

“Hobby–Lobby”–ing for Religious Freedom: Crafting the Religious Employer Exemption to the PPACA¹

*Emily Pitt Mattingly*²

INTRODUCTION

[F]aith is woven into their business. It is reflected in what they sell, in how they advertise, in how they treat employees, in how much they give to charity, and in the one day of the week when their stores are closed. In a profound way, their business is a ministry.³

FOUNDED and privately held by CEO David Green and his family, Hobby Lobby is one of the nation’s leading arts and crafts chains, operating over 500 stores in forty–one states with more than 13,000 full–time employees who are eligible for health insurance coverage.⁴ Despite its tremendous success, Hobby Lobby is currently in the midst of a battle to preserve its religious liberty.⁵

In September 2012, Hobby Lobby and a Christian bookstore chain, Mardel, filed a lawsuit in the Western District of Oklahoma, challenging on various religious grounds the Patient Protection and Affordable Care Act’s (PPACA)⁶ requirement that insurance provided by employers include coverage for women’s preventive screenings and health care, including contraception, at no additional cost to employees.⁷ Green has spoken about his family’s dilemma,

1 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29 and 42 U.S.C.) [hereinafter PPACA].

2 J.D. Candidate 2014, University of Kentucky College of Law; B.A. in History, 2011, Centre College. The author sincerely thanks M. Stephen Pitt and Thomas E. Rutledge for their guidance support throughout the writing process.

3 Plaintiffs’ Motion for Preliminary Injunction and Opening Brief in Support at 1, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (2012) (No. CIV–12–1000–HE), 2012 WL 5851136.

4 Tim Talley, *Hobby Lobby Sues over Health Care Reform Mandate to Cover Morning–After Pill*, HUFFINGTON POST (Sept. 12, 2012, 5:24 PM), http://www.huffingtonpost.com/2012/09/12/hobby-lobby-morning-after-pill_n_1878873.html.

5 *Pastor Rick Warren on Hobby Lobby Lawsuit*, BECKET FUND FOR RELIGIOUS LIBERTY (Jan. 4, 2013) [hereinafter Warren on Hobby Lobby], <http://www.becketfund.org/pastor-rick-warrens-on-hobby-lobby-lawsuit/>.

6 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111–148, § 1001, 124 Stat. 119, 131–32 (2010) (codified as part of Public Health Service Act at 42 U.S.C. § 300gg–13 (2012)).

7 See Steve Clark, *Laborers’ Health & Safety Fund of N. Am., PPACA Mandates Preventive Care; Women’s Provisions Stir Debate*, LIFELINES ONLINE (Sept. 2011), <http://www.lhsfna.org/index.cfm/lifelines/september–2011/ppaca-mandates-preventive-care/>.

explaining that, “[b]y being required to make a choice between sacrificing our faith [and] paying millions of dollars in fines, we essentially must choose which poison pill to swallow.”⁸ Indeed, with 13,000 employees and a proposed fine of \$100 per employee per day, Hobby Lobby’s failure to comply with the mandate would equate to \$1.3 million in daily fines.⁹ Following the U.S. Supreme Court’s denial of a preliminary injunction to prevent enforcement of the contraception–coverage requirement on December 26, 2012,¹⁰ the Green family released a statement disclosing its intent to defy the law despite the significant fines.¹¹

Hobby Lobby is representative of the numerous religious employers across the United States who have filed lawsuits challenging the PPACA’s contraceptive mandate. Although the majority of these cases have been dismissed in the district courts for various procedural reasons, a few have made their way to the federal courts of appeals.¹² Regarding the Hobby Lobby lawsuit, Pastor Rick Warren commented:

I predict that the battle to preserve religious liberty for all . . . will likely become the civil rights movement of this decade. If it takes a popular movement to reign in overreaching government, then Hobby Lobby’s courageous stand, in the face of enormous pressure and fines, will likely be considered the Birmingham bus boycott . . . Regardless of your faith, you should pay attention to this landmark case, and pray for a clear victory for freedom of conscience.¹³

Due to the numerous lawsuits filed and extensive media coverage of the contraceptive mandate controversy, the U.S. Supreme Court is likely to weigh in on the issue in the near future. But this Note does not attempt to make a decisive determination as to the constitutionality of the mandate. Rather, it seeks to identify discrepancies in the scarce precedent the U.S. Supreme Court has at its disposal, emphasize the criticism the current religious employer exemption has received. Ultimately, this Note argues that the religious exemption should be broadened to afford protection to certain religiously affiliated institutions that currently fail to qualify as “religious employers” under the current final interim rule amendment.¹⁴

8 Talley, *supra* note 4.

9 Ely Portillo, *Hobby Lobby President Expects Long Court Battle over Federal Contraceptives Mandate*, CHARLOTTE OBSERVER (Jan. 18, 2013), <http://www.charlotteobserver.com/2013/01/18/3795864/hobby-lobby-president-expects.html>.

10 Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012).

11 Neetzan Zimmerman, *Hobby Lobby Willing to Pay a Million Dollars a Day to Avoid Providing Employees with Coverage for Emergency Contraception*, GAWKER (Dec. 28, 2012, 4:41 PM), <http://gawker.com/5971855/hobby-lobby-willing-to-pay-a-million-dollars-a-day-to-avoid-providing-employees-with-coverage-for-emergency-contraception>.

12 *Next Wave of ACA Lawsuits Challenges Contraceptive Mandate*, 23 no. 3 MD. EMP. L. LETTER 5 (2012). See *Annex Med., Inc. v. Sebelius*, No. 13–1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Newland v. Sebelius*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

13 Warren on Hobby Lobby, *supra* note 5.

14 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Ser-

This is the crux of the problem: the interim final rule’s definition of “religious employer” excludes from exemption millions of religious organizations providing invaluable services to the general public—hospitals, soup kitchens, and school institutions—simply because they are not churches or church institutions.¹⁵ While a moderate expansion of the religious employer exemption to some nonprofit entities would afford exemption to certain religiously affiliated universities and hospitals, it would not fully address the public concern with the current exemption. The court should look past the artificial nonprofit buffer to provide exemptions to for–profit organizations—especially non–publicly traded, closely held corporations like Hobby Lobby—that are owned by people whose freedom to conduct their business in harmony with their religious beliefs is trampled upon by the contraceptive mandate.

Part I of this Note traces the background and development of section 2713 of the PPACA. Part II discusses the popular variations of exemptions to state–mandated prescription contraceptive coverage in comparison to the exemption adopted by the Department of Health and Human Services (HHS).¹⁶ As part of this discussion, Part II briefly outlines the only two state high court decisions that have dealt with the issue of contraceptive mandates and identifies various weak points in the opinions that undermine their value as “precedent” for the U.S. Supreme Court. For example, in *Catholic Charities of Sacramento v. Superior Court*, the California Supreme Court merely skimmed the surface of eight constitutional challenges asserted by a nonprofit organization in order to avoid an undoubtedly lengthy, but adequate and fair assessment of the claims.¹⁷ Similarly, in *Catholic Charities of the Diocese of Albany v. Serio*, the New York Court of Appeals was sharply dismissive of the plaintiff’s claims.¹⁸ Part II describes the nationwide discontent with the current exemption and identifies the potential economic and regulatory consequences of limiting it to such a narrow scope.

Finally, Part III justifies the need for a broader exemption. First, it advocates for passage of the “Notice of Proposed Rulemaking” (NPRM) announced February 1, 2013, by the Department of Health and Human Services intended to moderately broaden the scope of the religious employer exemption to the PPACA to reach certain nonprofit organizations.¹⁹ Part III also argues for

vices Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) [hereinafter Interim Final Rules].

15 See 45 C.F.R. § 147.130(a)(iv)(B) (2012); see also Interim Final Rules, *supra* note 14, at 8728.

16 Charged with promulgating regulations under the PPACA, the Department of Health and Human Services is the U.S. government’s principal agency in charge of health care and the provision of health services. See generally <http://www.hhs.gov/about/>.

17 See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

18 See *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

19 See Patricia Zapor, *HHS Issues Proposed Rules on Exemptions from Contraceptive Coverage*, CATHOLIC NEWS SERVICE (last updated Feb. 1, 2013), <http://www.catholicnews.com/data/stories/cns/1300438>. See also Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8459 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pt. 147) [hereinafter Pro-

further expansion of those proposed rules to ensure that Christian for-profit organizations like Hobby Lobby are not forced to comply with a law that goes against their religious beliefs.

I. HISTORY OF THE PPACA

A. Early Attempts at a Federal Coverage Mandate

The PPACA was signed into law on March 23, 2010 by the Obama Administration, ending a series of failed attempts to pass federal contraceptive coverage legislation.²⁰ Though access to prescription contraceptives has been available for years, employer-sponsored health insurance plans have rarely covered them.²¹ And while the PPACA represents the first time that the federal rules have *stipulated* that preventive services must be covered, previous federal action has been interpreted as a “de jure requirement” of coverage.²²

The Pregnancy Discrimination Act, arguably the most prominent of such action, was enacted in response to a controversial 1976 court ruling. In *General Electric Company v. Gilbert*, the U.S. Supreme Court held that an employer’s disability benefits plan did not violate Title VII of the Civil Rights Acts of 1964 in its failure to cover pregnancy-related disabilities.²³ In that case, the company repeatedly refused to extend disability benefits to their employees’ pregnancy-related work absences.²⁴ All other nonoccupational sickness accidents, however, were covered by the company’s disability plan.²⁵ Justice Rehnquist, for the majority, found that the company disability plan did not violate Title VII, since there was no showing that the exclusion of pregnancy disability benefits

posed Rules of February 2013].

20 PPACA, *supra* note 1, at § 2713; *see, e.g.*, Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Cong. (1st Sess. 2007); *see also Insurance Coverage for Contraception: A Proven Way to Protect and Promote Women’s Health*, NARAL PRO-CHOICE AM. FOUND. 4 (Jan. 1, 2010), <http://www.prochoiceamerica.org/assets/files/birth-control-insurance-coverage.pdf> (detailing unsuccessful litigation and legislative attempts for federal contraceptive-equity laws prior to enactment of the PPACA).

21 *See* CYNTHIA DAILARD, THE COST OF CONTRACEPTIVE INSURANCE COVERAGE, GUTTMACHER REP. ON PUB. POL’Y 2 (2003), *available at* <https://www.guttmacher.org/pubs/tgr/06/1/gr060112.html> (“Historically, private-sector insurance in the United States has failed to provide adequate coverage of prescription contraceptives.”).

22 Chad Brooker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 181 (2012).

23 *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

24 *Id.* at 129.

25 *Id.* at 128.

was a pretext “designed to effect invidious [sex] discrimination.”²⁶ In response, Congress passed the Pregnancy Discrimination Act of 1978 (PDA), amending Title VII “to prohibit sex discrimination on the basis of pregnancy.”²⁷

The intended effects of the PDA were immediately called into question in 1998, when, “[w]ithin weeks of hitting the U.S. market, more than half of Viagra prescriptions received health insurance coverage.”²⁸ Consequently, many women’s rights activists began to demand answers as to whether the PDA did in fact contemplate contraception coverage.²⁹ Many argued that it was unreasonable to cover treatment of male sexual dysfunction without providing for coverage that would reduce the number of unwanted pregnancies.³⁰ As one newspaper writer exclaimed, “the fury over Viagra may have given the fight for contraception covered under insurance plans just the momentum it needed.”³¹ Then, in 2000, it seemed that women’s rights activists got the response they had hoped for when the U.S. Equal Employment Opportunity Commission (EEOC) issued a decision announcing that employers must cover the expenses of prescription contraceptives to the same extent that they cover the expenses of other types of drugs and preventive care.³² Interestingly, much of the EEOC’s reasoning reflected the arguments made by the dissenters in *Gilbert* and those adopted by Congress when it passed the PDA.³³ But, while influential to the agency’s enforcement of Title VII, an EEOC decision lacks the force of law.³⁴ In fact, the Eighth Circuit effectively disregarded it in *In re Union Pacific Railroad*

26 *Id.* at 134–36.

27 Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

28 Geraldine Sealey, *Erections Get Insurance; Why Not the Pill?*, ABCNEWS (June 19, 2002), <http://abcnews.go.com/US/story?id=91538>; see Laura Meckler, *EEOC Preventive Insurance Includes Contraceptives*, ABCNEWS (Dec. 14, 2000), <http://abcnews.go.com/Health/story?id=117763&page=1>.

29 See, e.g., Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 373 (1998) (explaining that the PDA’s prohibition naturally applies to employee benefits, including health insurance coverage, “because health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’”).

30 *Contraceptive Equity Bills Gain Momentum in State Legislatures*, CTR. FOR REPRODUCTIVE RTS. (Aug. 1, 2005), <http://reproductiverights.org/en/document/contraceptive-equity-bills-gain-momentum-in-state-legislatures>.

31 Sealey, *supra* note 28.

32 EEOC ENFORCEMENT GUIDANCE: COMMISSION DECISION ON COVERAGE OF CONTRACEPTION (Dec. 14, 2000), available at Westlaw, 2000 WL 33407187.

33 See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 149 (1976) (Brennan, J., dissenting) (“Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly ‘sex related.’”); see also *id.* at 162 (Stevens, J., dissenting) (arguing that special treatment of pregnancy is sex discrimination because it is “the capacity to become pregnant which primarily differentiates the female from the male.”).

34 E.g., *In re Union Pac. R.R. Emp. Practices Litig.*, 378 F. Supp. 2d 1139, 1143 (D. Neb. 2005), *rev’d on other grounds*, 479 F.3d 936 (8th Cir. 2007) (“The EEOC’s policy is not binding on this Court, but is entitled to some deference, because the EEOC is the administrative body responsible for enforcement of Title VII and the PDA.”).

*Employment Practices Litigation*³⁵ when it ruled that exclusion of all prescription contraception from coverage under an employee health insurance plan does not constitute gender discrimination against female employees and thus does not violate Title VII as amended by the PDA.³⁶

In a final attempt to give the 2000 EEOC decision legal significance (and possibly in direct response to *In re Union Pacific*), Senator Reid and Representative Slaughter, both democrats, simultaneously introduced the Equity in Prescription Insurance and Contraceptive Act “to require . . . coverage of prescription contraceptive drugs and devices and contraceptive services under health plans.”³⁷ However, like its predecessor, the Putting Prevention First Act of 2004,³⁸ the bill failed to gain passage. Both bills would have mandated full coverage without cost sharing and with no exemptions for religious institutions.³⁹

B. *The Institute of Medicine (IOM) Report and HHS Decision*

Generally, the PPACA represents an effort to provide health coverage to the majority of Americans.⁴⁰ While that objective itself has been under significant political scrutiny,⁴¹ the provision mandating coverage of contraceptives as part of preventive care for women is the subject of the most recent debate—a debate with its deepest roots in religious, rather than political, ideology.⁴²

The controversial women’s preventive care provision nearly did not exist. In fact, it was not included in the original draft of the PPACA.⁴³ Rather, this

³⁵ *In re Union Pac. R.R. Emp. Practices Litig.*, 479 F.3d 936, 944 (8th Cir. 2007).

³⁶ *See id.*

³⁷ Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Cong. (1st Sess. 2007); Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, S. 3068, 110th Cong. (2d Sess. 2008).

³⁸ Putting Prevention First Act of 2004, H.R. 4192, 108th Cong. (2d Sess. 2004); Putting Prevention First Act of 2004, S. 2336, 108th Cong. (2d Sess. 2004).

³⁹ Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Cong. §§ 3–4 (1st Sess. 2007); Putting Prevention First Act of 2004, H.R. 4192, 108th Cong. §§ 301–04 (2d Sess. 2004).

⁴⁰ Elizabeth J. Bondurant & Steven D. Henry, *Constitutional Challenges to the Patient Protection and Affordable Care Act*, 78 DEF. COUNS. J. 249, 249 (2011) (“The PPACA focuses on reform of the health insurance market and attempts to provide better coverage for those with pre-existing conditions and improved prescription drug coverage in Medicare. . . . However, its most notable and far reaching legislative mandate is its requirement that each American purchase health insurance.”); *see, e.g.*, President Barack Obama, Remarks at Signing of PPACA (Mar. 23, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill>.

⁴¹ Bondurant & Henry, *supra* note 40 (“The PPACA has produced strong emotions across the political spectrum.”).

⁴² *See* Jennifer Haberkorn & Kathryn Smith, *ACA Now Faces Contraception Test*, POLITICO, (Nov. 9, 2012, 4:41 AM), <http://www.politico.com/news/stories/1112/83599.html>.

⁴³ Adam Sonfield, *Contraception: An Integral Component of Preventative Care for Wom-*

key provision was added in response to recommendations offered by the U.S. Preventive Services Task Force (USPSTF) regarding the frequency and type of preventive care individuals should be entitled to receive.⁴⁴ The Women’s Health Amendment (WHA) filled the gaps in the USPSTF’s recommendations by requiring the Department of Health and Human Services (HHS) to identify a fourth category of services that should be covered: women’s preventive care and screening.⁴⁵ The WHA was introduced by Senator Barbara Mikulski and passed on December 3, 2009—making it the first amendment voted on and passed in the Senate during the health reform legislative process.⁴⁶

Under the added WHA provisions, HHS was required to propose comprehensive and evidence–based guidelines for women’s preventative health coverage.⁴⁷ In order to promulgate such guidelines, HHS Secretary Kathleen Sebelius requested that a panel of experts convened by the Institute of Medicine (IOM) “review the science and make recommendations for what women’s

en, GUTTMACHER POL’Y REV., Spring 2010, at 2, available at <http://www.guttmacher.org/pubs/gpr/13/2/gpr130202.html>.

44 The USPSTF is an independent panel of nonfederal health experts, including primary care providers, health behavior specialists, and methodologists. “Its mission is twofold: (1) assess the benefits and harms of preventive services for people asymptomatic for the target condition on the basis of age, gender, and risk factors for disease; and (2) make recommendations about which preventive services should be incorporated into routine primary care practice.” COMM. ON PREVENTIVE SERVICES FOR WOMEN, INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 29 (2011) [hereinafter IOM Report].

45 See *Denying Coverage of Contraceptives Harms Women*, NAT’L WOMEN’S LAW CTR. (Aug. 23, 2012), http://www.nwlc.org/sites/default/files/pdfs/fs_on_the_relig_exempt_to_cc_without_cost-sharing_november_2011.pdf. The WHA additions to PPACA § 2713 provide the following:

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

- (1) evidence–based items or services that have in effect a rating of ‘A’ or ‘B’ in the current recommendations of the United States Preventive Services Task Force;
- (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and
- (3) with respect to infants, children, and adolescents, evidence–informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration. [And]
- (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

PPACA, *supra* note 1, at § 1001 (codified as part of Public Health Service Act at 42 U.S.C. § 300gg–13 (2012)).

46 Press Release, Sen. Barbara A. Mikulski, Mikulski Puts Women First in Health Care Reform Debate: Senator Introduces First Amendment to Senate Health Care Reform Bill to Guarantee Women Access to Preventive Health Screenings and Care at No Cost (Nov. 30, 2009), <http://www.mikulski.senate.gov/media/pressrelease/11-30-2009-2.cfm>.

47 Rebecca Hall, Comment, *The Women’s Health Amendment and Religious Freedom: Finding a Sufficient Compromise*, 15 J. HEALTH CARE L. & POL’Y 401, 407 (2012).

preventive health services should be covered.”⁴⁸ The IOM Committee, acting as the scientific resource for HHS’s final coverage rule, focused on diseases and conditions more common in women than in men.⁴⁹ Between November 2010 and May 2011, the IOM Committee held three informative meetings on preventive services for women and “gathered extensive information on numerous topics related to health and health care services for women.”⁵⁰ It held public forums in which women’s health organizations, national health interest groups, and other experts issued statements to the Committee on the latest developments in their respective fields.⁵¹

Perhaps most significant in its findings was the fact that contraception and contraceptive counseling were not included in the range of preventive services available to women under the PPACA.⁵² Therefore, in July of 2011, the IOM published its final report, “Clinical Preventive Services for Women: Closing the Gaps,” where it recommended for consideration as a preventive service for women, among other things, “the full range of Food and Drug Administration–approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”⁵³

However, per the WHA’s instruction, the IOM’s recommendations had to be “supported by the Health Resources and Services Administration” (HRSA) before they could be implemented.⁵⁴ After presentation, the HRSA adopted them in large part on August 1, 2011.⁵⁵ Consequently, new health plans had to include, inter alia, “FDA–approved contraception methods and contraceptive counseling” without cost sharing for “insurance policies with plan years beginning on or after August 1, 2012.”⁵⁶

48 Press Release, Sen. Barbara A. Mikulski, Mikulski Applauds Adoption of IOM Guidelines for Women’s Preventive Health (Aug. 1, 2011), <http://www.mikulski.senate.gov/media/press-release/8-1-2011-1.cfm>.

49 *Id.*

50 IOM Report, *supra* note 44, at 22–23.

51 *Id.* at 23.

52 *Id.* at 109. As support for its following recommendation (Recommendation 5.5), the IOM Report cited evidence that

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

Id. (citation omitted).

53 *Id.* at 109–10. This is formally labeled “Recommendation 5.5” in the IOM Report.

54 See Adam Marks, Student Article, *Good Health and Low Costs: Why the PPACA’s Preventive Care Provisions May Not Produce Expected Outcomes*, 23 LOY. CONSUMER L. REV. 486, 488–89 (2011).

55 Press Release, U.S. Dept of Health & Human Services, Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html>.

56 *Id.*

C. Formation of the Religious Employer Exemption and the Accommodation

After the interim final regulations (which included the IOM’s recommendations) were publicized, HHS requested public comments and received considerable feedback on the list of specific preventive services for women that should be covered under § 2713(a)(4).⁵⁷ While many commenters supported the inclusion of contraceptive services for all women with no exemptions, others stressed that requiring religious employers’ group health plans to cover services “that their faith deems contrary to its religious tenets” would encroach upon their religious freedom.⁵⁸ Some religious employers do not currently cover contraceptive services in their plans for precisely that reason.⁵⁹

In response to the negative feedback, HHS found it “appropriate that HRSA, in issuing these Guidelines, take[] into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate.”⁶⁰ The interim final rules were thus amended to provide the HRSA increased discretion to exempt religious employers from compliance with its guidelines respecting the provision of contraceptive services.⁶¹

After incorporating HRSA’s recommendations, HHS’s proposed amendment to the final interim rules provided that:

[F]or purposes of this policy, a religious employer is one that: (1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non–profit organization under [certain sections of the Internal Revenue Code which] refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.⁶²

The exemption was narrow to say the least. One commentator has called it “the narrowest religious exemption ever adopted in federal law.”⁶³ HHS

⁵⁷ 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) (codified at 45 C.F.R. § 147.130(a)(iv)(B) (2012)) [hereinafter *Amendments to Interim Final Rules*].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS WITH RESPECT TO PHSA § 2713 [hereinafter *HRSA GUIDELINES*], available at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf>.

⁶² Amendments to Interim Final Rules, *supra* note 57, at 46,623.

⁶³ Eric V. Hall, *Religious Employer Exemption Under the Federal Mandate for All Health Plans*, LEWIS ROCA ROTHGERBER (Sept. 28, 2011), <http://www.lrlaw.com/religious-employer-exemption-under-the-federal-mandate-for-all-health-plans-09-28-2011>. For comparison, see 42

explained that the above definition will “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 HHS accepted comments and considered alternative definitions until January 20, 2012, when HHS Secretary Sebelius announced the adoption of the religious employer exemption as it was initially defined in the proposed amendment to the interim final rules.⁶⁵

Despite Sebelius’s assertion that the final rule would have “no impact on the protections that existing conscience laws and regulations give to health care providers,”⁶⁶ it immediately sparked intense public outrage—particularly from the huge class of purported religious employers that failed to qualify for the exemption under the narrow definition provided in the final rule. In effect, under HHS’s adopted definition of “religious employer,” only one segment of employer, such as churches and other “houses of worship,” is exempt from providing contraceptive coverage.⁶⁷

Contemporaneous with the issuance of the final rules, HHS issued guidelines establishing a temporary enforcement safe harbor, under which “non-exempted, non-grandfathered group health plans established or maintained by nonprofit organizations”⁶⁸ that traditionally did not cover prescription contraceptives for religious reasons, were granted an additional year to comply with the rules (i.e. until the first plan year beginning on or after August 1, 2013).⁶⁹ This was the Obama Administration’s attempt to reach out and “accommodate” religious organizations that do not meet the requirements for exemption but nonetheless make religious objections to covering contraceptive services, while still ensuring that female employees receive contraceptive coverage without cost sharing.⁷⁰ HHS announced its willingness to compromise by maintaining the adopted definition of “religious employer” as required under the exemption, but ensuring that

U.S.C. § 2000e-1(a) (2012) (providing that religious organizations may discriminate “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious organization] . . . of its activities”).

⁶⁴ *Id.*

⁶⁵ See Press Release, U.S. Dep’t of Health & Human Services, 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>.

⁶⁶ *Id.*

⁶⁷ See *Contraceptive Coverage in the Health Care Law: What’s New as of August 1, 2012?*, NAT’L WOMEN’S LAW CTR. (Feb. 25, 2013), <http://www.nwlc.org/resource/contraceptive-coverage-health-care-law-what%E2%80%99s-new-august-1-2012>; see also Amendments to Interim Final Rules, *supra* note 57, at 46,623.

⁶⁸ HRSA GUIDELINES, *supra* note 61, at 2-4.

⁶⁹ *Id.*

⁷⁰ See *id.*

[b]efore the end of the temporary enforcement safe harbor, the Departments [of Health and Human Services, Labor, and the Treasury] 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 sponsored by non-exempted, non-profit religious organizations with religious objections to contraceptive coverage.⁷¹

In March 2012, HHS issued an Advance Notice of Proposed Rulemaking (ANPRM) in order to express its intention to promulgate the above amendments to the final regulations, and opened itself up to public feedback for a ninety-day period.⁷² Despite this attempt to appease non-exempt, nonprofit religious employers, religiously affiliated entities voiced their increased dissatisfaction with the ambiguous and uncertain nature of the proposed accommodation.⁷³ While it may have pacified some nonprofit employers who believe themselves to be far enough removed from the equation that they are not actually facilitating the use of contraceptives, many nonprofit employers who objected to the law still feel that they are ultimately compelled to provide access to the contraceptives.⁷⁴

71 Interim Final Rules, *supra* note 14 at 8728 (emphasis added).

72 Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,503, 16,508 (Mar. 21, 2012); see News Release, U.S. Dep’t of Health & Human Services, Administration Releases Advance Notice of Proposed Rulemaking on Preventive Services Policy (Mar. 16, 2012), <http://www.hhs.gov/news/press/2012pres/03/20120316g.html>.

73 See, e.g., Press Release, U.S. Conference of Catholic Bishops, United for Religious Freedom: A Statement of the Administrative Committee of the United States Conference of Catholic Bishops (Mar. 14, 2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf> (“One particular religious freedom issue demands our immediate attention: the now-finalized rule of the U.S. Department of Health and Human Services that would force virtually all private health plans nationwide to provide coverage of sterilization and contraception—including abortifacient drugs—subject to an exemption for ‘religious employers’ that is arbitrarily narrow, and to an unspecified and dubious future ‘accommodation’ for other religious organizations that are denied the exemption.”).

74 See Mark L. Rienzi, Senior Counsel for Becket Fund for Religious Liberty, *Constitutional Challenges: Religious Liberty and the HHS Mandate*, Address at the Brendan F. Brown Lecture Series (Oct. 3, 2012), in 29 J. CONTEMP. HEALTH L. & POL’Y 1, 4–5 (2012).

II. CONSEQUENCES OF MAINTAINING SUCH A NARROW EXEMPTION

A. *Scope of State Exemptions*

As explained above, adoption of section 2713 of the PPACA meant that for the first time, women would not have to pay a deductible or co-payment to get prescription contraceptives. This “no cost” portion is really the only innovation, for as one commentator has pointed out regarding the mandatory coverage requirement, “as a legal matter, [and as] a constitutional matter, it’s completely unremarkable.”⁷⁵ Employers have been required to provide contraceptive coverage as part of their employee health benefit plans since the EEOC decision in 2000.⁷⁶

There are currently twenty-eight states requiring insurers that cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices.⁷⁷ Of those twenty-eight states, twenty allow certain insurers and employers to avoid compliance by qualifying under a “religious employer” exemption.⁷⁸ HHS maintains that their definition of “religious employer” is “consistent with [that of] most states that have such exemptions.”⁷⁹ However, a closer look at the breakdown of state exemptions reveals that these definitions vary—while three states choose only to exempt churches and church associations, nine states extend exemption status to religious organizations (including at least some hospitals) and seven provide some sort of middle ground.⁸⁰ So in reality, HHS’s definition is merely consistent with the approach taken by the smallest groups of those states that have such exemptions.

⁷⁵ Julie Rovner, *Rules Requiring Contraceptive Coverage Have Been in Force for Years*, KAISER HEALTH NEWS (Feb. 10, 2012), <http://www.kaiserhealthnews.org/stories/2012/february/10/npr-contraception-rules-in-force-for-years.aspx>.

⁷⁶ *Id.*; see *supra* note 32 and accompanying text.

⁷⁷ *State Policies in Brief: Insurance Coverage of Contraceptives*, GUTTMACHER INST., http://www.guttmacher.org/pubs/spib_ICC.pdf (last updated Sept. 1, 2013).

⁷⁸ *Id.*

⁷⁹ Amendments to Interim Final Rules, *supra* note 57 (“The definition of religious employer, as set forth in the amended regulations, is based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services.”).

⁸⁰ *State Policies in Brief: Insurance Coverage of Contraceptives*, *supra* note 77. The Guttmacher Institute divides the states into three categories: (1) those with “limited” refusal clauses (includes only churches and church associations); (2) those with “broader” refusal clauses (includes churches, church associations, religiously affiliated elementary and secondary schools, and some charities and universities); and (3) those with “expansive” refusal clauses (includes religious organizations and at least some hospitals). *Id.*

B. State Decisions May Prove Poor Precedent

Right now HHS has such a narrow standard as to who operates a religious ministry, Jesus himself couldn't pass muster. . . . His chief teaching about serving one's neighbor highlights the Good Samaritan who took care of a weebegone stranger by providing medical care, food and lodging. Jesus did not say anything about checking the man's religious affiliation beforehand. There was no catechism test afterwards. The point of the story is to help anyone who needs help.⁸¹

Out of the twenty states with religious employer exemptions, California, New York, and Oregon are the only three states, to date, to craft them so narrowly that only churches and church associations are allowed to refuse compliance with mandated contraception coverage.⁸² Interestingly, in the past decade there have only been two legal challenges to state–mandated contraception coverage—one in California and one in New York.⁸³ Both states' statutes are consistent in defining a “religious employer” for purposes of the exemption:

A “religious employer” is an entity for which each of the following is true:
 (A) The inculcation of religious values is the purpose of the entity.
 (B) The entity primarily employs persons who share the religious tenets of the entity.
 (C) The entity serves primarily persons who share the religious tenets of the entity.
 (D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)(i) or (iii), of the Internal Revenue Code of 1986, as amended.⁸⁴

In both cases, the states' high courts upheld the challenged mandates.⁸⁵ This is significant in light of the fact that the federal mandate's definition of “religious employer” for purposes of the exemption is identical to that of California, New York, and Oregon.⁸⁶

Despite the fact that no state contraception coverage mandate—with or without a religious exemption—has ever been overturned by the judiciary,⁸⁷

81 Sister Mary Ann Walsh, *Jesus Won't Pass Muster at HHS*, USCCB BLOG (Sept. 12, 2011, 10:24 AM), <http://usccbmedia.blogspot.com/2011/09/jesus-wont-pass-muster-at-hhs.html>.

82 *State Policies in Brief: Insurance Coverage of Contraceptives*, *supra* note 77 (noting that California, New York, and Oregon are the only three states to include a “limited” refusal clause, which “allows only churches and church associations to refuse to provide coverage, and does not permit hospitals or other entities to do so”).

83 See *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 CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A)–(D) (West 2008); accord N.Y. INS. LAW § 3221[f][16][A][1] (McKinney 2006). The cited provisions of the Internal Revenue Code exempt “churches, their integrated auxiliaries, and conventions or associations of churches” as well as “the exclusively religious activities of any religious order” for purposes of filing annual returns. I.R.C. § 6033(a)(2)(A)(i), (iii) (2012).

85 *Catholic Charities of Sacramento*, 85 P.3d at 95; *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 468.

86 Interim Final Rules, *supra* note 14, at 8728.

87 See, Nancy Frazier O'Brien, *State contraceptive mandates widespread but not as broad as*

there have been several challenges to the federal contraception mandate in the recent past and present,⁸⁸ with more almost certain to be filed soon.⁸⁹ In light of the persistent opposition to the scope of the federal mandate's religious exemption, as well as the weighty religious freedom questions at stake, it is increasingly likely that the U.S. Supreme Court will soon step in to resolve the issue. Regardless of whether the state courts ultimately reached the correct decision, there are significant areas of weakness in the California and New York high courts' opinions that demonstrate, at the very least, the inadequate attention given to meritorious arguments. Because the New York Court of Appeals decided *Catholic Charities of the Diocese of Albany v. Serio*⁹⁰ merely two years after the California Supreme Court decided *Catholic Charities of Sacramento v. Superior Court*⁹¹ using largely the same argument to reach an identical conclusion, it is sufficient to focus on the apparent ambiguities and loopholes left in the California Supreme Court decision that renders it weak precedent for the U.S. Supreme Court to follow.

Prior to 1999, state legislatures commonly offered a "conscience clause" exemption to laws that conflicted with religious doctrine.⁹² In many states, such clauses were narrowed and renamed "refusal clauses" at about the same time the United States saw the emergence of state contraceptive mandates.⁹³ In 2001, Catholic Charities of Sacramento filed suit against the State of California to challenge one such "limited refusal clause" provided in the California Women's Contraception Equity Act (CAWCEA).⁹⁴ The CAWCEA sought to eliminate sex discrimination in health care benefits by regulating the terms of insurance contracts. While it did not affirmatively require any employer to provide employees with coverage of prescription drugs, if they chose to include such coverage, prescription contraceptives had to be included.⁹⁵ In order to

HHS plan, CATHOLIC NEWS SERVICE (Aug. 8, 2011), <http://www.catholicnews.com/data/stories/cns/1103146.htm>.

88 See, e.g., Complaint, *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2012 WL 5851136 (W.D. Okla. Sept. 12, 2012); Complaint, *Newland v. Sebelius*, No. 1:12-CV-1123, 2012 WL 1536098 (D. Colo. Apr. 30, 2012); Complaint, *Colo. Christian Univ. v. Sebelius*, No. 11-CV-03350-CMA-BNB (D. Colo. Dec. 21, 2011); Complaint, *Belmont Abbey Coll. v. Sebelius*, No. 1:11-CV-01989, 2011 WL 8997549 (D.D.C. Nov. 10, 2011).

89 See News Release, U.S. Conference of Catholic Bishops, U.S. Bishops Vow to Fight HHS Edict (Jan. 20, 2012), <http://www.usccb.org/news/2012/12-012.cfm> ("The Catholic bishops are committed to working with our fellow Americans to reform the law and change this unjust regulation. We will continue to study all the implications of this troubling decision.")

90 859 N.E.2d at 464.

91 85 P.3d at 76.

92 See, e.g., *Background: Religious Liberty*, CAL. CATHOLIC CONF. (Nov. 28, 2011) (describing the history of this legislative practice in California), <http://www.cacatholic.org/index.php/issues2/religious-liberty/181-background-religious-liberty>.

93 See *State Policies in Brief: Insurance Coverage of Contraceptives*, *supra* note 77.

94 CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2008); *Catholic Charities of Sacramento*, 85 P.3d at 95.

95 HEALTH & SAFETY § 1367.25(a)(i).

avoid curtailing employer’s religious practices, the CAWCEA did provide a narrow exception for “religious employers,” under which those who met each of four criteria (detailed above) could request a policy, including drug coverage generally, but excluding coverage for “contraceptive methods that are contrary to the religious employer’s religious tenets.”⁹⁶

Catholic Charities is a nonprofit social service organization dedicated to stewardship that provides, among other things, care to the elderly, food and housing for the poor, and aid to the disabled.⁹⁷ Because this charitable organization did not qualify as a “religious employer” under the strict parameters of the CAWCEA’s exemption, yet desired to continue providing prescription drugs to its employees, it sought a preliminary injunction to preclude enforcement of the mandate.⁹⁸ In March 2004, however, the California Supreme Court validated the exemption (thus upholding the mandate).⁹⁹ In doing so, it rejected all eight constitutional challenges to the CAWCEA—three of which pertained to the Establishment Clause, three to the Free Exercise Clause, one specifically under the California Constitution, and one under the Fourteenth Amendment.¹⁰⁰

Regarding its Establishment Clause Claim, Catholic Charities was primarily concerned with the state’s ability to distinguish an entity’s secular activities from its religious activities.¹⁰¹ This argument is particularly relevant because it pertains directly to the four criteria outlined in the CAWCEA’s religious employer exemption.¹⁰² Specifically, Catholic Charities argued that “the distinctions drawn by the Legislature between religious organizations engaging in purportedly ‘religious activities,’ as opposed to those engaging in purportedly ‘secular activities,’ are wholly contrary to Roman Catholic teaching, which regards religious organizations, such as Catholic Charities, as vital Roman Catholic religious ministries.”¹⁰³ In response, the state supreme court emphasized that “[t]he United States Supreme Court has long recognized that the alleviation of significant governmentally created burdens on religious exercise is a permissible legislative purpose that does not offend the establishment clause.”¹⁰⁴ In the state court’s line of reasoning, the CAWCEA’s

96 *Id.* § 1367.25(b). See *supra* text accompanying note 84.

97 *Our Focus*, ROMAN CATHOLIC DIOCESE OF SACRAMENTO, http://www.diocese-sacramento.org/social_service_ministry/social_service_ministry.html (last visited Oct. 13, 2013).

98 The preliminary injunction was denied by the trial court, and affirmed on appeal. *Catholic Charities of Sacramento, Inc. v. Superior Court*, No. C037025, 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 2001).

99 *Catholic Charities of Sacramento*, 85 P.3d at 76, 79.

100 *Id.* at 73–74, 76.

101 *Id.* at 79.

102 CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2008).

103 Maureen K. Bailey, *Contraceptive Insurance Mandates and Catholic Charities v. Superior Court of Sacramento: Towards a New Understanding of Women’s Health*, 9 TEX. REV. L. & POL. 367, 376 (2005).

104 *Catholic Charities of Sacramento*, 85 P.3d at 79 (citations omitted).

“accommodation” of religion would be worthless if the state legislature could not distinguish between religious and secular activities.¹⁰⁵

The California Supreme Court’s response was weak in several ways. First, the court did not resolve the issue of the extent to which the government can “premis[e] a religious institution’s eligibility for an exemption” upon a certain characterization.¹⁰⁶ Rather, the court merely stated that the legislature’s action in creating an exemption for certain religious entities was justified.

Second, the court found support for its decision in cases that could be factually distinguishable from the situation in *Catholic Charities*. The court seemed ready and willing to distinguish *Espinosa v. Rusk*¹⁰⁷ on its facts, which was cited by Catholic Charities in support of its Establishment Clause claim. However, the court cites both *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos*¹⁰⁸ and *East Bay Asian Local Development Corp. v. California*¹⁰⁹ as examples of cases in which the judiciary upheld Congressional distinctions between secular and religious activities, the court fails to take notice of the distinguishable facts in these cases: that the courts in neither *Amos* nor *East Bay* had a *need* to distinguish between secular and religious activities because they crafted their religious exemptions much more broadly. This was a significant distinction the court should have made between those cases and *Catholic Charities of Sacramento*.¹¹⁰

Finally, the Achilles heel in the opinion lies in its response to the Catholic Charities’ excessive entanglement argument. When Catholic Charities contended that the law fostered “an excessive government entanglement with religion,” the court declined to address the larger issue, resolving the case instead on its specific facts.¹¹¹ Catholic Charities had tried to bring the larger

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* That is, the government may characterize an entity’s activities as either secular or religious for purposes of the exemption.

¹⁰⁷ *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980); see *Catholic Charities of Sacramento*, 85 P.3d at 79 (“*Espinosa* addressed the different problem of content-based prior restraints on speech”).

¹⁰⁸ See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter–Day Saints v. Amos*, 483 U.S. 327, 329–30 (1978).

¹⁰⁹ See *E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1128 (Cal. 2000).

¹¹⁰ For example, the statute upheld by the court in *East Bay* stated that the mandate

shall not apply to a noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur:

(1) The association or corporation objects to the application of the subdivision to its property.

(2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

E. Bay Asian Local Dev. Corp., 13 P.3d at 1140 (citing CAL. GOV’T CODE § 25373(d) (West 2003)).

¹¹¹ *Catholic Charities of Sacramento*, 85 P.3d at 80.

Constitutional issues before the court, *conceding* in its complaint that it did not meet the four requirements for religious exemption. As the California Court of Appeal noted,

Catholic Charities concedes that it does not meet any of the four criteria necessary to qualify for the religious employer exception. It serves people of all faiths and does not proselytize or attempt to inculcate those it serves with its religious beliefs. Its employees, 74 percent of whom are not Catholic, come from a diverse group of religious faiths. It offers social services to the general public that promote a just and compassionate society, reduce the causes of poverty, and build healthy communities. And it is a nonprofit public benefit organization exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code, rather than section 6033(a)(2)(A)(i) or (iii) of that code.¹¹²

So in that *particular* case, the California Supreme Court did not need to affirmatively answer whether or not the government’s exemption is “excessively entangled” with religion. Instead, it merely suggested that

[t]he argument might have merit as applied to a hypothetical employer that sought to qualify under the [CAWCEA]’s exemption for religious employers . . . but objected on establishment clause grounds to an entangling official effort to verify that its purpose was the inculcation of religious values, and that it primarily employed and served persons who shared its religious tenets.¹¹³

Such an unresponsive decision opens the door to future claims by employers attempting to distinguish themselves from Catholic Charities simply by avoiding concession of their disqualification under the exemption.

The California Supreme Court did not end the exemption inquiry after it rejected Catholic Charities’ Establishment Clause claims. But while it entertained the plaintiff’s Free Exercise arguments, its second analysis proved as insufficient as its first. Catholic Charities argued that the CAWCEA coerced it to violate its religious beliefs in that “the CAWCEA, by regulating the content of insurance policies, in effect requires employers who offer their workers insurance for prescription drugs to offer coverage for prescription contraceptives.”¹¹⁴ The court, applying the general rule articulated in *Employment Division, Department of Human Resources of Oregon v. Smith*, countered that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹¹⁵

As with the court’s Establishment Clause analysis, there are a couple of discrepancies in the majority’s opinion with regard to Free Exercise. After *Smith*, it is clear that such neutral, generally applicable laws do not have to be

¹¹² *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 183–84 (Cal. Ct. App. 2001).

¹¹³ *Catholic Charities of Sacramento*, 85 P.3d at 80.

¹¹⁴ *Id.* at 81.

¹¹⁵ *Id.* (quoting *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)).

justified by a compelling state interest.¹¹⁶ However, the text of the rule in *Smith* specifically pertains to an “individual.”¹¹⁷ Indeed, the court in *Catholic Charities of Sacramento* glosses over the fact that certain courts have expressly held that religious “institutions” have no place in a *Smith* context.¹¹⁸ But whether or not *Smith* pertains to religious institutions, the fact is that the applicability of *Smith* is not as obvious as the California Supreme Court seems to think it is.¹¹⁹ If *Smith* does not apply, the State of California would have to demonstrate a compelling state interest in excluding only churches and church associations from compliance with the contraceptive mandate in order to avoid a Free Exercise violation under strict scrutiny analysis.¹²⁰ While the court, apparently playing devil’s advocate, did contemplate such an interest, it again missed the mark.

The purpose behind the CAWCEA was twofold: addressing the state’s problem of gender discrimination and improving access to prescription contraceptives.¹²¹ The attempt to reduce discrimination seems to be a legitimate goal in light of the legislature’s finding that “women during their reproductive years spent as much as 68% more than men in out-of-pocket health care costs.”¹²² However, regarding access to contraception, the legislature found that “while most health maintenance organizations (HMO’s [sic]) covered prescription contraceptives, not all preferred provider organization (PPO) and indemnity plans did. As a result, approximately 10% of commercially insured Californians did not have coverage for prescription contraceptives.”¹²³ To reiterate, ten percent did not have contraceptive coverage. That is a very small number in light of the fact that, as the dissent in *Catholic Charities of Sacramento* points out, “[t]he insurance gap itself is not large, and Catholic Church employers can constitute only a small percentage of that small percentage.”¹²⁴

116 Employment Div., Dep’t. of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990).

117 *Id.*

118 See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303 (11th Cir. 2000); see also Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1070 (2000) (explaining that circuits are split as to whether *Smith* applies to religious institutions).

119 *Smith*’s applicability to institutions is an unsettled issue. See Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992) (extending *Smith* to cover a Christian school).

120 Under *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963), the Court determined that laws allegedly burdening the exercise of religion must be examined under strict scrutiny, meaning that the government must show that the measure is narrowly tailored to serve a compelling state interest.

121 *Catholic Charities of Sacramento*, 85 P.3d at 74.

122 *Id.*

123 *Id.*

124 *Id.* at 108 (Brown, J., dissenting).

C. An Expansion to the Exemption for a Contraction of Public Outcry

What if the state courts were all too quick in their decision to validate a narrowly crafted exemption? Finding loopholes in these two state opinions does not itself support the need for a broader exemption. It merely casts a strong shadow of doubt on the credibility of those who decided such an exemption was not in violation of the constitutional rights of religiously affiliated entities. But there is more value from the above analysis than might be apparent at first glance. Both *Catholic Charities of Sacramento* and *Catholic Charities of the Diocese of Albany* effectively illustrate just how strong the negative public sentiment was almost ten years ago toward the state exemptions that so greatly influenced HHS when it crafted the current religious employer exemption from the PPACA.

With the passage of PPACA section 2713 in 2010, nationwide dissatisfaction with the narrowness of the religious employer exemption echoed Californians' earlier responses to CAWCEA. Since the moment of the PPACA's inception, the outcry over the contraception coverage mandate has only escalated. Litigation began in November 2011 with the filing of *Belmont Abbey College v. Sebelius*.¹²⁵ Since then, the Becket Fund, which credits itself with leading the charge against the mandate, has represented eight religiously affiliated colleges and institutions, including Hobby Lobby.¹²⁶ To date, there are seventy-four lawsuits challenging the mandate across the United States on behalf of over 200 plaintiffs.¹²⁷

Immediately after the Obama Administration announced its plan for “accommodation” and issued the Advance Notice of Proposed Rulemaking (ANPRM) in March 2012, public feedback poured in to HHS during the designated ninety-day comment period. In fact, it has been estimated that a wide variety of stakeholders sent over 200,000 comments to the Department.¹²⁸ While some comments specifically expressed preferences for alternative means of accommodating religious employers, many weighed in on changing the scope of the exemption itself.¹²⁹

A review of the comments suggests that the Administration is likely to face real economic and regulatory consequences if it maintains such a narrow scope for religious exemption. Particularly intriguing are the following: (1) Employers may not actually know the religious beliefs of those they hire or serve, which precludes them from qualification under the current exemption's second and

¹²⁵ See Complaint, *Belmont Abbey College v. Sebelius*, No. 1:12-cv-01169-ESH, 2011 WL 8997549 (D.D.C. Nov. 10, 2011).

¹²⁶ See *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Oct. 15, 2013).

¹²⁷ *Id.* For a complete, updated list of all HHS mandate lawsuits, see <http://www.becketfund.org/hhsinformationcentral/>.

¹²⁸ Proposed Rules of February 2013, *supra* note 19, at 8459.

¹²⁹ See *id.*

third criteria.¹³⁰ These employers argue that they are forbidden from inquiring about religious beliefs during the hiring process in order to comply with various employment discrimination laws.¹³¹ (2) If the HHS's narrow definition of "religious employer" is maintained, employees may ultimately lose health coverage altogether, as some employers express increased unwillingness to offer coverage to which they take religious exception.¹³² In fact, one study estimated that as of July 2012, around ten percent of employers would simply drop coverage and send their employees to government-run exchanges.¹³³ Another study, conducted by the Congressional Budget Office, projected that as many as twenty million fewer Americans could have employer-sponsored insurance (ESI) by 2019.¹³⁴ (3) Finally, many emphasized that other federal laws, including the PPACA in its additional provisions, have broader conscience clauses and religious exemptions than the HHS final interim rule,¹³⁵ and expressed concern that such a narrow definition sets a precedent for use in other areas of federal and state law.¹³⁶

The sheer number of lawsuits demonstrates widespread dissatisfaction and now that the public has had an opportunity to express its discontent to the federal government in an organized fashion, HHS may find that the apparent consequences of maintaining the current religious employer exemption to section 2713 of the PPACA outweigh the mandate's intended benefits—access and equality—which have been consistently articulated throughout its legislative history.

¹³⁰ *Id.*

¹³¹ See *Religious Accommodation in the Workplace: Your Rights and Obligations*, ANTI-DEFAMATION LEAGUE 3-4 (2012), <http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/religfreeres/ReligAccommodWPlace-docx.pdf> ("Questions concerning an applicant's religion or the religious holidays observed by an applicant are impermissible.").

¹³² Proposed Rules of February 2013, *supra* note 19, at 8458.

¹³³ Alyene Senger, *What Are the Odds Your Employer Will Drop Health Coverage?*, THE FOUNDRY (July 27, 2012, 2:45 PM), <http://blog.heritage.org/2012/07/27/what-are-the-odds-your-employer-will-drop-health-coverage>. This particular study was conducted by Deloitte, the world's largest management consulting firm.

¹³⁴ *Id.* (citing CONGRESSIONAL BUDGET OFFICE, CBO AND JCT'S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE 19, 23 (2012), *available at* http://cbo.gov/sites/default/files/cbofiles/attachments/03-15-ACA_and_Insurance_2.pdf).

¹³⁵ See, e.g., Letter from Office of General Counsel, U.S. Conf. of Catholic Bishops, to Ctrs. for Medicare & Medicaid Services and Dep't of Health & Human Services, at 16 (Aug. 31, 2011), *available at* www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf.

¹³⁶ See *id.* at 9.

III. SOLUTIONS: THE NEW “PROPOSED RULES” DO NOT PROPOSE ENOUGH

A. The Notice of Proposed Rulemaking: A Moderate Approach

At the very least, the religious employer exemption from the contraceptive mandate should be expanded to afford exemption status to nonprofit entities. In *Catholic Charities of Sacramento*, Justice Brown’s dissent correctly points out that the State of California failed to produce any substantive evidence that broadening the religious employer exemption to exclude nonprofit religious entities, like Catholic Charities, from its contraceptive mandate “would render the whole scheme ineffective or would be so administratively burdensome as to preclude enforcement.”¹³⁷ HHS may have run into a similar evidentiary problem, as it announced on February 1, 2013, a new “Notice of Proposed Rulemaking” (NPRM)¹³⁸ that appears to accommodate many of the objections raised by nonprofit religious institutions like Catholic Charities.¹³⁹ In fact, if such proposed rules were passed, it would render both *Catholic Charities of Sacramento v. Superior Court* and *Catholic Charities of the Diocese of Albany v. Serio* moot.¹⁴⁰

According to the text of HHS’s proposed rules, there would be two principal changes to the PPACA’s contraception mandate:

First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer’s purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage.¹⁴¹

Regarding which previously non-exempt religious entities will meet the requirements for recognition as “religious employers” and thus qualify for the new proposed accommodation, HHS proposes to amend the definition adopted in the 2012 final rules by deleting the first three prongs¹⁴² and clarifying

¹³⁷ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 108 (Cal. 2004) (Brown, J., dissenting).

¹³⁸ See Proposed Rules of February 2013, *supra* note 19, at 8459.

¹³⁹ *Zapor*, *supra* note 19.

¹⁴⁰ See *Catholic Charities of Sacramento*, 85 P.3d at 86; *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). Catholic Charities, the nonprofit organization who brought both suits, would likely qualify for exemption under the NPRM, since its social work is its main obstacle to qualification under the current four-part definition of “religious employer.”

¹⁴¹ See Proposed Rules of February 2013, *supra* note 19, at 8459.

¹⁴² To reiterate, under the current religious employer exemption, the first three prongs that must be satisfied are as follows: (1) employer must have the inculcation of religious values as its purpose; (2) employer must primarily employ persons who share its religious tenets; and (3) employer

application of the fourth. Thus, under the proposed rule,

[a]n employer that is organized and operates as a nonprofit entity ... would be considered a religious employer for purposes of the religious employer exemption. For this purpose, an organization that is organized and operates as a nonprofit entity is not limited to any particular form of entity under state law, but may include organizations such as trusts and unincorporated associations, as well as nonprofit, not-for-profit, non-stock, public benefit, and similar types of corporations.¹⁴³

Who does this include? This proposed rule seemingly clarifies that churches and other houses of worship that the current exemption “intended” to cover would not be disqualified solely because they provide charitable social services to or employ people of other faiths.¹⁴⁴ The good news for Catholic Charities is that it would almost certainly pass muster under this slightly expanded definition. The rule cautions, however, that “for this purpose, an organization is not considered to be organized and operated as a nonprofit entity if its assets or income accrue to the benefit of private individuals or shareholders.”¹⁴⁵ Thus, faith-based, for-profit entities—like Hobby Lobby—are still excluded from the exemption.¹⁴⁶ HHS’s apparent overarching goal, with this moderate expansion that eliminates the first three prongs of the current definition, is exclusively to remove the need for any inquiry into an employer’s purposes, the religious beliefs of its employees, and the religious beliefs of those it serves.

The term “moderate” is accurate in describing the expansive nature of the definition, for it only goes halfway in appeasing religious objectors to the religious employer exemption. It could also be described as a “broader refusal clause,” as many refer to such religious exemptions. In fact, according to the Guttmacher Institute’s September 2013 survey of state insurance coverage of contraceptives, there are seven states that currently provide a “‘broader’ refusal clauses that allows churches, associations of churches, religiously affiliated elementary and secondary schools, and, potentially, some religious charities and universities to refuse, but not hospitals.”¹⁴⁷ For example, Maine defines

must primarily serve persons who share its religious tenets. *See* Amendments to Interim Final Rules, *supra* note 57.

¹⁴³ Proposed Rules of February 2013, *supra* note 19, at 8461.

¹⁴⁴ *Id.* (“The Departments [of HHS, Labor, and Treasury] agree that the exemption should not exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school. Indeed, this was never the Departments’ intention in connection with the 2011 amended interim final rules or the 2012 final rules.”).

¹⁴⁵ *Id.*

¹⁴⁶ Shane Vander Hart, *New Rules for HHS Contraceptives Mandate Excludes Hobby Lobby*, CAFFEINATED THOUGHTS: STIMULATING CHRISTIAN CONSERVATIVE NEWS & COMMENT (Feb. 1, 2013), <http://caffeinatedthoughts.com/2013/02/changes-in-hhs-contraceptives-mandate-do-no-go-far-enough/> (“It is obvious that this proposed rule still leave [sic] businesses operated by people of faith [outside] the mandate.”).

¹⁴⁷ *State Policies in Brief: Insurance Coverage of Contraceptives*, *supra* note 77.

“religious employer” for purposes of its contraceptive coverage exemption as

[a]n employer that is a church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches as defined in 26 United States Code, Section 3121 (w) (3) (A) and that qualifies as a tax–exempt organization under 26 United States Code, Section 501(c) (3).¹⁴⁸

While simplification of the definition of “religious employer” in the proposed rules does not extend exemption status to universities or hospitals like those in Maine’s definition above, the proposed accommodation would do so to an extent. The second significant change under the HHS’s proposed rules would be an accommodation that would “protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage” to which they take religious objection.¹⁴⁹ The process would be essentially as follows: eligible organizations would inform their insurers that they qualify for the accommodation. The insurers would then contact the organizations’ employees and explain that they would provide them with contraceptive coverage at no cost through a completely separate insurance policy that is in no way connected to the religious employer. The insurers could pass off that cost by paying less than they otherwise would to participate in the new state health exchanges.¹⁵⁰ For purposes of the accommodation, an “eligible organization” would be an organization that:

- (1) on account of religious objections, opposes providing coverage for some or all of any contraceptive services otherwise required to be covered;
- (2) is organized and operates as a nonprofit entity;
- (3) holds itself out as a religious organization; and
- (4) self–certifies that it meets these criteria in accordance with the provisions of the final regulations.¹⁵¹

In addition to eligible organizations with insured and self–insured group health plans, HHS would also propose that an eligible nonprofit religious organization that offers a student health plan could avail itself of an accommodation.¹⁵² This is surely good news for religiously affiliated universities, such as Notre Dame, Catholic University of America, and the Archdiocese

148 ME. REV. STAT. ANN. tit. 24, § 2332–J(2) (2000 & Supp. 2012). For more examples, see ARK. CODE ANN. § 23–79–1104(b)(3), 1102(3) (Supp. 2009); MASS. GEN. LAWS ch. 176G, § 40(c) (LexisNexis 2005); N.J. STAT. ANN. § 17:48–6ee (West 2008); N.C. GEN. STAT. ANN. § 58–3–178(e) (2011); R.I. GEN. LAWS § 27–41–59(b) to 59(d) (2008).

149 Proposed Rules of February 2013, *supra* note 19, at 8462.

150 See Kelly Kennedy, *HHS Issues Proposed Contraception Coverage Rule*, USA TODAY (Feb. 1, 2013, 5:44 PM), <http://www.usatoday.com/story/news/politics/2013/02/01/contraceptive-regulation-proposal-hhs-sebelius/1883165>.

151 Ctr. for Consumer Info. & Ins. Oversight, *Women’s Preventive Services Coverage and Non–Profit Religious Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVICES (Feb. 1, 2013), <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html>.

152 *Id.*

of New York, which were among some forty-three Catholic groups that filed suit claiming that the federal government was forcing them to support contraception and birth control or face steep fines.¹⁵³ As Notre Dame expressed in its lawsuit filed in the Northern District of Indiana, “[i]n order to safeguard their religious freedoms, religious employers must plead with the government for a determination that they are sufficiently ‘religious.’”¹⁵⁴ The proposed rules would alleviate this burden to a certain extent, and universities like Notre Dame have a good shot at availing themselves of the accommodation.

As HHS Secretary Kathleen Sebelius stated in a press conference on the same day as the announcement of the NPRM, “Today, the administration is taking the next step in providing women across the nation with coverage of recommended preventive care at no cost, while respecting religious concerns. . . . We will continue to work with faith-based organizations, women’s organizations, insurers, and others to achieve these goals.”¹⁵⁵ Extending coverage to religious charitable organizations like Catholic Charities, as well as to some universities like Notre Dame, is most certainly a *step* in the right direction.

B. “Hobbling” Won’t Reach Hobby Lobby in Time

Government policy under our constitution, history and statutory law has recognized the right of citizens to be free from government compulsion of conscience on such fundamental matters. The only acceptable outcome is the complete repeal of the HHS mandate and the restoration of a thriving marketplace where Americans can choose health care coverage consistent with their beliefs.¹⁵⁶

A *baby step*, that is. While the Proposed Rules should certainly be adopted, the religious employer exemption needs to be further expanded to include for-profit institutions like Hobby Lobby for two key reasons: (1) the Proposed Rules do not adequately address the public concern with the currently drafted religious employer exemption and (2) basing exemption status on an artificial nonprofit buffer is arbitrary and unmeritorious.

1. Insufficiency of the Proposed Rules.—As Kyle Duncan, General Counsel for the Becket Fund for Religious Liberty, points out: “Today’s proposed rule does nothing to protect the religious freedom of millions of Americans. . . . We are extremely disappointed with today’s announcement. HHS waited nearly

¹⁵³ See *Notre Dame, Catholic Groups Sue to Block Contraception Mandate*, 22 WESTLAW J. INS. COVERAGE, no. 34, June 1, 2012, at 1.

¹⁵⁴ Complaint and Demand for Jury Trial, *Notre Dame v. Sebelius*, No. 3:12-CV-00253, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012).

¹⁵⁵ Kennedy, *supra* note 150.

¹⁵⁶ *SBA List Blasts So-Called HHS Mandate Policy “Update,”* SUSAN B. ANTHONY LIST, <http://www.sba-list.org/newsroom/press-releases/sba-list-blasts-so-called-hhs-mandate-policy-update> (last visited October 13, 2013) (quoting Marjorie Dannenfelser, President, Susan B. Anthony List).

a year and then gave us a proposed rule that still burdens religious liberty.”¹⁵⁷ In the eyes of Duncan and many others, the Obama Administration’s “new” proposed accommodation is really no different than the old accommodation proposed in March 2012.¹⁵⁸ This is certainly a compelling argument. At the core of the whole objection to the contraceptive mandate is the federal government’s requirement that religious employers fund contraception for their employees against their religious beliefs. For any employer operating a business for–profit, this would *not* change.

HHS now proposes to accommodate certain nonprofit schools, charities, and other organizations not originally included as narrowly defined “houses of worship.”¹⁵⁹ But HHS’s goal is still *to provide employees with access to contraception at no cost to the employees themselves*.¹⁶⁰ The accommodation merely shifts the financial burden from the individual employers to their insurance providers. Specifically, HHS explains in the new proposed rules that health insurance issuers would automatically provide separate, individual market contraceptive coverage at no cost to plan participants. They claim “issuers generally would find that providing such contraceptive coverage is cost neutral because they would be insuring the same set of individuals under both policies and would experience lower costs from improvements in women’s health and fewer childbirths.”¹⁶¹

That looks nice on paper. But it is hard to imagine that insurance companies will simply absorb those costs for nothing in return. It is more likely that they will simply raise the premiums they charge their policyholders. While the new rules technically prohibit insurers from attempting to “impose any premium, fee, or other charge”¹⁶² for the coverage, insurers might be skeptical,¹⁶³ and raise fees elsewhere to make up for their costs. It seems that, either directly or indirectly, employers will still ultimately bear the real cost of financing contraceptives.

157 Shane Vander Hart, *New Rules for HHS Contraceptives Mandate Excludes Hobby Lobby*, CAFFEINATED THOUGHTS: STIMULATING CHRISTIAN CONSERVATIVE NEWS & COMMENTARY (Feb. 1, 2013), <http://caffeinatedthoughts.com/2013/02/changes-in-hhs-contraceptives-mandate-do-no-go-far-enough>.

158 Grace–Marie Turner, *The HHS Mandate Isn’t Fixed*, NAT’L REV. ONLINE (Feb. 1, 2013, 2:33 PM), <http://www.nationalreview.com/corner/339562/hhs-mandate-isn-t-fixed-grace-marie-turner> (“While the administration has expanded the definition of institutions that could qualify for a ‘religious employer exemption,’ the ‘accommodation’ is no different than the notice issued last year. The administration still intends to force health–insurance companies to provide the coverage.”).

159 Zapor, *supra* note 19.

160 Proposed Rules of February 2013, *supra* note 19, at 8460 (“The Departments aim to secure the protections under section 2713 of the PHS Act that are designed to enhance coverage of important preventive services for women without cost sharing while accommodating the religious objections to contraceptive coverage of eligible organizations.”).

161 *Id.* at 8463.

162 *Id.* at 8473.

163 See Louise Radnofsky, *Contraception Opt–Out Offer: Employers who Object to Coverage Could Shift Responsibility, Cost to Insurers*, WALL ST. J. (Feb. 2, 2013, 2:08 PM), <http://online.wsj.com/article/SB10001424127887324156204578277891958846414.html>.

PPACA regulations would not only force employers to financially provide for their employees' access to contraceptives, but also require insurance companies to join in on the action or pay higher fees to participate in the new online markets run by the government. This is exactly the argument that angry employers made to the original accommodation! There simply would be no change.

2. *The Artificial Nonprofit Buffer.*—Under the proposed rule, for-profit employers will still be forced to provide contraceptive coverage to insured employees despite any religious objections simply because of their artificial, for-profit status.¹⁶⁴ The question arises: Is a statutorily ordained, artificial, for-profit, corporate entity a “religious employer,” or is it a “non-religious” employer that just happens to be owned and operated by religious people? The answer is simple—numerous for-profit organizations provide comparable public services to those provided by nonprofit entities, and those for-profits are no less “religious” simply because they generate profits that accrue to private individuals or shareholders.¹⁶⁵

HHS needs to look beyond the artificial for-profit/nonprofit barrier and recognize that many for-profit organizations are run by real people with religious beliefs that deserve as much respect under the law as they would receive by operating their businesses in ways that happen to be financially structured as nonprofit entities. If not, HHS and the Obama Administration will find themselves facing the same economic and regulatory backlash that spurred the announcement of these proposed rules. Perhaps most importantly, many American employees will likely lose employer-sponsored health benefits altogether, as for-profit employers seek a middle ground between violating their personal religious doctrines and meeting higher staffing costs due to penalties for not providing objectionable insurance coverage. As Judie Brown, president of American Life League cleverly analogized: “This administration treats our country’s conscience like a jailor. If Obama now proposes releasing a few prisoners while denying freedom to everyone else, he will find that people of faith are not quite that easily fooled and will resist en masse.”¹⁶⁶

164 Proposed Rules of February 2013, *supra* note 19, at 8462 (“The Departments do not propose that the definition of eligible organization extend to for-profit secular employers. Religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations. Accordingly, the Departments believe it would be appropriate to define eligible organization to include nonprofit religious organizations, but not to include for-profit secular organizations.”).

165 See Hart, *supra* note 157 (quoting Majorie Dannenfeler of Susan B. Anthony List) (“There must be no religious ‘test’ by the government as to who, and what type of entities, are entitled to a conscience.”).

166 Paul E. Rondeau, *New Rules on HHS Mandates: Just Another Obama Ploy?*, WASH. TIMES COMMUNITIES (Feb. 1, 2013), <http://communities.washingtontimes.com/neighborhood/common-sense/2013/feb/1/new-rules-hhs-mandates-just-another-obama-ploy/>.

CONCLUSION: GLUING THE PIECES TOGETHER

After HHS adopted an exceedingly narrow definition of “religious employer” for purposes of an exemption to the contraceptive mandate in August 2011, the Obama Administration received substantial negative feedback, primarily from Catholic organizations outraged by the fact that their social work and employment choices, in activities outside the church itself, disqualified them from the religious employer exemption. In response, HHS announced a plan for an “accommodation.” HHS issued an Advance Notice of Proposed Rulemaking in March 2012 that would allow some non–exempt, nonprofit entities to provide contraceptive services to their employees indirectly through insurance providers. Public feedback, however, suggested that significant negative consequences would result if HHS were to maintain such a narrow scope for religious exemption. Due to this negative public response, and persistence of for–profit religious organizations that were not fooled by HHS’s accounting trick, HHS announced in February 2013 its Notice of Proposed Rulemaking that, if adopted, would accommodate a wider range of religious nonprofits—such as certain religious schools and charities.

While adoption of these Proposed Rules is necessary, and certainly a small step in the right direction, the religious employer exemption to the contraceptive mandate needs to be further expanded to include for–profit organizations like Hobby Lobby. The reason is simple and twofold: (1) The Proposed Rules do not accurately address what is at the heart of the public concern with the currently drafted exemption—that employers who take religious objection to the provision of contraception to their employees should not be forced to comply with the contraceptive mandate; and (2) conditioning “religious employer” exemption on a statutorily ordained artificial nonprofit status is arbitrary and unjust.

While plaintiffs like Notre Dame University may find relief under the proposed rules, the current proposal would afford no relief to private, for–profit companies owned or managed by religious shareholders and CEOs, such as Hobby Lobby, who apparently would abandon their businesses before surrendering their religious convictions. If exemption from the mandate is not expanded to encompass such for–profit institutions, the same backlash that sparked the announcement of the initial accommodation will surely follow. For as Jesus asserted: “What shall it profit a man, if he shall gain the whole world, and lose his own soul?”¹⁶⁷

¹⁶⁷ *Mark* 8:36 (King James). See also Jeannie DeAngelis, *Hobby Lobby and the Loss of America’s Soul*, AM. THINKER (Dec. 30, 2012), http://www.americanthinker.com/2012/12/hobby_lobby_and_the_loss_of_americas_soul.html.