recipients also mostly share those religious values, and who is a qualified non-profit organization.¹² HRSA stated that "[s]uch an accommodation [for religious employers] would be consistent with the policies of States that require

6. 42 U.S.C. § 300gg-13 (a)(4) (Supp. 2010).

7. *Id.*

8. *See generally* 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) (to be codified at 45 C.F.R. pt. 147).

9. *Id.* at 46,623. *See also* COMM. ON PREVENTATIVE SERVS. FOR WOMEN, INST. OF MED. OF THE NAT'L ACADS, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 2, 109-10 (2011) [hereinafter CLOSING THE GAPS] (recommending coverage for all FDA-approved contraceptive methods as preventative services).

10. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,621.

11. *Id.* at 46,623.

12. *Id.*

contraceptive services coverage, the majority of which simultaneously provide for a religious accommodation.”¹³

On January 20, 2012, HHS Secretary Kathleen Sebelius released a statement that the religious exemption originally promulgated would remain the same, but that nonprofit religious employers “who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law.”¹⁴ Addressing the concerns of both women’s rights groups and religious organizations, the Secretary also stated that “this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services.”¹⁵ While many groups applauded the stance taken by HHS to maintain coverage of as many women as possible through a narrow exemption,¹⁶ some religious organizations were unsatisfied with the ruling, feeling that it violated religious freedoms, among other concerns.¹⁷ In response to the feedback from religious groups and in an attempt to better balance the rights of such groups with the coverage recommendations of the IOM, the Obama Administration updated the final rule with a compromise. The compromise provided a one-year safe harbor for non-exempt institutions and announcing plans to develop a regulation requiring insurance companies to provide contraception coverage if a qualifying religious organization chooses not to.¹⁸ This compromise, announced on February 10, 2012, was an attempt to balance the IOM-recommended needs of women with the desires of religious groups to not cover medication they consider morally objectionable.¹⁹

Despite the Administration’s efforts to respond to criticism from religious groups in the final rule, there was a significant backlash in response to the compromise.²⁰ Religious groups continued to file legal complaints even after the

13. *Id.*

14. Press Release, U.S. Dep’t of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

15. *Id.*

16. See, e.g., Jodi Jacobson, *Obama Administration Does the Right Thing, Finally, on Contraceptive Coverage*, RH REALITY CHECK (Jan. 20, 2012, 7:27 PM), <http://www.rhrealitycheck.org/article/2012/01/20/obama-administration-does-right-thing-on-contraceptive-coverage>.

17. See, e.g., Press Release, U.S. Conference of Catholic Bishops, U.S. Bishops Vow to Fight HHS Edict (Jan. 20, 2012), <http://usccb.org/news/2012/12-012.cfm>.

18. See Press Release, Office of the Press Sec’y, The White House, Fact Sheet: Women’s Preventive Services and Religious Institutions (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.

19. *Id.* (announcing the implementation of a policy intended to accommodate religious freedom while addressing women’s health needs).

20. See, e.g., Press Release, U.S. Conference of Catholic Bishops, Bishops Renew Call to Legislative Action on Religious Liberty (Feb. 10, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/bishops-renew-call-to-legislative-action-on-religious->

compromise was proposed, asserting that the coverage mandate was unconstitutional.²¹ At the time of publication, at least twenty-three lawsuits have been filed in opposition to the mandate, although more are expected.²² Belmont Abbey College, Colorado Christian University, Ave Maria University, and the Eternal World Television Network (EWTN)²³ filed identical complaints, hereinafter referred to collectively as the Becket Fund Complaints, protesting their mandated participation in the coverage prior to the compromise.²⁴ Geneva College and Louisiana College, represented by the Alliance Defense Fund, filed similar

liberty.cfm (arguing that the new regulatory solution was unclear and that only a complete rescission of the mandate would be acceptable).

21. The compromise was proposed on February 10, 2012. Press Release, Office of the Press Sec'y, The White House, *supra* note 18. Colorado Christian University, Belmont Abbey College, and EWTN brought suits prior to the announcement. *See generally* Complaint, Eternal Word Television Network, Inc. v. Sebelius, No. 2:12-cv-00501-SLB (N.D. Ala. filed Feb. 9, 2012) [hereinafter EWTN Complaint]; Complaint, Colo. Christian Univ. v. Sebelius, No. 11-cv-03350-CMA-BNB (D. Col. filed Dec. 21, 2011) [hereinafter Colo. Christian Univ. Complaint]; Complaint, Belmont Abbey Coll. v. Sebelius, No. 1:11-cv-01989-JEB (D.D.C. filed Nov. 10, 2011) [hereinafter Belmont Abbey Complaint]. At least eight complaints were filed after the announcement. *See generally* Complaint, Legatus v. Sebelius, No. 2:12-cv-12061-RHC-MJH (E.D. Mich. filed May 7, 2012) [hereinafter Legatus Complaint], Complaint, Newland v. Sebelius, No. 1:12-cv-1123 (D. Colo. filed Apr. 30, 2012) [hereinafter Newland Complaint], Complaint, O'Brien Jr. v. U.S. Dep't of Health & Human Servs., No. 4:12-cv-00476-CEJ (E.D. Mo. filed Mar. 15, 2012) [hereinafter O'Brien Complaint]; Complaint, Nebraska v. U.S. Dep't of Health & Human Servs., No. 4:12-cv-03035 (D. Neb. filed Feb. 23, 2012) [hereinafter Nebraska Complaint]; Complaint, Ave Maria Univ. v. Sebelius, No. 2:12-cv-00088-FtM-29SPC (M.D. Fla. filed Feb. 21, 2012) [hereinafter Ave Maria Complaint]; Complaint, Geneva Coll. V. Sebelius, No. 2:12-cv-00207-JFC (W.D. Pa. filed Feb. 21, 2012) [hereinafter Geneva Coll. Complaint]; Complaint, La. Coll. v. Sebelius, No. 12-cv-463 (W.D. La. filed Feb. 18, 2012) [hereinafter La. Coll. Complaint], Complaint, Priests for Life v. Sebelius, No. 12-cv-753 (E.D.N.Y. filed Feb. 15, 2012) [hereinafter Priests for Life Complaint]. An additional twelve suits, representing forty-three entities, were filed simultaneously on May 21, 2012. Laurie Goodstein, Bishops Sue Over Contraception Mandate, N.Y. Times, May 21, 2012, at A17. *See generally, e.g.*, Complaint, Roman Catholic Archbishop of Washington v. Sebelius, No. 12-cv-00815 (D.D.C. filed May 21, 2012) (alleging violations of RFRA, the Free Exercise, Establishment, and Free Speech clauses of the First Amendment, and the Administrative Procedure Act).

22. *See* Leigh Jones, *Lawyers Reveal Contraceptive Mandate Lawsuit Strategy*, CROSSWALK.COM (Feb. 25, 2012), <http://www.crosswalk.com/news/lawyers-contraceptive-mandate-lawsuit-strategy.html> (noting that at least two additional suits are planned and that the "larger strategy" of the numerous groups in opposition to the mandate is to file as many suits as possible in many different districts in order "not only to represent a wide array of clients but also to create the possibility of disagreement among different courts") (quoting Kyle Duncan, General Counsel for the Becket Fund for Religious Liberty).

23. The State of Alabama joined EWTN as a co-plaintiff on March 22, 2012. *See generally* The State of Alabama and Attorney General Luther Strange's Motion to Intervene, Eternal Word Television Network, Inc. v. Sebelius, No. 2:12-cv-00501-SLB (N.D. Ala. filed Mar. 22, 2012).

24. EWTN Complaint, *supra* note 21; Colo. Christian Univ. Complaint, *supra* note 21; Belmont Abbey Complaint, *supra* note 21. *See also* Becket Fund's HHS Mandate Challenge, THE BECKET FUND, <http://www.becketfund.org/hhs/> (last visited Apr. 9, 2012). Because these lawsuits have been filed by the same counsel, The Becket Fund, and are essentially identical, they will be referred to jointly as the Becket Fund Complaints. *Id.*

suits.²⁵ Seven states and private entities have also filed a joint complaint alleging many of the same legal issues.²⁶ Additionally, at least one individual business owner has filed a suit, alleging that the mandate violates his religious liberty by requiring the company he controls to pay for contraception, sterilization, and medication with “known abortifacient mechanisms of action.”²⁷ The complaints filed after the compromise maintain the unconstitutionality of mandating coverage for contraception but also raise the issue of the uncertain and unpublished nature of the compromise.²⁸ Although these lawsuits may be dismissed as not ripe, given the safe harbor provision and indeterminate nature of the proposed regulation at this time, this article will address the legal issues raised by those complaints as they are likely to be the same or similar issues to those that may be raised once the mandate goes into effect.²⁹

Religious freedom is an important constitutional value and it is necessary that any mandate or exemption not needlessly burden religious groups.³⁰ However, equal protection of women is also an important governmental concern and thus, any religious exemption must not disadvantage female employees who are subject to an employer's decision not to cover their essential health needs.³¹ The compromise attempts to balance the interests of religious freedom and women's health by alleviating the financial burden from religious employers who object to providing

25. See Geneva Coll. Complaint, *supra* note 21, at 1 (claiming that HHS violated RFRA, the First and Fifth Amendments, and the Administrative Procedure Act); La. Coll. Complaint, *supra* note 21, at 1 (asserting that HHS violated RFRA, the First and Fifth Amendments, and the Administrative Procedure Act).

26. See Nebraska Complaint, *supra* note 21, at 1–2 (objecting to the mandate as individuals, non-profit corporations and the states Nebraska, South Carolina, Michigan, Texas, Florida, Ohio, and Oklahoma). Although this assertion is not within the scope of this article, the seven states also claim that if “employers were to cease provision of health insurance in order to avoid the requirements of the Rule, an immediate and substantial spike in the number of enrollments in Plaintiff States’ Medicaid programs would result.” See *id.* at 21.

27. O’Brien Complaint, *supra* note 21, at 2.

28. See Nebraska Complaint, *supra* note 21, at 14 (alleging that no known legal barrier prevents HHS from “unilaterally withdrawing” the one-year grace period).

29. See, e.g., Defendants’ Memorandum of Law in Support of Their Motion to Dismiss at 2, Belmont Abbey Coll. v. Sebelius, No. 1:11-cv-01989-JEB (D.D.C. filed Feb. 16, 2012) (noting that plaintiffs’ complaint does not allege any imminent injury and lacks ripeness due to the rule’s lack of finality); see also Sarah Kliff, *How a New Lawsuit Could Overturn the Contraceptives Mandate*, WASH. POST WONKBLOG (Feb. 24, 2012, 10:50 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/how-a-new-lawsuit-could-overturn-the-contraceptives-mandate/2012/02/24/gIQAqevpXR_blog.html (noting that while the current complaints are unlikely to “gain traction” for several years due to timing, once they do, they will hinge on the courts’ interpretation of RFRA).

30. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that religious freedoms can only be overridden by the most crucial state interests).

31. See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 (Cal. 2004) (holding that the legislature acted legitimately even when infringing on certain religious organizations by attempting “to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives”). These needs were deemed essential by the IOM, and thus included in the final rule. See, e.g., 42 U.S.C. § 300gg–13(a)(4) (Supp. 2010).

contraceptive coverage while ensuring that every woman has access to such necessary medical coverage.³²

II. PPACA'S CONTRACEPTIVE MANDATE

Congress passed PPACA in an effort to bring health coverage to all Americans.³³ As part of the legislative process, the WHA was included “to guarantee women access to preventive care and screenings at no cost” and to ensure gender equity in health care coverage for all Americans.³⁴ It was the first amendment voted on and passed in the Senate during the health reform debates.³⁵

The interim final rule was developed to address these preventative services and requires that group health insurance plans and issuers provide coverage, without cost-sharing, for certain preventive health services including “evidence-based” preventive care and screenings.³⁶ The necessity for female-specific preventative service coverage is due to the fact that women, because of their gender-specific reproductive needs, pay more than men for necessary preventative measures not covered under many insurance plans.³⁷ By covering essential services that are currently needed or used by a majority of American women,³⁸ the WHA ensures that women are not discriminated against or financially disadvantaged

32. See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012) (to be codified at 29 C.F.R. pt. 2590) (seeking comments on ways to accommodate religious organizations “while ensuring contraceptive coverage for plan participants and beneficiaries covered under their plans . . . without cost sharing”).

33. See Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.); *id.* § 1501(a)(2)(C) (“The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. . . . [and] will increase the number and share of Americans who are insured.”); see also Wendy E. Parmet, *The Individual Mandate: Implications for Public Health Law*, 39 J.L. MED. & ETHICS 401, 401 (2011) (stating the finding by Congress that the mandate is “essential to ensuring near universal coverage”).

34. E-Newsletter, Mikulski Amendment Guarantees Women Access to Affordable Preventive Care, BARBARA A. MIKULSKI U.S. SENATOR FOR MD. (Dec. 2009) [hereinafter Mikulski E-Newsletter], <http://mikulski.senate.gov/media/enewsletter/December-2009-Womens-Health-Amendment.cfm>.

35. *Id.*

36. 45 C.F.R. § 147.130 (2011).

37. See David M. Herszenhorn & Robert Pear, *Senate Passes Women's Health Amendment*, PRESCRIPTIONS (Dec. 3, 2009, 12:32 PM), <http://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/> (quoting Senator Mikulski's explanation during the WHA's floor debate that many women face hurdles to health care access because of gender-specific conditions, such as C-sections); see also Comments Re: CMS-9992-IFC2 from Laura W. Murphy, Dir. Wash. Legislative Office, Am. Civil Liberties Union to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 2 (Sep. 30, 2011), http://www.aclu.org/files/assets/aclu_comments_9_30_11.pdf [hereinafter ACLU Comments] (noting that the WHA was intended to eliminate gaps in women's access to preventative care under PPACA).

38. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, GUTTMACHER POL'Y REV., Winter 2011, at 7, 9.

because of their gender.³⁹ Additionally, by establishing a baseline federal standard for all employer-provided coverage, the WHA mitigates the inequitable distribution of women's preventative care that is the current reality because of the patchwork of state rules.⁴⁰

A. The WHA & Women's Preventative Health

While one primary motivation of the WHA was to ensure adequate mammogram access,⁴¹ an important component of the amendment was that the women's preventative health guidelines proposed by HRSA be evidence-based and comprehensive.⁴² In order to develop these guidelines, the IOM "review[ed] what preventive services are necessary for women's health and well-being" and developed recommendations accordingly.⁴³ The IOM examined existing standards, evidence, academic literature, federal goals, and clinical guidelines from the medical profession, as well as public comments.⁴⁴ In July of 2011, after this extensive process, the IOM published "Clinical Preventive Services for Women: Closing the Gaps."⁴⁵ In addition to well-woman visits, sexually transmitted infection and gestational diabetes screenings, and other services, the IOM's final report recommended that all "Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and

39. See Mikulski E-Newsletter, *supra* note 34 (showing that forty states permit insurance companies to charge women more than men for the same health care and that a woman may be charged up to 140 percent more for health insurance than a man of the same age and health).

40. Janice Lee, *A Quick Fix Solution for the Morning After: An Alternative Approach to Mandatory Contraceptive Coverage*, 9 GEO. J.L. & PUB. POL'Y 189, 209 (2011) (explaining that the varying state religious exemptions or lack thereof create "a hodgepodge of rules"). This also creates a situation where state laws vary drastically and are drawn starkly in favor of women's rights or religious freedoms. *See id.* at 211. It is also important to note that the HHS mandate is a baseline and any State with a narrower exemption or no exemption at all would still be able to require even employers exempted under the HRSA guidelines to cover contraception for employees. *See* NAT'L ASS'N OF INS. COMM'RS, PREEMPTION AND STATE FLEXIBILITY IN PPACA 1 (2010), http://www.naic.org/documents/index_health_reform_general_preemption_and_state_flex_ppaca.pdf (explaining that PPACA sets minimum coverage standards and state laws setting higher standards will retain their authority).

41. Press Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Applauds Passage of Mikulski Amendment Guaranteeing Coverage of Women's Preventive Health Care (Dec. 3, 2009), http://www.acog.org/About_ACOG/News_Room/News_Releases/2009/ACOG_Applauds_Passage_of_Mikulski_Amendment (noting that the amendment protects women's coverage of routine mammograms).

42. Press Release, Barbara A. Mikulski U.S. Senator for Md. Media Ctr., Mikulski Applauds Adoption of IOM Guidelines for Women's Preventative Health (Aug. 1, 2011), <http://www.mikulski.senate.gov/media/pressrelease/8-1-2011-1.cfm> (heralding the IOM's recommendations as a fulfillment of the WHA's requirement for evidence-based advice on women's health).

43. CLOSING THE GAPS, *supra* note 9, at 2 box.S-1.

44. *Id.* at 67.

45. *See generally id.*

counseling for all women with reproductive capacity” be covered under all insurance plans without a co-payment.⁴⁶

On August 1, 2011, HRSA adopted the IOM’s recommendations, including the recommendations for contraceptive services, in its interim final rule.⁴⁷ Non-grandfathered plans and issuers were required to provide the recommended coverage, without cost sharing, beginning on or after August 1, 2012.⁴⁸ As a result of the compromise, certain religious employers can use the new safe harbor provision and wait until August 1, 2013 to provide coverage or determine their exempt status.⁴⁹

There are many policy justifications for including contraceptive coverage in the preventative care mandate.⁵⁰ Women have always faced a lack of coverage for contraception and high costs even when it is covered,⁵¹ and the benefits of accessible contraception for women are numerous.⁵² States that currently require coverage do so to further the important governmental interests of “equality for women and public health and welfare.”⁵³ With these justifications in mind, many groups immediately heralded the federal coverage mandate as good public policy and a major advancement for gender equity in health care.⁵⁴ However, the new rule drew harsh criticism from some pro-life groups just as quickly.⁵⁵

46. *Id.* at 109–10; *Women’s Preventive Services: Required Health Plan Coverage Guidelines: Affordable Care Act Expands Prevention Coverage for Women’s Health and Well-Being*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Mar. 15, 2012).

47. Press Release, U.S. Dep’t of Health & Human Servs., *Affordable Care Act Ensures Women Receive Preventative Services at No Additional Cost* (Aug. 1, 2011), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html> (stating that the rule will include contraceptive services as part of comprehensive guidelines proposed by the IOM).

48. *Id.*

49. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,504 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

50. See generally Sonfield, *supra* note 38 (explaining that public policy reasons for covering contraceptive services, include health and economic benefits for women, children, families, and society as a whole).

51. Lee, *supra* note 40, at 193 & n.15; Sonfield, *supra* note 38, at 10 (noting that even women whose contraceptive prescriptions are insured pay over fifty percent of the cost).

52. See, e.g., Lee, *supra* note 40, at 194 n.20 (providing an example of a negative consequence from failing to provide contraceptive coverage); Sonfield, *supra* note 38 at 7–9 (noting the maternal and child health benefits as well as the economic and social benefits).

53. See, e.g., Lee, *supra* note 40, at 204.

54. See generally ACLU Comments, *supra* note 37 (applauding the HHS guidelines for their inclusion of contraceptive services).

55. See, e.g., Comments Re: Interim Final Rules on Preventive Services from Anthony R. Picarello, Jr., Gen. Counsel & Michael F. Moses, Associate Gen. Counsel, U.S. Conference of Catholic Bishops to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs. 1, 2 (Aug. 31, 2011) [hereinafter U.S. Conference of Catholic Bishops Comments], <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf> (urging HHS to rescind the mandate because the coverage requirement is “unprecedented” and “radical” and had too narrow an exemption for religious employers); Press Release, Family Research Council, FRC Files Comments Opposing HHS Mandated Abortifacient Coverage, Narrow Conscience Exemption Under

B. The Exemption and the Compromise

One of the strongest points of contention was the proposed exemption for religious employers.⁵⁶ Religious groups who opposed the current exemption argued that it was too narrow and did not include enough religious employers.⁵⁷ However, many other groups contended that the exemption was too broad or undermined the purpose of the WHA by limiting access to preventative services for many women.⁵⁸ HRSA stated that “most commenters” on the interim final rule suggested that the new requirements apply to all health care plans with no exemption.⁵⁹

The contentious exemption, one of a few proposed amendments to the interim final regulation, and now included in the final rule, permits qualifying religious employers to opt out of the otherwise mandated contraception coverage.⁶⁰ HHS explained that the Department believed it was appropriate to take into account the effect of such a requirement on “the religious beliefs of certain religious employers” and as such, stated:

that, for purposes of this policy, a religious employer is one that: (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. 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. 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

Obamacare (Sep. 30, 2011), <http://www.frc.org/newsroom/frc-files-comments-opposing-hhs-mandated-abortion-facient-coverage-narrow-conscience-exemption-under-obamacare>.

56. U.S. Conference of Catholic Bishops Comments, *supra* note 55; Press Release, Family Research Council, *supra* note 55.

57. See U.S. Conference of Catholic Bishops Comments, *supra* note 55; Press Release, Family Research Council, *supra* note 55; see also J. Lester Feder, ‘Conscience Clause’ in Health Rules, POLITICO (Aug. 1, 2011, 11:32 AM), <http://www.politico.com/news/stories/0811/60383.html> (quoting Anna Franzonello, staff counsel of Americans United for Life, who believed “the exemption was . . . still a very narrow conscience protection”).

58. See Comments on CMS-9992-IFC2 from NARAL Pro-Choice Am. Found. to Kathleen Sebelius, Sec’y, U.S. Dep’t of Health & Human Servs. 2 (Sep. 30, 2011) [hereinafter NARAL Comments], http://www.prochoiceamerica.org/assets/hhs_birth-control-regulations.pdf (asserting that the refusal provision was too broad because it would leave many women without full access and would thus undermine the purpose of the WHA and the IOM).

59. 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, 46,623 (Aug. 3, 2011).

60. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

comply with State law requirements to cover contraceptive services.⁶¹

This definition mirrors the definitions of a “religious employer” in New York and California⁶² and HRSA asserted that this definition was common in states with similar requirements.⁶³ Still, HRSA accepted comments and alternative definitions, explaining that their definition was “intended to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions.”⁶⁴ On January 20, 2012, after the close of the comment period, HHS adopted its initial exemption and definition, but gave religious employers extra time to comply and protected grandfathered plans.⁶⁵

After considerable public complaints, primarily from the Roman Catholic Church and associated organizations, the Administration proposed a compromise that maintained the same definition of a religious employer for the purposes of exemption, but added that:

[b]efore the end of the temporary enforcement safe harbor, the Departments will work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage. Specifically, the Departments plan to initiate a rulemaking to require issuers to offer insurance without contraception coverage to such an employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer’s plan participants (and their beneficiaries) who desire it, with no cost-sharing. Under this approach, the Departments will also require that, in this circumstance, there be no charge for the contraceptive coverage The Departments intend to develop policies to achieve the same goals for self-insured group health plans

61. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under The Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623.

62. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 n.3 (Cal. 2004) (quoting California’s statutory exemption from contraception coverage mandate for religious employers); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 462 (N.Y. 2006) (quoting New York’s statutory exemption from contraception coverage mandate for religious employers); see also ACLU Comments, *supra* note 37, at 4 (noting that the HHS definition for religious employers mirrors those for California and New York). For a more thorough discussion of these cases and their relation to the exemption’s constitutionality see *infra* Part IV.B.

63. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623.

64. *Id.*

65. Press Release, U.S. Dep’t of Health & Human Servs., *supra* note 14.

sponsored by non-exempted, non-profit religious organizations with religious objections to contraceptive coverage.⁶⁶

This compromise, however, was not well-received by the groups it attempted to appease, and was followed by considerable complaints.⁶⁷

III. STATES' REQUIREMENTS

While HHS maintains that its religious exemption to PPACA's coverage mandate is similar to "most" states, there is a great deal of variation among the states that have some form of equitable coverage requirements.⁶⁸ Some states have narrower religious exemptions, some have broader exemptions,⁶⁹ and others have no exemptions.⁷⁰

A. States' Coverage Mandates

Following the enactment of Title VII and the Pregnancy Discrimination Act (PDA),⁷¹ states began to examine gender equity in health insurance and to mandate coverage of certain contraceptive methods.⁷² In response to the law, the attention surrounding it, and the lawsuits prompted by Title VII,⁷³ many "states adopted some form of contraceptive-equity law, generally in the form of a mandatory contraceptive coverage law."⁷⁴

As of June 1, 2012, twenty-eight states "require insurers that cover prescription drugs to provide coverage of the full range of FDA-approved

66. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,728.

67. See, e.g., Statement from the Admin. Comm. of the U.S. Conference of Catholic Bishops, United for Religious Freedom (Mar. 14, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf> (affirming their strong opposition to the HHS rule because they believe it is a threat to religious freedom).

68. See, e.g., *Insurance Coverage of Contraceptives*, STATE POLICIES IN BRIEF (Guttmacher Inst., New York, N.Y.), June. 1, 2012, at 2, http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (outlining the differences among state contraception coverage mandates); Lee, *supra* note 40, at 192 (noting that state requirements are very polarized).

69. See *Insurance Coverage of Contraceptives*, *supra* note 68 (detailing which states have "limited," "broader," and "expansive" refusal provisions).

70. See *id.* (noting that eight states do not exempt any entities from contraception coverage).

71. 42 U.S.C. §§ 2000(e)(k) (2006).

72. See Lee, *supra* note 40, at 195 (explaining that after the enactment of the PDA, which made it illegal to discriminate against an employee based on his or her sex, legal scholars suggested that the PDA might be used to require employer coverage of prescription contraceptives for employees).

73. See *Equal Emp't Opportunity Comm'n v. United Parcel Serv.*, 141 F.Supp.2d 1216, 1220 (D. Minn. 2001) (denying an employer's motion to dismiss sex discrimination claim under Title VII); Lee, *supra* note 40, at 95 n.22 (noting a federal district court's finding that an employer violated Title VII by failing to provide coverage for contraceptive services).

74. See Lee, *supra* note 40, at 195.

contraceptive drugs and devices.”⁷⁵ A number of these states offer some exemptions for mandated contraceptive coverage,⁷⁶ often requiring employers who refuse to cover these services to notify employees.⁷⁷

Despite the presence of such exemptions in many state statutes, HRSA’s conclusion that such exemptions are “common” may be misleading. While many states do allow religious employers to opt out, there are a number that do not.⁷⁸ Some recently enacted or amended statutes do not include such exemptions,⁷⁹ and there is some indication that this is a growing trend.⁸⁰ For example, “[o]ne of the most far-reaching state contraceptive mandates was enacted . . . in Wisconsin. As of January 2010, Wisconsin will require all providers of health insurance to include contraceptive services, irrespective of religious affiliation, moral objection, or category of ‘religious employer.’”⁸¹ This potential trend, along with the IOM recommendations, may indicate an evolving sense in public policy of the importance of these types of services for women.⁸²

75. *Id.* These states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. *Id.* at 3.

76. *Id.* at 2–3 (finding that twenty states offer some refusal provision, usually for religious reasons, for insurers or employers).

77. *Id.* (noting fourteen states where either the employer or the insurer must notify the enrollee). The ACLU also recommended such a requirement if HRSA determines that a religious exemption should be part of the final rule in the PPACA case. ACLU Comments, *supra* note 37, at 16.

78. See *Insurance Coverage of Contraceptives*, *supra* note 68, at 2–3 (finding that eight states, Colorado, Georgia, Iowa, Montana, New Hampshire, Vermont, Washington, and Wisconsin, do not have any religious exemption).

79. See COL. REV. STAT. ANN. § 10-16-104 (3)(a)(I) (West Supp. 2011) (requiring coverage, without religious exception, of contraception by all group insurance policies); GA. CODE ANN. § 33-24-59.6 (c) (2005) (requiring that all policies that offer prescription benefits cover prescription contraceptive benefits without copayment without any exception for religious organizations); WIS. STAT. ANN. § 632.895 (17) (a)–(c) (West Supp. 2011) (mandating that every disability or self-insured health policy, without exceptions for religious organizations, that covers certain services include coverage of contraceptives prescribed by a health care provider).

80. See The Becket Fund for Religious Liberty, *Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities*, STUD. CATH. HIGHER EDUC. (Ctr. for the Study of Catholic Higher Educ., Emmitsburg, Md.), Oct. 2009, at 7, <http://www.catholichigher.org/LinkClick.aspx?fileticket=xTuC7vbCx9g%3D&tabid=665> (noting the recent trend in state contraceptive mandates rejecting “conscientious objections”).

81. *Id.* See also WIS. STAT. ANN. § 632.895 (17) (a)–(c) (West Supp. 2011).

82. Public opinion also seems to favor contraception mandates. See, e.g., *Survey: Majority of Americans Do Not Believe Religious Liberty is Under Attack*, PUB. RELIGION RESEARCH INST. (Mar. 15, 2012), <http://publicreligion.org/research/2012/03/march-rs-2012-research/> (noting that 6-in-10 Americans believe that public employers and religious hospitals should be required to provide health care plans that cover contraception).

B. Legal Challenges to States' Coverage Requirements

There have been two legal challenges to state-mandated contraception coverage,⁸³ although no state mandate has been struck down.⁸⁴ The HHS exemption is very similar to the one upheld in the two state cases.⁸⁵ In *Catholic Charities of the Diocese of Albany v. Serio*, a New York law mandating contraception coverage was upheld.⁸⁶ The Court found that the mandate did not violate an organization's free exercise rights because the law was neutral and had the important governmental objectives of improving women's health and eliminating gender disparities in health care costs.⁸⁷ In *Catholic Charities of Sacramento, Inc. v. Superior Court*, the California Supreme Court held that provisions of a statute similar to New York's did not impermissibly interfere with an employer's religious autonomy and would not likely be subject to strict scrutiny analysis because the exemption benefitted, and did not burden, religion, and thus, did not violate the Free Exercise Clause.⁸⁸ However, the Court also noted that the statute would meet the *Sherbert* strict scrutiny test⁸⁹ because even if the statute "substantially burdens a religious belief or practice, the law nevertheless serves a compelling state interest and is narrowly tailored to achieve that interest."⁹⁰ It is also notable that both courts

83. See generally *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

84. But see *Lee*, *supra* note 40, at 192 & n.12 (citing *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 938 (8th Cir. 2007), to support the proposition that state courts have varied in judgments to mandated contraceptive coverage challenges). Despite this author's assertion that there have been judgments against some state contraception-coverage mandates, *Standridge* is not a challenge to a state mandate, but rather addresses whether the lack of contraceptive coverage, absent a mandate, violates the PDA and Title VII. See *Standridge*, 479 F.3d at 938 (finding an employer's failure to provide coverage for contraceptive services does not violate Title VII). While in *Standridge*, the Eighth Circuit held that an organization could permissibly exclude contraception from their employee health without violating Title VII, as amended by the PDA, this has no bearing on a state's ability to mandate coverage if they so choose, but only that absent a statute, coverage is not mandated by Title VII. *Id.* Based on the IOM's thorough findings that contraceptives are part of essential preventative care for women, this case is inapposite to the federal rule. See CLOSING THE GAPS, *supra* note 9, at 2 box.S-1.

85. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 80; *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 462. See also ACLU Comments, *supra* note 37, at 4 (noting that the New York and California exemptions are nearly identical to HRSA's exemption).

86. *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 464.

87. *Id.* at 464.

88. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 67, 83.

89. In *Sherbert v. Verner*, the Court held that "any incidental burden on the free exercise of . . . religion" requires "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . .'" 374 U.S. 398, 403 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). This has generally been considered a "strict scrutiny" test. *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 466.

90. *Catholic Charities of Sacramento*, 85 P.3d at 92.

found that the religious exemptions contained in the statutes, which mirror the one promulgated by HHS, did not offend the Establishment Clause.⁹¹

IV. CURRENT AND ANTICIPATED CHALLENGES TO THE FEDERAL COVERAGE REQUIREMENT

Despite the fact that no mandate, with or without a religious exemption, has ever been overturned by courts, there have already been at least twenty-three challenges brought by non-exempt employers,⁹² states, and individuals,⁹³ with more likely to be filed in the near future.⁹⁴ Additionally, because this is a federal mandate, the Religious Freedom Restoration Act (RFRA) is implicated.⁹⁵

A. Religious Objections

To understand why certain religious organizations are arguing that they should be exempted from mandated contraceptive coverage, it is necessary to examine why they believe such a mandate is a violation of their religious beliefs.⁹⁶ The challenges mainly arise from some churches' beliefs regarding the allegedly abortifacient nature of contraceptive drugs and the fact that these treatments are unnecessary.⁹⁷ For example, the Becket Fund Complaints state that:

[t]he College has a sincere religious objection to providing coverage for Plan B and ella since it believes those drugs could prevent a human embryo, which they understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus, causing the death of the embryo. . . . The College considers

91. *Catholic Charities of Sacramento*, 85 P.3d at 81; *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 468.

92. See *supra* notes 21–29 and accompanying text.

93. See generally *Nebraska Complaint*, *supra* note 21.

94. See, e.g., Press Release, U.S. Conference of Catholic Bishops, *supra* note 17 (vowing to continue studying the implications of the WHA mandate).

95. E.g., *Belmont Abbey Complaint*, *supra* note 21, at 3 (asserting that the mandate violates Belmont Abbey's religious freedom and thus implicates RFRA). It is important to note that RFRA was not at issue in the two state cases discussed. See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 73 (objecting to the statute at issue based on the Establishment and Free Exercise clauses of the United States and California Constitutions); *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 463 (asserting violations of "the Free Exercise clauses of the New York and United States constitutions, and the Establishment Clause of the United States Constitution").

96. Note that this section examines only objecting religious groups. There are numerous religious groups who not only allow contraception but are supportive of the HHS rule and narrow exemption. See generally *Luiza Oleszczuk, Some Religious Groups Voice Support for Obama's Contraception Mandate Despite Outcry*, CHRISTIAN POST (Feb. 9, 2012, 12:57 PM), <http://www.christianpost.com/news/religious-groups-voice-support-for-obamas-contraception-mandate-despite-catholic-outcry-69007/> (noting that a "coalition of 22 Christian, Jewish and Muslim institutions" support the mandate).

97. See, e.g., Press Release, Family Research Council, *supra* note 55 (asserting that "potentially abortion-causing contraceptives" are not health care because pregnancy is not a disease).

the prevention by artificial means of the implantation of a human embryo to be an abortion.⁹⁸

Medically speaking, however, hormonal contraceptives cannot cause an abortion, and the belief that such medication is abortifacient is a theological, not medical or legal, contention.⁹⁹

Objectors also argue that “pregnancy . . . is not a disease” and thus, preventative measures are not “health care.”¹⁰⁰ This argument is also unlikely to succeed. The IOM thoroughly researched the issues in accordance with the guidelines established by the WHA and found that these services are necessary preventative care.¹⁰¹ Additionally, the contraceptive services and medications recommended by the IOM are not just used to treat pregnancy.¹⁰² There are a wide variety of medical conditions that require women to take hormonal treatments.¹⁰³ Based on the tradition of judicial deference to the IOM and agency findings regarding medical decisions, it is unlikely that a court will disregard such findings relating to the medical necessity of contraceptive services.¹⁰⁴

B. Current Legal Actions

Currently, at least forty-nine employers have filed suits arguing that they should be exempted from the contraceptive coverage mandate, including the Becket Fund Complainants: Belmont Abbey College,¹⁰⁵ Colorado Christian University,¹⁰⁶ EWTN,¹⁰⁷ and Ave Maria University.¹⁰⁸ The Becket Fund Complaints all raise the

98. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 13.

99. *See* AM. MED. ASS'N HOUSE OF DELEGATES, RESOLUTION No. 443 (A-04), FDA REJECTION OF OVER-THE-COUNTER STATUS FOR EMERGENCY CONTRACEPTION PILLS (2004) [hereinafter AMA RESOLUTION] (finding that Plan B only acts to inhibit ovulation or ovum implantation and thus “cannot terminate an established pregnancy”).

100. U.S. Conference of Catholic Bishops Comments, *supra* note 55, at 1; Press Release, Family Research Council, *supra* note 57.

101. *See* CLOSING THE GAPS, *supra* note 9, at 2 box.S-1.

102. *See* Hugo Maia & Julio Casoy, *Non-contraceptive health benefits of oral contraceptives*, 13 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 17, 21–22 (2008) (finding that oral contraceptives can be used to treat “menorrhagia, dysmenorrhoea, ovulatory pain, acne and hirsutism,” to prevent “salpingitis, endometriosis and myomas,” to increase bone mass during perimenopause, and to reduce the risk of “endometrial, ovarian and possibly colon cancer,” as well as potentially to protect against ovarian cysts, rheumatoid arthritis, benign breast disease, and atherosclerosis).

103. *Id.*

104. *See* Rempfer v. Sharfstein, 583 F.3d 860, 867 (D.C. Cir. 2009) (noting that absent contradictory scientific evidence, the Court must defer to the FDA’s scientific judgment). *But see* Ralph F. Hall & Eva Stensvad, *A Failure to Comply: An Initial Assessment of Gaps in IOM’s Medical Device Study Committee*, 12 MINN. J. L. SCI. & TECH. 731, 738 (2011) (noting that although courts are usually deferential to IOM findings, courts have occasionally intervened if there is a deficiency in methodology).

105. *See generally* Belmont Abbey Complaint, *supra* note 21.

106. *See generally* Colo. Christian Univ. Complaint, *supra* note 21.

107. *See generally* EWTN Complaint, *supra* note 21.

108. *See generally* Ave Maria Complaint, *supra* note 21.

same twelve issues.¹⁰⁹ Additionally, the lawsuit brought by the states and individuals raise the same constitutional issues: Free Speech, Free Exercise, Freedom of Association, and RFRA violations.¹¹⁰ The suits brought by Louisiana and Geneva College, represented by the Alliance Defense Fund, also allege the Free Exercise, Establishment Clause, Free Speech, and Administrative Procedure Act violations.¹¹¹ Because these complaints are likely indicative of future suits,¹¹² this article will examine each complaint in light of the existing case law in New York and California.¹¹³

The Becket Fund Complaints assert that the HHS rule does not meet the strict scrutiny standard re-established by RFRA.¹¹⁴ To satisfy their burden of proof, the complainants must show that the challenged rule is a substantial burden on their ability to act on a sincere religious belief.¹¹⁵ If a substantial burden is found, the government must then prove that it is acting in furtherance of a compelling state interest and in the least restrictive manner.¹¹⁶ Although RFRA was not at issue in either of the cases brought against states' mandates,¹¹⁷ both state courts implied that

109. *E.g., id.* at 20–28. Claims include violations of: RFRA; the First Amendment's Free Exercise, Establishment, and Freedom of Speech clauses, the Administrative Procedure Act, the Weldon Amendment, and the Affordable Care Act. *Id.* Although the suit brought by Ave Maria was filed after the compromise was announced, the complaint ignores the intentions of the compromise to alleviate the burden on concerned stakeholders such as itself and alleges that after the expiration of the safe harbor, it will be subject to the mandate. *See generally id.*

110. *See generally* Nebraska Complaint, *supra* note 21.

111. *See generally* Geneva Coll. Complaint, *supra* note 21; La. Coll. Complaint, *supra* note 21.

112. *See* Kliff, *supra* note 29, at 2 (noting that although the current complaints may not be ripe, complaints filed after the plaintiffs are actually affected by the policy will hinge on issues related to RFRA).

113. *See infra* Part IV.B. Additionally, this article will address the complaints in light of the wording of the now final religious exemption. *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147). Although the constraints placed on many of the complainants are likely to be alleviated by the compromise, the lawsuits themselves, which were filed both before and after the compromise was published, either ignore the compromise or discredit it as too undefined or tenuous to trust as a final rule. *See* Nebraska Complaint, *supra* note 21, at 13–14 (noting that although HHS indicated that it would abide by a “temporary enforcement safe harbor,” the Agency could unilaterally decide to break that promise).

114. *E.g.,* Belmont Abbey Complaint, *supra* note 21, at 16–17.

115. 42 U.S.C. § 2000bb–1(a) (2006). RFRA does not specifically define “substantial burden.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). Guiding the “substantial burden” analysis in *Navajo Nation*, the Ninth Circuit stated that “the cases that RFRA expressly adopted and restored — *Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the ‘substantial burden’ inquiry.” *Id.* at 1069. There is no substantial burden unless the government “force[d] the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*” or “coerce[d] the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*.” *Id.* at 1070.

116. *See* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

117. *See supra* note 95 and accompanying text.

the mandate and exemption met strict scrutiny nonetheless.¹¹⁸ The compromise, which relieves non-exempt, yet inconvenienced, religious employers of the financial burden of providing contraceptive coverage, make it considerably less likely that a court will find a substantial burden.¹¹⁹

A burden is not found to be substantial when an organization's "sensibilities" are merely offended, even if one's religion is inconvenienced.¹²⁰ To have a lesser standard would mean that "[e]ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires."¹²¹ In *Navajo Nation v. U.S. Forest Service*, the plaintiffs argued that the use of a sacred mountain would desecrate the mountain but failed to show a substantial burden because the use did not "coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions" or loss of governmental benefits.¹²² Here, the mandate and compromise do not pose a substantial burden, because those who object to the use of the covered medication are not required to use or endorse the use of the medication, nor are they coerced to do so by threat of punishment; they must only allow employees to access the necessary medication at no cost to the employer.¹²³

Even if the rule does pose a substantial burden,¹²⁴ a court will likely find that the mandate is narrowly tailored to meet the government's compelling interests.¹²⁵ The rule is tailored to mandate coverage of only those services found to be necessary to women's health.¹²⁶ With the compromise now ensuring that such coverage will be at no cost to the objecting employers, there is no better way to tailor the law so as to not compromise the state's interest in promoting health and

118. See *supra* note 87–90 and accompanying text. Although the court in *Catholic Charities of Diocese of Albany v. Serio* explicitly rejected application of the strict scrutiny test, it did note that the State had a "substantial interest". 859 N.E.2d 459, 467–68 (N.Y. 2006).

119. See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. Pt. 147) (providing non-exempt religious employers an alternative to directly providing coverage of contraceptive services).

120. *Navajo Nation*, 535 F.3d at 1063.

121. *Id.*

122. *Id.* at 1070.

123. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,504 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

124. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 91 (Cal. 2004) (explaining that a substantial burden exists if the receipt of an important benefit is conditioned "upon conduct proscribed by a religious faith" or where such benefit is denied "because of conduct mandated by religious belief") (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981)). Under the compromise, a dissenting employer will not be required to modify any behavior as the insurer would carry the financial burden, so it is unlikely that a substantial burden exists. See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. at 16,503 (noting that insurers are required to cover contraceptive services where a qualifying employer opts not to).

125. Cf. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 93 ("Certainly the interest in eradicating gender discrimination is compelling.").

126. Cf. *id.* at 93–94 (noting that a broader exemption will negatively impact women).

avoiding gender discrimination for all women while enabling employers to have no responsibility to finance or provide the necessary services.¹²⁷

The complainants also assert that the rule violates the Free Exercise Clause because it is intentionally discriminatory.¹²⁸ But there is no evidence of discrimination in either the WHA or the mandate, which applies to all employers, not just religious ones, and the fact “[t]hat the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church does not mean the exemption discriminates against the Catholic Church.”¹²⁹ If the government were prohibited from passing any law that violated the religious belief of one individual or organization, no law could ever be passed.¹³⁰

Complainants also argue that the HHS rule violates the Free Exercise Clause by “impos[ing] the Mandate on some religious organizations but not on others, resulting in” discrimination among religions.¹³¹ This argument will also likely fail because, as recognized by the court in *Catholic Charities of Sacramento*, the legislature must be able to determine which activities fall within religious accommodations and which do not; otherwise, there would be no practical way to have any religious exemptions.¹³² The complainants’ Establishment Clause argument, based on *Larson v. Valente*,¹³³ fails for similar reasons. This exemption does not impose a burden, but alleviates one, based not on distinctions between religions, but based on the accommodation of specific religious beliefs infringed upon by the mandate.¹³⁴ Additionally, courts may find such arguments to be moot once the compromise is effective, because the financial burden of objecting religious employers, even those not originally exempt, will be alleviated.¹³⁵

127. N.C. Aizenman, *Next Fights over Birth Control May Be in Courtrooms*, WASH. POST, Mar. 8, 2012, at A03 (noting the ACLU’s view that it will be difficult for challengers to show that that same goals could be accomplished through narrower means).

128. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 18.

129. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 84–85.

130. *See Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990) (holding that it is contrary to common sense and constitutional tradition to allow an individual’s obligation to obey a law hinge on whether or not that law coincided with that individual’s religious beliefs, making that individual “a law unto himself”).

131. *E.g.*, Belmont Abbey Complaint, *supra* note 21 at 19.

132. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 79.

133. 456 U.S. 228, 253–54 (1982) (holding that where a law has the effect of burdening or favoring one religious denomination over another, a law violates the Establishment Clause).

134. *Cf. Catholic Charities of Sacramento, Inc.*, 85 P.3d at 85 (recognizing the religious exemption as a “legislative accommodation” and it alleviates a “governmentally imposed burden” on religion); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468–69 (N.Y. 2006) (holding that legislation accommodating certain types of religious organizations does not violate the Establishment Clause and to hold otherwise would discourage religious exemptions).

135. *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (requesting comments on how to accommodate organizations not exempted by the original religious language).

Complainants also argue that the HHS rule violates the First Amendment's Freedom of Speech guarantee, both by compelling speech and inhibiting expressive association.¹³⁶ In both challenges to state-mandated coverage, courts found that this claim was insubstantial because "[f]or purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose."¹³⁷

The Becket Fund complainants assert that the rule gives HRSA "[u]nbridled [d]iscretion" because HRSA "may" grant an exemption to certain religious groups.¹³⁸ Complainants assert that this vests HRSA with excessive discretion over which organizations can have their First Amendment interests accommodated, thus violating the Free Exercise Clause and infringing on claimants' freedom of speech.¹³⁹ This argument will not likely be successful, because there must be "a real and substantial threat of the identified censorship risks" and the statute must have "a substantial number of impermissible applications" in order to be found violative of the Free Exercise Clause in this way.¹⁴⁰ Because the WHA does not infringe on the Plaintiffs' or anyone else's freedom of speech, as noted above, there is no basis for an unbridled discretion claim.

The complainants also argue that the HHS rule violates the Administrative Procedure Act, but this too is unlikely to succeed. The Becket Fund Complaints contend that HHS violated legal procedure and acted in an arbitrary and capricious manner because "[w]ithout proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations" and "Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule."¹⁴¹ Courts will likely reject this because there was an extensive period of comments and negative comments were specifically acknowledged in a statement by Secretary Sebelius.¹⁴² HHS also provided extra time for certain institutions to comply with the mandate

136. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 20–21.

137. *Cf. Catholic Charities of Sacramento, Inc.*, 85 P.3d at 88–89 (noting further that religious employers are free to express their disapproval); *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 465 (finding that the coverage mandate does not force or prevent any communication or association).

138. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 21.

139. *Id.*

140. *Griffin, III v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1321 (Fed. Cir. 2002).

141. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 22–23.

142. Press Release, U.S. Dep't of Health & Human Servs., *supra* note 14 (acknowledging comments concerned with the infringement on employers' religious liberty and expressing a desire to find a balance between those concerns and women's health needs).

and developed a compromise, which shows not just a meaningful consideration of adverse comments, but also a meaningful response.¹⁴³

The two final claims address allegations that, because the institutions in question believe the covered medication is abortifacient in nature, the HHS mandate violates the Weldon Amendment and PPACA¹⁴⁴ by requiring abortion coverage.¹⁴⁵ However, as stated above, because the medical and legal definitions of abortion do not include these medications in the category of abortifacients, a court is likely to defer to medical terminology, rather than a theological belief about when life begins, in determining the statutory meaning of abortion.¹⁴⁶ Based on the prevailing medical consensus, neither the Weldon Amendment nor PPACA are violated because the covered mandated drugs are not abortive in a medical sense.¹⁴⁷

V. RECOMMENDATIONS

HHS had a number of options when implementing the IOM recommendations.¹⁴⁸ It could have offered no exemption for any religious organizations or it could have allowed for a broader exemption.¹⁴⁹ HHS chose a narrow exemption in an attempt to balance religious freedom and women's coverage needs.¹⁵⁰ The exemption selected is most similar to those upheld in New York and California, and will likely pass constitutional muster when challenged at the federal level.¹⁵¹ The compromise also maintains the current narrow and legally defensible exemption while providing a "temporary enforcement safe harbor."¹⁵² During this period, "the Departments plan to develop and propose changes to these

143. *Id.*; Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (requesting comments on the proposed compromise for non-exempt religious employers).

144. Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 508, 123 Stat. 3034, 3280 (2009); *see also* 42 U.S.C. § 18023 (Supp. 2010) (noting that health plans are not required to provide coverage of abortion services).

145. *E.g.*, Belmont Abbey Complaint, *supra* note 21, at 23-24.

146. AMA RESOLUTION, *supra* note 99; *see also* Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 (E.E.O.C. Guidance Dec. 14, 2000) (noting that the PDA does not exempt contraceptives in the same way it allows exemption for abortions).

147. *See* discussion *supra* Part IV.A, for a more detailed refutation of the claims that these covered services are abortifacient in a medical sense.

148. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (noting the wide variety of public suggestions regarding the exemption, including a narrower or broader religious exemption, a complete rescission of the exemption, or a different definition of religious employer).

149. *See supra* Part III.A (noting the variety of state statutes, including statutes with broad exemptions and those with none, that have not been overturned by courts).

150. Press Release, U.S. Dep't of Health & Human Servs., *supra* note 14.

151. *See* discussion *supra* Part IV.B.

152. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,727.

final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services."¹⁵³

A. The Compromise: Exempting Employers Without Jeopardizing Access

Given the legislative history of and policy choices that guided the WHA, the final rule should not provide any exemption that puts female employees at risk of not having coverage.¹⁵⁴ If employers are allowed to exclude employees from needed medical coverage, the WHA's goals of gender equality and coverage of women's essential health needs are compromised, unless excluded employees have coverage available at the same cost as women working for non-exempted employers.¹⁵⁵ Because no woman is forced to use services that violate her religious beliefs, nor are religious employers expected to condone or encourage contraceptive use, or pay for it, there is no substantial burden and no valid reason to offer an exemption that undermines the WHA.¹⁵⁶ Employers are simply required to provide the option to all employees who may or may not share their religious values.¹⁵⁷ By allowing certain employers to not cover certain services for their female employees, those employees' rights are compromised.¹⁵⁸ If HRSA were to determine that the religious exemption was inappropriate and, instead, required all employers to cover all preventative services, it would have a number of valid arguments for doing so,¹⁵⁹ although this decision would have elicited serious complaints from religious groups.¹⁶⁰ But even when HHS exempted religious and ensured, through the compromise, that objecting religious employers will not have to pay for these services, there is still conflict and religious institutions still object.¹⁶¹

153. *Id.*

154. See generally Patient Protection and Affordable Care Act of 2010, 42 U.S.C. 300gg-13(4) (Supp. 2010) (recommending coverage of preventative services for women without exception).

155. See Sonfield, *supra* note 38, at 7 (noting that that Senate debate clearly showed that the WHA was intended to cover key services for women, including contraceptive services and supplies).

156. See Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004) (observing that no religious objector has ever been exempt from a neutral, generally applicable law when "the requested exemption would detrimentally affect the rights of third parties").

157. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,725.

158. See ACLU Comments, *supra* note 37, at 11 (noting that religious exemptions affects the fundamental rights of "gender equality, reproductive autonomy, and religious liberty" of women who work for exempted employers).

159. See generally *id.*

160. See, e.g., The Becket Fund for Religious Liberty, *supra* note 80 (showing the backlash from religious leaders to the Wisconsin law that was enacted with no religious exemption).

161. E.g., Statement of the Admin. Comm. of the U.S. Conference of Catholic Bishops, *supra* note 71.

Since HHS chose to include a religious exemption, in order to remain true to the spirit of PPACA and the goal of ensuring equal access to health care, the choice to keep the exemption narrow was appropriate and prudent given the state courts' findings.¹⁶² With the addition of the compromise, which ensures that all employees will have access to essential health services, the Administration stayed true to the goals of the WHA and the IOM's recommendations.¹⁶³

B. Additional Safeguards for Women

While the current exemption and subsequent compromise were prudent choices based on legal precedent, to ensure that all women are covered while respecting religious freedom, HHS should clarify its position and improve safeguards for women employed by exempt organizations. These safeguards should include access for all women, even those whose employers fall within the original exemption (i.e. churches).¹⁶⁴ The final rule should clarify this point, even though it seems likely the compromise was intended to cover such women.¹⁶⁵ Additionally, any work with stakeholders, including insurers, should ensure that, although insurers will bear the cost of providing coverage,¹⁶⁶ religious employers will not face higher insurance costs or have difficulty obtaining insurance coverage for their employees, which would undermine the purpose of PPACA and the WHA by diminishing access rather than increasing it.¹⁶⁷ Finally, any additional compromises should avoid providing an overbroad exemption that burdens insurers with the cost of covering employees of any business whose owner disagrees with his or her employees use of contraception.¹⁶⁸ Because the exemption and compromise are

162. See *supra* Part IV.

163. See 42 U.S.C. § 300gg-13(a)(4) (Supp. 2010); CLOSING THE GAPS *supra* note 9 at 10; See generally Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

164. Although the compromise did not explicitly state that it is intended to benefit women who are employed by both exempt and non-exempt organizations, the intent of the WHA and HHS's subsequent elaboration on preventative care indicate that the compromise was intended to benefit all women. See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501, 16,503 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (stating that the proposed amendments would establish alternative ways to ensure "that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing").

165. See Office of the Press Sec'y, The White House, *supra* note 18 (noting that the goal of the new policy is to provide preventative care for all women).

166. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. at 16,505–06. Such coverage is likely cost neutral, if not advantageous in light of the greater costs of pregnancy or disease it might prevent. See *id.* at 16,503.

167. See Sonfield, *supra* note 38 at 10 (showing that there is a strong correlation between lack of insurance and reduced use of medical services, including prescriptive contraceptives).

168. Cf. O'Brien Complaint, *supra* note 21, at 2, 11 (asserting that as a "for-profit, secular employer[,]," being required to provide contraceptives for employees of his for-profit businesses would violate constitutional and statutory provisions).

legally optional, the Administration must keep any final exemption narrow enough to not overburden insurers and risk jeopardizing access in unanticipated ways.¹⁶⁹

CONCLUSION

In balancing the religious freedom of employers with women's need for access to important preventative care, the HHS compromise covered as many women as possible while remaining sensitive to religious opposition. HHS further protected religious employers by providing an exemption that relieves them of the financial burden of covering contraceptive services.¹⁷⁰ Nonetheless, this compromise has already been challenged by religiously-affiliated employers who oppose the coverage but were not included in the original exemption.¹⁷¹ However, given the state case law and the precedent set by states with no religious exemption, the rule and exemption should be upheld.¹⁷²

This is an evolving area of law, as states have seen very few claims and the PPACA mandate makes the matter a federal one, which implicates RFRA and a stricter standard of review.¹⁷³ Additionally, public opinion is varied and comments received by HRSA have contained a variety of sentiments regarding a religious exemption.¹⁷⁴ However, based on the stated goals of PPACA and the case law in

169. Ann Radelat, *Connecticut Insurers Wary of Obama's Contraceptive Plan*, CONN. MIRROR (Feb. 16, 2012), <http://ctmirror.org/story/15463/connecticut-insurers-wary-obamas-contraceptive-plan> (noting health insurance providers' skepticism that the compromise can be accomplished without any premium increases for subscribers).

170. See generally *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

171. See, e.g., La. Coll. Complaint, *supra* note 21, at 1. However, many of the plaintiffs are likely covered under the safe harbor provision of the compromise and as such, it is unlikely that most of the current suits will be heard by courts. See *supra* note 29 and accompanying text.

172. See *supra* Section IV.B.

173. See *supra* note 93 and accompanying text.

174. Compare ACLU Comments, *supra* note 37, at 2 (urging HHS to deny requests to expand the religious exemption), NARAL Comments, *supra* note 58, at 2 (asserting that the refusal provision was too broad because it would leave many women without full access and would thus undermine the purpose of the WHA and the IOM), Comments on CMS-9992-IFC2 from Douglas Laube, Dir., Physicians for Reprod. Choice & Health to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 1-2, 4-6 (Sep. 30, 2011), <http://www.prch.org/prch-comments-faith-based-employers-exemption-hhs-contraception-insurance-rules> (stating that while there should be no religious exemption, if employers are exempted they should be required to notify employees in writing and provide prescriptions for contraceptive medication prescribed for purposes other than birth control), and Comments on CMS-9992-IFC2 from Reprod. Health Techs. Project et al. to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. 1 (Sep. 30, 2011), <http://www.rhthp.org/documents/CommentsonInterimFinalRuleonPreventiveServices-FINALHHS.pdf> (urging the inclusion of emergency contraceptives as preventative services for women), with Comments on CMS-9992-IFC2 from Alliance Def. Fund et al. to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 2 (Sep. 29, 2011), <http://www.cardinalnewmansociety.org/LinkClick.aspx?fileticket=3mLxfWWkTY%3D&tabid=36> (asserting that the religious exemption is unprecedented, narrow, and discriminatory), Comments on CMS-9992-IFC2 from Am. Ctr. For Law & Justice to Ctrs. for Medicare & Medicaid Servs. Dep't of

this area, all women should have coverage. Based on the aims of the WHA, PPACA, and the IOM study, which found that certain preventative services are necessary for women,¹⁷⁵ HHS should have applied the new rules to all employers, and all women, with no exemptions, thus achieving the goals of maximum preventative care for all women. By exempting certain entities and not others, the Administration faces numerous complaints from non-exempt employers despite the fact that all employers should be subject to neutral, generally applicable laws, like the mandate, that have a compelling government interest.¹⁷⁶ However, the current exemption and rule HHS has chosen to uphold is an adequate compromise, provided that women who work for exempt religious institutions have the ability to obtain equal coverage elsewhere without facing a financial burden because of their employers' religious beliefs.¹⁷⁷ The optimal solution is one in which all women, even those who work for exempted organizations such as churches, have equal access to necessary, IOM-recommended contraceptive services without bearing a higher cost burden or facing additional barriers to insurance access.

Health & Human Servs. 5 (Sep. 29, 2011), <http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/aclj-comments-HHS-dominican-sisters.pdf> (asserting that the "partial religious exemption" is likely unconstitutional and renders the legislation not generally applicable), U.S. Conference of Catholic Bishops Comments, *supra* note 55 (urging HHS to rescind the mandate because the coverage requirement is "unprecedented" and "radical" and has too narrow an exemption for religious employers), and Comments on CMS-9992-IFC2 from Family Research Council to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 1-2 (Sep. 30, 2011), <http://downloads.frc.org/EF/EF11158.pdf> (opposing the mandate for medical, practical, and religious reasons).

175. See CLOSING THE GAPS, *supra* note 9, at 2 & box.S-1.

176. See Sarah Lipton-Lubet, *Keep Your Beliefs Out of My Birth Control*, ACLU BLOG RIGHTS (Sep. 30, 2011, 1:56 PM), <http://www.aclu.org/blog/reproductive-freedom/keep-your-beliefs-out-my-birth-control> (noting that religious liberty does not extend to the imposition of religious beliefs on people who do not hold those beliefs). Because the pre-compromise plan would likely have been upheld, the addition of the burden to insurers may put women at risk of higher premiums or difficulty obtaining coverage if employed by an objecting employer. Radelat, *supra* note 169. However, this article attempts to analyze the rule and compromise assuming the Administration will be successful in its discussions with stakeholders and as such, any reaction from insurers that will jeopardize access is beyond its scope.

177. Lipton-Lubet, *supra* note 176.