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Drafting a Sensible Conscience Clause: A Proposal for Meaningful Conscience Protections for Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives

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DRAFTING A “SENSIBLE”
CONSCIENCE CLAUSE:
A PROPOSAL FOR MEANINGFUL
CONSCIENCE PROTECTIONS FOR
RELIGIOUS EMPLOYERS OBJECTING
TO THE MANDATED COVERAGE
OF PRESCRIPTION CONTRACEPTIVES

Daniel J. Rudary[†]

“[U]nder the new rule our institutions would be free to act in accord with Catholic teaching on life and procreation only if they were to stop hiring and serving non-Catholics Could the federal government possibly intend to pressure Catholic institutions to cease providing health care, education and charitable services to the general public? Health care reform should expand access to basic health care for all, not undermine that goal.”¹

–Daniel Cardinal DiNardo, Archbishop of Galveston-Houston and Chairman of the US Catholic Bishops’ Committee on Pro-Life Activities

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1. *HHS Mandate For Contraceptive And Abortifacient Drugs Violates Conscience Rights*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Aug. 1, 2011), <http://www.usccb.org/news/2011/11-154.cfm>.

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INTRODUCTION

On May 17, 2009, President Barack Obama took the stage at the University of Notre Dame to make a commencement appearance that was, by his own admission, “not . . . without controversy.”² Upset by the University’s decision to bestow an honorary doctor of laws degree on a pro-choice President, many in the Catholic community called on Notre Dame to rescind Mr. Obama’s invitation and reaffirm its commitment to the Church’s teaching on the sanctity of human life. During his speech, the President attempted to mollify these concerns and achieve broader, bipartisan support for health care reform by calling for “a sensible

2. President Barack Obama, Commencement Address at the University of Notre Dame (May 17, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-notre-dame-commencement>.

conscience clause” rooted in the need to ensure that “all of our health care policies are grounded not only in sound science, but also in clear ethics.”³

Less than a year after his speech at Notre Dame, President Obama laid the cornerstone of his domestic agenda by signing the Patient Protection and Affordable Care Act (ACA or Act) into law, fundamentally reforming the nation’s health care system and spawning a political and legal debate that led all the way to the Supreme Court.⁴ While the law’s most controversial component has undoubtedly been the so-called “individual mandate” to purchase health insurance, a similarly passionate debate regarding the law’s implications for religious employers has also brought the Obama Administration into direct conflict with the Catholic Church.⁵

The ACA regulates the national health insurance market by directly regulating group health plans and health insurance issuers. One of the provisions of the Act mandates that health plans provide coverage without cost sharing for women’s preventive care and directs the Secretary of Health and Human Services (HHS) to determine which services are to be covered under the mandate.⁶ On August 1, 2011, the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury promulgated an interim final rule

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3. *Id.*
 4. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.); *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).
 5. The author acknowledges that bona fide objections to the HHS mandate have been raised by a variety of religious bodies, including orthodox Jewish and Protestant communities. Because a compelling interest analysis under the Religious Freedom Restoration Act requires a determination as to whether or not a regulation burdens a specific plaintiff’s religious beliefs, however, this Note will limit itself to addressing whether the theological and moral objections raised by Catholic employers translate into a viable cause of action under the Act. As courts applying the RFRA have acknowledged, it is much easier to conduct a free-exercise analysis in the context of hierarchical religions like Catholicism as opposed to other bodies with less-definite and less well-known teachings. *See, e.g., Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (acknowledging that certain tests for applying the RFRA require courts “to determine the authoritative sources of law for the religion in question and to interpret the commands emanating from those sources. In the case of hierarchical religions such as Roman Catholicism, this process of identification and interpretation, which resembles the procedures of legal positivism, is feasible. In the case of nonhierarchical religions, however, such as Islam, Judaism, and a multitude of Protestant sects, the process is infeasible, or at least very difficult and attended with a high degree of indeterminacy.”).
 6. Coverage of Preventive Health Services, 42 U.S.C. § 300gg-13(a)(4) (2006).

on mandated preventative care that required all group health plans and health insurance issuers to provide, without cost sharing, all contraceptive methods and sterilization procedures approved by the Food and Drug Administration (FDA).⁷

The Catholic Church, however, has consistently taught that the use of contraception is gravely sinful.⁸ While the HHS mandate includes an exemption for “religious employers,” Catholic hospitals, universities, and charitable organizations have taken issue with its narrow criteria,⁹ which require that a “religious employer” (1) have the primary purpose of inculcating religious values, (2) primarily employ only those who share its beliefs, (3) primarily serve individuals of the same faith, and (4) qualify as a nonprofit organization under Sections 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.¹⁰

Rather than promoting the “sensible” compromise that President Obama spoke about at Notre Dame, Church leaders argued that this exemption has the effect of limiting conscience protections to religious organizations “that do not reach out to the world.”¹¹ Notre Dame President Fr. John Jenkins, who originally lauded President Obama’s 2009 commencement address as a roadmap for seeking common ground between the Administration and the Church, subsequently outlined the university’s “impossible position” of either paying for “contraception and sterilization in violation of the Church’s moral teaching” or discontinuing “employee and student health care plans in violation of the Church’s social teaching.”¹²

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7. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2011); *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Feb. 16, 2013).
 8. THE CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH § 2370, at 570 (1994) [hereinafter CATECHISM] (“[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible’ is intrinsically evil.”).
 9. Joan Frawley Desmond, *Obama Administration Approves Mandated Contraception Coverage*, NATIONAL CATHOLIC REGISTER (Aug. 2, 2011), <http://www.ncregister.com/daily-news/obama-Administration-approves-mandated-contraception-coverage/>.
 10. 45 C.F.R. § 147.130 (2011).
 11. Desmond, *supra* note 9.
 12. Letter from John I. Jenkins, President of the University of Notre Dame, to Kathleen Sebelius, Secretary of Health and Human Services (Sept. 28, 2011) [hereinafter Jenkins Letter], *available at* http://president.nd.edu/assets/50056/comments_from_rev_john_i_jenkins_notre_dame_3.pdf.

Fr. Jenkins was not the only one concerned with the implications of a rule requiring religiously affiliated employers to subsidize contraception. Following the Administration’s announcement, Catholic churches across the country mobilized to fight the HHS mandate and draw the nation’s attention to the issue of religious liberty. On Sunday, January 29, 2012, priests across the country stood in their pulpits and read a letter from the American bishops charging the Administration with “[casting] aside the First Amendment to the Constitution of the United States,” and threatening civil disobedience if compelled to conform to the mandate.¹³ Recognizing that this issue transcended Catholic teaching and spoke to broader constitutional concerns, secular publications began to enter the fray and opine that the President had “awakened a sleeping giant” with a decision that would have dire political consequences.¹⁴ Others insinuated that by requiring Catholic institutions to purchase contraception, the Administration was pursuing a “re-election agenda that requires an end to freedom of religion.”¹⁵

In response to these concerns, President Obama directed HHS to study solutions that would preserve the Administration’s policy on access to preventive care while respecting the free-exercise rights of religious employers.¹⁶ Subsequently, when the Administration finalized its interim rule on preventive care on February 10, 2012, President Obama announced that the HHS would initiate a further rulemaking procedure to modify the application of the mandate to religious employers.¹⁷ During this process, the Administration is extending a temporary enforcement safe-harbor to “non-exempt, non-profit religious organizations” that will be in place until the first plan year that begins on or after August 1, 2013.¹⁸

13. Peggy Noonan, *A Battle the President Can’t Win*, WALL ST. J., Feb. 4-5, 2012, at A15; Letter from Richard Lennon, Bishop of Cleveland, to the Diocese of Cleveland (Jan. 26, 2012) (on file with author).

14. Noonan, *supra* note 13.

15. Kevin O’Brien, *Contraception or the Constitution?*, THE CLEVELAND PLAIN DEALER, Jan. 26, 2012, at A7.

16. Remarks on Preventive Health Care Insurance Coverage and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. 2 (Feb. 10, 2012) [hereinafter Remarks].

17. *See id.*; *see also* Certain Preventive Services Under the Affordable Care Act, 77 Fed Reg. 16,501 (Mar. 21, 2012) (announcing the intention of the Departments of Health and Human Services, Labor, and the Treasury to establish alternative ways to fulfill the mandate’s requirements when coverage is sponsored or arranged by a religious organization that is not exempt under the final regulations published February 15, 2012.).

18. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012).

Notwithstanding the President’s compromise, the HHS mandate has continued to engender considerable legal controversy¹⁹ and may very well remain vulnerable to a free-exercise challenge. To understand why, it is necessary to review both the religious and the legal issues at stake in this debate. Accordingly, Part I of this note will ask whether mandated contraceptive coverage actually has the potential to violate an employer’s religious beliefs. Having concluded that compelling Catholic institutions to facilitate access to contraception would transgress deeply held religious values, Part II will assess whether the mandate’s requirements (as modified by the President’s February 2012 compromise) actually impose this burden on religious employers.

To redress these concerns, Part III will analyze what—if any—cause of action these organizations have under the Supreme Court’s recent free-exercise decisions. As state courts applying this jurisprudence have shown, however, the doctrine handed down by the Court in *Employment Division, Department of Human Resources of Oregon v. Smith* poses an insuperable obstacle to free-exercise challenges against regulations like the HHS mandate that are facially neutral and generally applicable.

Notwithstanding *Smith*, the HHS mandate’s facial neutrality and general applicability do not necessarily insulate it from a free-exercise challenge under current federal law. Accordingly, Part IV will analyze the mandate’s requirements in light of the Supreme Court’s interpretation of the Religious Freedom Restoration Act (RFRA)²⁰ in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*. This Note will argue that, unlike the failed challenges decided under *Smith*, a challenge to the federal HHS mandate is buttressed by the Supreme Court’s application of the RFRA in *O Centro*, which upheld the RFRA’s compelling interest test and empowered courts to fashion individualized exemptions to federal laws that burden religious exercise.²¹

Having concluded that the mandate’s contraception coverage requirement is unlikely to satisfy the RFRA’s compelling interest analysis, Part V will put forth the proposal that, short of repeal, the mandate’s exemption criteria should be broadened to provide “sensible” conscience protections to institutional religious employers who are currently placed in “an impossible position” by the mandate’s limited exemption. Should the Administration fail to follow this course, it is likely that federal courts, following the lead of the Supreme Court in *O Centro*, will create specific exemptions for as many religious institutions

19. See, e.g., Michelle Bauman, *Forty-Three Catholic Organizations File Lawsuits Against HHS Mandate*, CATHOLIC NEWS AGENCY (May 21, 2012, 10:39 AM), <http://www.catholicnewsagency.com/news/forty-three-catholic-organizations-file-lawsuits-against-hhs-mandate/>.

20. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (2008).

21. *Id.*; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

that decide to challenge the mandate under the RFRA. Ultimately, this legal quagmire can be avoided by the implementation of a “sensible” conscience clause that will ensure “our health care policies are grounded not only in sound science, but also in clear ethics.”²²

I. DOES FACILITATING ACCESS TO CONTRACEPTION VIOLATE BONA FIDE RELIGIOUS BELIEFS?

Despite protests that the federal mandate impermissibly burdens the freedom of Catholic institutions to act in accordance with their religious beliefs, many Americans are at a loss as to why the nearly ubiquitous practice of contraception would lead to a showdown between church and state. On the one hand, the Catholic Church claims that facilitating such coverage (even for non-Catholic employees) would transgress its deeply held moral values. On the other hand, supporters of the mandate argue that ecclesiastical institutions are simply searching for a theological peg on which to hang an objection rooted not in moral conviction, but in an unwillingness to pay for valuable and necessary medical services.²³

A. *Whose Burden? The Economic Cost of Failing to Cover Contraceptive Products and Services*

From an economic perspective, any burden associated with an individual’s choice to use contraception does not hinder the religious exercise of Catholic employers; rather, it falls on the backs of cash-strapped single women and working families who cannot afford to live without it. Accordingly, for those who support the Administration’s decision, including the numerous Catholic women who use birth control, the HHS mandate is “both laudable and common-sense.”²⁴ Failing to enact such a measure would, in the words of former Maryland Lieutenant-Governor Kathleen Kennedy-Townsend, “deny a benefit to a whole class of workers—including hundreds of thousands of non-Catholics—who want it, need it, and are legally entitled to it.”²⁵

The case is even more sympathetic for non-Catholics employed by Church-affiliated institutions. And although contraceptive pills, patches, and rings only cost up to \$60 for a month’s supply, this out-of-pocket expense can be daunting for the estimated 11 million women of

22. Obama, *supra* note 2.

23. See, e.g., Kathleen Kennedy Townsend, *Out of Step with the Flock: Bishops Far Behind on Birth Control Issues*, THE ATLANTIC (Dec. 9, 2011, 9:57 AM), <http://www.theatlantic.com/health/archive/2011/12/out-of-step-with-the-flock-bishops-far-behind-on-birth-control-issues/249703/>.

24. *Id.*

25. *Id.*

reproductive age who live below the poverty level.²⁶ Even with insurance coverage, which typically covers only a portion of the costs associated with prescription contraceptives, these expenses can still constitute up to 29 percent of a woman’s personal expenditures for health services.²⁷ For these women, an inability to cover the costs associated with contraception often results in a decision not to use birth control.²⁸ In that case, employers (and society at large) may be required to pay the even higher costs associated with unwanted pregnancies, miscarriages, and abortions.²⁹

According to advocates of prescription contraceptive coverage, this formula is a recipe for financial disaster. For a full-term pregnancy, medical costs can rise to \$8,619, while a miscarriage or abortion will cost, respectively, \$1,038 and \$416.³⁰ Alternatively, insurance coverage of contraceptives can provide significant savings for employers. Certain studies, for example, have shown that private employers pay less in medical benefits every year for each employee who receives contraceptive coverage.³¹ These findings are supported by similar trends in public benefit spending. According to the Guttmacher Institute, for example, every public dollar invested in contraception can save up to \$3.74 in Medicaid expenditures for care related to unplanned pregnancies.³² Additionally, it was estimated that the services performed at family planning clinics saved \$5.1 billion in 2008.³³ With these economic

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26. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost Sharing*, 14 GUTTMACHER POLICY REV. 7, 9 (2011); GUTTMACHER INSTITUTE, TESTIMONY OF GUTTMACHER INSTITUTE SUBMITTED TO COMMITTEE ON PREVENTIVE SERVICES FOR WOMEN INSTITUTE OF MEDICINE 7 (2011) [hereinafter GUTTMACHER TESTIMONY], available at <http://www.guttmacher.org/pubs/CPSW-testimony.pdf>.
 27. GUTTMACHER TESTIMONY, *supra* note 26, at 8.
 28. *Health-Care Law Holds Tremendous Promise for Women’s Reproductive Health Care*, NARAL PRO-CHOICE AMERICA 3 (Jan. 1, 2012), <http://www.prochoiceamerica.org/media/fact-sheets/birth-control-healthy-pregnancies-affordable-care-act.pdf>; Christopher G. Kuhn, *An EPICC Oversight: Why the Current Battle for Access to Contraception Will Not Help Reduce Unintended Pregnancy in the U.S.*, 17 HEALTH MATRIX 347, 352 (2007).
 29. *Insurance Coverage for Contraception: A Proven Way to Protect and Promote Women’s Health*, NARAL PRO-CHOICE AMERICA FOUNDATION 2 (Jan. 1, 2010), <http://www.prochoiceamerica.org/media/fact-sheets/birth-control-insurance-coverage.pdf>.
 30. *Id.*
 31. *See, e.g., Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, WASH. BUS. GROUP ON HEALTH 8 (Sept. 20, 2000), http://www.businessgrouphealth.org/pdfs/healthy_pregnancy.pdf.
 32. Sonfield, *supra* note 26, at 10.
 33. *Id.*

benefits in mind, it is undoubtedly in an employer’s best financial interests to cover the costs of employees’ birth control and, in doing so, reduce its own expenses and the number of unwanted pregnancies that may end in abortion.

Advocates of mandated prescription contraceptive coverage also point to the more intangible benefits that birth control can provide for women in contemporary society. In promulgating its final rule, HHS noted that access to contraception improves the social and economic status of women by giving them the option to participate more fully in economic and political life.³⁴ Because women use birth control more than men, however, these benefits are often overshadowed by the out-of-pocket costs that are unique to female preventive care. In the judgment of the Administration, providing such care without cost-sharing is one way to level the playing field for men and women by reducing sex-specific healthcare costs.³⁵

Accordingly, if the federal birth control mandate benefits employers by reducing long-term health care costs, does not require anyone to use birth control, and simply makes it more affordable for those who do, how can Catholic institutions claim that the federal government is substantially burdening their free-exercise rights?

B. Catholic Teaching on Artificial Contraception

While it is undoubtedly clear that an employer’s best economic interests mitigate in favor of making contraception more readily available, Catholic institutions have insisted that facilitating the use of these products and services will impermissibly burden their free exercise of religion.³⁶ To understand the gravity of the Church’s concerns, and whether or not they are actually implicated by the revised rule, it is necessary to understand the Church’s moral position with regard to both using contraception and cooperating in its procurement.

While many Christian and non-Christian religions condemn extramarital sex, homosexual acts, masturbation, pornography, and polygamy, the Catholic Church remains the only mainstream religious body to condemn contraception as “intrinsically evil.”³⁷ This teaching has its roots in both the Bible and the teachings of early church fathers like Augustine of Hippo, who taught that “[t]hey who resort to [contraceptives], although called by the name of spouses, are really not

34. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

35. *Id.*

36. See Desmond, *supra* note 9.

37. CATECHISM, *supra* note 8, § 2370, at 570.

such; they retain no vestige of true matrimony, but pretend the honourable designation as a cloak for criminal conduct.”³⁸

Today, the Church presents its teaching on artificial contraception as part of a holistic understanding of human sexuality that respects both the unitive and the procreative aspects of the marital act. Sexual intercourse is procreative in the sense that its natural, biological end is the creation of new life. Furthermore, sexual activity is unitive insofar as it forges an intimate bond between a man and a woman that brings the two together in order to ensure the proper care, upbringing, and education of that young life. By frustrating either end of the sexual act—the unitive or the procreative—the Church teaches that a couple acts contrary to God’s will as it has been revealed to man by natural law.³⁹

The HHS mandate, however, encompasses more than just pregnancy-preventing drugs. It covers the full range of FDA-approved contraceptive services and products, including the morning-after pill.⁴⁰ These drugs operate post-conception to inhibit the implantation of an embryo, “blur[ring] the line between birth control and abortion.”⁴¹ Because Catholic belief holds that life begins at the moment of conception,⁴² the compelled subsidization of these products by Catholic institutions would force them to participate in a practice that the Second Vatican Council denounced as an “unspeakable crime.”⁴³

From the Church’s perspective, the only morally acceptable form of birth control is natural family planning—the practice by which

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38. AUGUSTINE, 1 ON MARRIAGE AND CONCUPISCENCE—WHAT IS SINLESS IN THE USE OF MATRIMONY? WHAT IS ATTENDED WITH VENIAL SIN, AND WHAT WITH MORTAL? (419), *available at* <http://www.ccel.org/ccel/schaff/npnf105.xvi.v.xvii.html> (last visited Feb. 17, 2013).
39. PAUL VI, ENCYCLICAL LETTER HUMANAE VITAE, paras. 12-13: AAS 60 (1968), *available at* http://www.catholicsociety.com/documents/paul_vi/Humanae_vitae.pdf; *see Genesis* 38:9–10; *Deuteronomy* 23:1.
40. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (requiring coverage, without cost-sharing, for all FDA approved contraceptive methods); *see also Birth Control Guide*, FDA, <http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm> (last visited Feb. 17, 2013) (listing the “morning after pill” as an FDA approved contraceptive).
41. Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL’Y 741, 753 (2005).
42. CATECHISM, *supra* note 8, § 2270, at 547.
43. THE CATHOLIC CHURCH, GAUDIUM ET SPES, para. 51 (1965), *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html; CATECHISM, *supra* note 8, §§ 2270-2272, at 547-48.

intercourse is relegated to the infertile periods of a woman's reproductive cycle. Because this practice acts in conformity with (and not against) nature, its use has been sanctioned by the Church as a means by which couples may regulate pregnancy.⁴⁴

The Church's moral concerns, however, are not limited to the immediate act of using artificial contraception. Writing on the issue in 1968, Pope Paul VI predicted that the widespread use of prophylactics would "open wide the way for marital infidelity and a general lowering of moral standards."⁴⁵ Before his ascension to the papacy, Benedict XVI also reflected that the disassociation of sexuality from procreation would render all sexual acts equal, allowing man to express his sexual desires in any way he sees fit.⁴⁶ This, of course, would remove any moral opprobrium from pornography, prostitution, and other behaviors condemned by the Church as acts of sexual vice. With these principles in mind, the Catholic Church's teaching on contraception cannot be considered as a stand-alone issue. Rather, it lies at the root of the Church's much more expansive and foundational teaching on the sanctity of human life, which, according to Pope John Paul II, must be "defended with maximum determination."⁴⁷

While the Church teaches that the guilt of sin is normally incurred by individual behavior, it also forbids actions that, while not specifically sinful, lend "material cooperation" to morally dubious conduct.⁴⁸ This cooperation may be formal or material.⁴⁹ Formal cooperation occurs when one takes part in the sinful act of another and thus shares the principal's intent to commit the offense in question.⁵⁰ Material cooperation, on the other hand, does not involve sinful intent. Rather, it occurs when one gives assistance to another's sin by an act that is in and of itself not morally wrong.⁵¹ Such material cooperation may be immediate or mediate.⁵² One gives immediate material cooperation to the

44. PAUL VI, *supra* note 39, at paras. 15-16.

45. *Id.* at para. 17.

46. JOSEPH CARDINAL RATZINGER WITH VITTORIO MESSORI, THE RATZINGER REPORT 85 (Salvatore Attanasio & Graham Harrison trans., 1985).

47. JOHN PAUL II, CHRISTIFIDELES LAICI: THE VOCATION AND THE MISSION OF THE LAY FAITHFUL IN THE CHURCH AND IN THE WORLD sec. 38, at 108 (1988).

48. CATECHISM, *supra* note 8, § 1868, at 457 ("[W]e have a responsibility for the sins committed by others when *we cooperate in them . . .*") (emphasis in original).

49. THOMAS J. HIGGINS, MAN AS MAN: THE SCIENCE AND ART OF ETHICS 341 (The Bruce Publishing Co. rev. ed. 1958).

50. *Id.*

51. *Id.*

52. *Id.* at 342.

sin of another when he or she takes part in the other’s sinful act—albeit the cooperator does not share the *mens rea* of the principal.⁵³ Mediate material cooperation, on the other hand, occurs when one performs an act that is “preparatory to another’s sin.”⁵⁴ Accordingly, the Church would consider facilitating access to contraception to be at least mediate material cooperation because it facilitates conduct that is inherently sinful. Theologians, however, have argued that the HHS mandate actually threatens Catholic employers with *immediate* material cooperation in evil, as they would be paying for health plans that provide direct access to “free” contraception.⁵⁵

Because the guilt of sin may be imputed to actions that pave the way for wrongdoing, the Church teaches that even mediate material cooperation in evil should be avoided whenever possible.⁵⁶ Immediate material cooperation, on the other hand, is “never legitimate.”⁵⁷ Because the HHS mandate would compel employers to facilitate access to contraception, objecting religious institutions would necessarily have to choose between following the law (and materially cooperating in sin) or discontinuing employee health benefits.⁵⁸ By forcing a religious employer to make such a decision in order to comply with the law, however, the requirements of the HHS mandate may very well constitute a “substantial burden” on the free exercise of religion.⁵⁹

53. *Id.* (explaining that immediate material cooperation, albeit without sinful intent, occurs when one plays an active role in another’s wrong). An example is an individual assisting in a robbery because she was threatened with death. The individual is providing immediate material cooperation to the sinner, but her cooperation would not be considered intrinsically wrong because she was acting under duress.

54. *Id.*

55. Benjamin Mann, *Moral Theologians Reject Catholic Writer’s Defense of HHS Mandate*, CATHOLIC NEWS AGENCY (Feb. 16, 2012, 11:07 AM), <http://www.catholicnewsagency.com/news/moral-theologians-reject-catholic-writers-defense-of-hhs-mandate/>.

56. HIGGINS, *supra* note 48, at 341 (“The general law of morality is that man must avoid evil as far as he can and the specific law of charity bids him to prevent his neighbor from doing wrong to the best of his ability . . . but at times the principle of double effect may be applied. Since the material cooperator does not intend the evil of the principal’s act, whenever his own act is good or indifferent and he has a proportionately grave reason for acting, his co-operation will be licit.”).

57. Mann, *supra* note 55.

58. *See* Jenkins Letter, *supra* note 12 (outlining the University of Notre Dame’s position of either paying for contraceptives in violation of the Church’s moral teaching or discontinuing employee and student health plans in violation of the Church’s social teaching).

59. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (defining a substantial burden as one that “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.”);

II. DOES THE HHS MANDATE REQUIRE CATHOLIC EMPLOYERS TO VIOLATE THEIR RELIGIOUS BELIEFS?

On February 15, 2012, the interim final rule requiring that all health plans and health insurance issuers provide contraceptive services with no cost-sharing was finalized “without change.”⁶⁰ Even so, the Administration announced that it will work with religious employers over a one-year period to “find an equitable solution that protects religious liberty and ensures that every woman has access to the care that she needs.”⁶¹ During this process, the Administration is extending a temporary enforcement safe-harbor to “non-exempt, non-profit religious organizations” that will be in place until the first plan year that begins on or after August 1, 2013.⁶²

While these proposed accommodations do not yet have the force of law, the Administration has initiated a rulemaking procedure during the temporary enforcement safe-harbor to modify the manner in which the HHS mandate is applied to non-exempt religious employers.⁶³ The proposed modifications will require insurance companies to offer insurance without contraceptive coverage to objecting institutions and simultaneously offer contraceptives to those institutions’ employees without cost-sharing.⁶⁴ A similar (but yet-to-be defined) provision will

Sherbert v. Verner, 374 U.S. 398, 404 (1963) (burden is substantial if it forces a person to “choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.”). Many of the Circuits have articulated definitions of “substantial burden” consistent with this example. *See, e.g.*, *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (defining a substantial burden as one that “truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs”); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (stating that a substantial burden can “result from pressure that tends to force adherents to forego religious precepts . . .”).

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. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).
61. Remarks, *supra* note 16.
62. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 16,503 (Mar. 21, 2012).
63. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147); Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012).
64. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,505-06 (“This means that contraceptive coverage would not be included in the plan document, contract, or premium charged to the religious organization. Instead, the issuer would be required to provide

also be implemented for non-exempt religious employers who self-insure.⁶⁵

In promulgating its decision to accommodate the concerns of religious employers, the Administration asked that insurers, who will be required to provide contraceptive coverage directly to the employees of objecting institutions, offer such services free of charge.⁶⁶ This decision was based on studies showing that contraceptive coverage is at least cost-neutral after factoring in the savings generated by a reduction in pregnancies and related pre-natal care.⁶⁷ Accordingly, the Administration expects that “issuers would pay for contraceptive coverage from the elimination of the need to pay for services that would otherwise be used if contraceptives were not covered.”⁶⁸ Specifically, while actuarial firms have found that the cost of adding prescription contraceptives to employee health plans is about \$26 per enrolled woman, these costs are effectively mitigated by savings that can add up to \$97 annually per employee.⁶⁹

Despite the claims that providing contraceptive coverage is “cost saving,”⁷⁰ recent studies have shown that providers who are compelled to offer these services free of charge may have to pass costs down to their customers, including religious employers. One nation-wide survey of pharmacy directors, for example, revealed that none of the respondents believed mandated contraception coverage would reduce overall costs by limiting unplanned pregnancies.⁷¹ One pharmacy director even went so far as to remark that “[w]hen mandates are put in place, organizations

participants and beneficiaries covered under the plan separate coverage for contraceptive services . . . without cost sharing.”).

65. *Id.* at 16,506.
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. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (“Under this approach, the Departments will also require that, in this circumstance, there be no charge for the contraceptive coverage.”).
67. *Id.*; see also JOHN BERTKO ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE COST OF COVERING CONTRACEPTIVES THROUGH HEALTH INSURANCE (2012).
68. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,506 (Mar. 21, 2012).
69. BERTKO ET AL., *supra* note 67.
70. *Id.*
71. REIMBURSEMENT INTELLIGENCE, PAYER SURVEY: CURRENT CONTRACEPTION BENEFIT STRUCTURE AND ANTICIPATED IMPACT OF MANDATED NO-COST ACCESS FOR ALL MEMBERS 3 (2012).

have an opportunity and need to raise prices, change cost structures, and pass along additional costs to our customers.”⁷²

Harvard University economics professor Greg Mankiw has also concluded that any change for religious employers under the modified rule is simply a matter of semantics.⁷³ Because all insurance costs will be passed on to a religious employer through its premiums, and those insurance costs will necessarily include the “free” contraceptives that the insurer must offer to a religious institution’s employees (without imposing any cost on them), the employer will inevitably have to pick up the tab.⁷⁴ These findings have reinforced concerns that despite the President’s compromise, religious employers will still be compelled to subsidize contraception by bearing the substantial, albeit less visible, burden of “free” birth control coverage through their premiums.⁷⁵ Accordingly, Church leaders have warned that the Administration’s offer to exclude contraceptives from religious employer health plans is “illusory” because under the revised rule, “[e]veryone doing business with insurance companies—employers and employees alike—[will] be paying for [contraception].”⁷⁶

Even if objecting religious employers were in no position to financially subsidize contraceptives, religious liberty advocates have argued that the Administration’s proposed accommodation still presents them with the moral dilemma of “triggering” access to sinful products and services.⁷⁷ According to this argument, even though an employer may not be required to directly purchase birth control, the fact that it offers any plan to its employees means that participants and beneficiaries will simultaneously receive access to “free” contraception via the employer’s insurer as a benefit of employment.

This is not an argument about some speculative future harm. Rather, it is what the HHS mandate actually requires all non-exempt

72. REIMBURSEMENT INTELLIGENCE, PAYERS SAY BIRTH CONTROL MANDATE WILL INCREASE PREMIUMS (Feb. 17, 2012), *available at* http://reimbursementintelligence.com/wp-content/uploads/2012/02/Contraceptive-Press-Release_FINAL1.pdf.

73. Greg Mankiw, *Semantics at the Highest Level*, GREG MANKIW’S BLOG (Feb. 11, 2010), <http://gregmankiw.blogspot.com/2012/02/semantics-at-highest-level.html>.

74. *See id.*

75. Michelle Bauman, *Insurers Do Not Believe Contraception Mandate Will Cut Costs*, CATHOLIC NEWS AGENCY (Feb. 22, 2012, 2:24 AM), <http://www.catholicnewsagency.com/news/insurers-do-not-believe-contraception-mandate-will-cut-costs/>.

76. Mann, *supra* note 55.

77. Mark Rienzi, *ROLL CALL: Nothing Changes with Obama’s Birth Control Compromise*, BECKET FUND FOR RELIGIOUS LIBERTY (Feb. 16, 2012), <http://www.becketfund.org/nothing-changes-with-obamas-birth-control-compromise/>.

religious employers to do.⁷⁸ By simply offering healthcare benefits, an employer is ensuring that its employees will receive “free” access to birth control through that employer’s insurer, even if the contraceptives are not “directly” covered under the employer’s plan. While it may be argued that simply paying employees also “triggers” access to morally objectionable products and services, it must be noted that each employee *chooses* what to do with the money she earns. Up until now, religious employers were also able to *choose* what to offer their employees with regard to health insurance and benefits. The ability to make this choice led many Catholic institutions to exclude contraceptive coverage from their employee benefit plans.⁷⁹ Under the HHS mandate, however, any religious employer that offers health insurance to its employees will, by default, have *no choice* about whether their insurance provider will offer employees, as a benefit of their employment, contraceptives and abortion-inducing drugs. Accordingly, the President’s proposed compromise “changes nothing of the moral substance” behind religious employers’ objections because they will still have to provide and pay for insurance that, one way or another, covers products that they object to.⁸⁰

Because such activity would directly facilitate the sin of another, a Catholic employer cannot, in good conscience, comply with the mandate.⁸¹ The only way around this dilemma is to try to fit within the mandate’s narrow “religious employer” exemption (by only hiring and serving co-religionists) or to cease providing health benefits altogether. Far from solving the employer’s problem, however, these solutions would either force the organization out of the public sphere or lead to substantial fines and penalties under the ACA.⁸²

78. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,506 (Mar. 21, 2012) (requiring insurance issuers to provide contraceptive coverage to *participants and beneficiaries* covered under a religious employer’s plan).

79. Louise Radnofsky, *Schools Navigate State Birth-Control Patchwork*, WALL ST. J., Mar. 1, 2012, at A2 (noting that even when faced with state-level contraceptive coverage requirements, Catholic institutions were able to avoid covering contraceptives by moving to self-insured plans, which are regulated by the federal government and not the states. Under the HHS mandate, however, these institutions can no longer avoid providing contraceptive coverage through their insurance plans.).

80. Open letter from John Garvey, President of the Catholic University of America, et al. (Feb. 23, 2012) [hereinafter Garvey Letter], available at <http://www.becketfund.org/wp-content/uploads/2012/02/Unacceptable-2-23-6pm.pdf>.

81. For a discussion on the doctrine of material cooperation, see *supra* Part I.B.

82. The ACA does not require employers to provide health insurance coverage for their employees. If, however, an employer retains fifty or more full time employees and any of these employees have to obtain insurance through an

Supporters of the President’s compromise have argued that indirect cooperation with morally questionable behavior can hardly amount to a religious burden when it is practically unavoidable in a modern, interconnected economy.⁸³ An individual’s tax contributions, for example, may very well go to fund government activities that he or she considers to be immoral. In response, religious leaders have clarified that this issue is not analogous to what the *government* chooses to do with its resources. Rather, it is about whether religious employers have “the freedom *in their own right* not to facilitate something that violates the tenets of their own faith.”⁸⁴ Formerly, these institutions would have had the freedom to exclude coverage for products or services they deemed to be immoral. Now, however, any religious employer offering health insurance is placed in the position of extending to its employees, through its insurance provider, the “free benefit” of contraceptives and abortion-inducing drugs.⁸⁵ The fundamental question that courts will have to address is whether any of these concerns actually burden a religiously affiliated employer’s free exercise of religion. To that extent, it will be necessary to review applicable free-exercise law under both the First Amendment and the Religious Freedom Restoration Act.

Exchange because the employer does not offer insurance or it is not “affordable,” the employer will face financial penalties beginning in 2014. Should a Catholic institution with at least fifty employees choose not to offer health coverage due to the contraceptive mandate, it would be subject to these penalties if and when its employees sought alternative insurance through an Exchange. HINDA CHAIKIND & CHRIS L. PETERSON, SUMMARY OF POTENTIAL EMPLOYER PENALTIES UNDER PPACA (P.L. 111-148) 1, 3 (2010), *available at* http://www.ltgov.ri.gov/smallbusiness/employer_provisions.pdf.

83. David Gibson, *Contraception Objections Fail Catholic’s Moral Reasoning*, USA TODAY (Feb. 14, 2012, 6:14 PM), <http://www.usatoday.com/news/religion/story/2012-02-14/catholic-bishop-morals-birth-control-contraception/53095538/1>.
84. *Conscience, Not Contraception*, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS (Feb. 16, 2012), <http://www.aaplog.org/get-involved/letters-to-members/conscience-not-contraception/> (quoting testimony of Rabbi Meir Soloveichik before the House Oversight and Government Reform Committee on Feb. 16, 2012).
85. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (requiring that while a religious employer may be offered a policy that excludes contraception, their insurer shall simultaneously offer the employees of that institution any FDA-approved contraceptive drug or service free of charge).

III. MANDATED PRESCRIPTION CONTRACEPTIVE COVERAGE AND THE SUPREME COURT’S FREE-EXERCISE JURISPRUDENCE

If the HHS mandate threatens to burden the free-exercise rights of religious employers, it must satisfy the limitations placed on government entanglement in religious belief and practice articulated in the Bill of Rights. The First Amendment to the Constitution of the United States provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁸⁶ To date, at least one judge has gone so far as to describe the Supreme Court’s recent decisions interpreting the First Amendment’s religion clauses as “whimsical” and “somewhat erratic.”⁸⁷ Given the capricious nature of the Court’s free-exercise decisions over the past half century, such a criticism is not without merit.

A. *The Supreme Court’s “Whimsical” and “Erratic” Free-Exercise Jurisprudence—From Sherbert to Lukumi*

From 1963 until 1990, the Supreme Court construed the Free-Exercise Clause of the First Amendment to require that any law burdening religious exercise either directly or indirectly must be (1) justified by a compelling state interest and (2) narrowly tailored to satisfy that interest.⁸⁸ This balancing test outlined by the Court in *Sherbert v. Verner* was subsequently rejected by the majority in *Employment Division v. Smith*.⁸⁹ In *Smith*, two members of the Native American Church were denied unemployment benefits because they were fired for smoking peyote, which was deemed to constitute work-related misconduct.⁹⁰ Because their peyote use took place in the context of a Native American religious ceremony, the employees brought suit to challenge their denial of benefits as a violation of the Free-exercise Clause.⁹¹ Finding against them, the majority held that “an individual’s religious beliefs” do not “excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”⁹² If not, the Court feared, individuals would use their religious beliefs as a basis for non-compliance with valid state laws regulating public health, safety,

86. U.S. CONST. amend. I.

87. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 98 (Cal. 2004) (Brown, J., dissenting).

88. *See Sherbert v. Verner*, 347 U.S. 398, 406 (1963).

89. *See Employment Division, Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 885 (1990).

90. *Id.* at 874.

91. *Id.*

92. *Id.* at 878-79.

and welfare.⁹³ Accordingly, the *Smith* Court concluded that if a law is facially neutral and generally applicable, the First Amendment does not “relieve an individual of the obligation to comply.”⁹⁴

The product of a divided Court, the *Smith* decision was roundly criticized by the dissenting justices. Justice O’Connor, for example, lamented how “today’s holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s fundamental commitment to individual religious liberty.”⁹⁵ Justice Blackmun’s dissent, which was joined by Justices Brennan and Marshall, also suggested that the majority’s opinion was an overreaction and would have dire consequences for the First Amendment.⁹⁶

Three years later, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court fused *Smith* with *Sherbert* to create a new, two-part test for analyzing free-exercise claims.⁹⁷ Henceforth, in order to prevail on a free-exercise claim, a plaintiff would have to show that a challenged law is (1) not neutral and generally applicable, per *Smith*, and is (2) not narrowly tailored to further a compelling state interest, as defined in *Sherbert*.⁹⁸ Nevertheless, even after *Lukumi*, *Smith* remained the operative test for Free-Exercise cases because a showing that a challenged law is generally applicable and facially neutral will preclude any inquiry into the state’s compelling interest under *Sherbert*.

*B. Unsuccessful Challenges to State Contraceptive Mandates
Under Smith*

Concerned with the implications of the Supreme Court’s holding in *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 to restore *Sherbert*’s strict scrutiny analysis of laws burdening religious exercise.⁹⁹ The RFRA was subsequently held unconstitutional as applied against state governments in *City of Boerne v. Flores*.¹⁰⁰ Accordingly, free-exercise challenges brought by religious employers in response to state contraceptive coverage laws predating the HHS

93. *Id.* at 879.

94. *Id.*

95. *Id.* at 891 (O’Connor, J., dissenting).

96. *Id.* at 908 (Blackmun, J., dissenting).

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

98. *Id.* at 531-32.

99. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(2)-(b)(1) (2008).

100. *City of Boerne v. Flores*, 521 U.S. 507, 507-08 (1997). For a detailed discussion of the RFRA and the Supreme Court’s application of the law to both the states and the federal government, see *infra* Part III.A.

mandate have been evaluated under *Smith’s* facial neutrality and general applicability test. As the two cases below will demonstrate, *Smith* has posed “an insuperable obstacle” to the free-exercise claims of religious employers who have sought to be exempted from mandated contraceptive coverage.¹⁰¹

In a lengthy opinion, the Supreme Court of California applied *Smith* to uphold the State’s prescription contraception coverage law in *Catholic Charities of Sacramento, Inc. v. Superior Court*.¹⁰² There, Sacramento’s Catholic Charities challenged the California Women’s Contraceptive Equity Act on the grounds that it violated the religion clauses of both the federal and the state constitutions.¹⁰³ Significantly, the court noted that *Smith* “would at first glance appear to dispose of [the plaintiff’s] free exercise claim.”¹⁰⁴ Because the Act’s requirements applied neutrally and generally to all employers (regardless of religious affiliation), the court found that they did not target religious practice without advancing a legitimate secular interest.¹⁰⁵ As such, the Act satisfied *Smith’s* requirement that a valid law, in addition to being generally applicable, also be “neutral” toward religion. Any perceived antipathy toward Catholicism, the court noted, was not the result of the mandate itself, but of its narrowly tailored exemption which, although it failed to include many Catholic institutions, was a proper exercise of legislative discretion.¹⁰⁶ Just because the exemption did not encompass all Catholic organizations, the court reasoned, did not mean that the law was drafted as an attack on the Catholic Church.¹⁰⁷

The New York Court of Appeals closely followed the reasoning of the California Supreme Court when it ruled on a similar challenge brought against New York’s contraceptive coverage mandate. In *Catholic Charities of the Diocese of Albany v. Serio*, the plaintiffs challenged the exemption for religious employers codified in New York’s Women’s Health and Wellness Act (WHWA) as “unconstitutionally narrow.”¹⁰⁸

101. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006).

102. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 98 (Cal. 2004).

103. The California Women’s Contraceptive Equity Act includes a provision in the California Health and Safety Code and a provision in the California Insurance Code. See CAL. HEALTH & SAFETY CODE § 1367.25 (West 2005); CAL. INS. CODE § 10123.196 (West 2005).

104. *Catholic Charities of Sacramento*, 85 P.3d at 82.

105. *Id.* at 82-84.

106. *Id.* at 83-84.

107. *Id.* at 84-85.

108. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 462 (N.Y. 2006).

This statute employed the same exemption that is codified in California’s Women’s Contraceptive Equity Act and currently codified in the HHS mandate.¹⁰⁹ Applying the Supreme Court’s decisions in *Smith* and *Lukumi*, the New York court held that “the First Amendment has not been offended.”¹¹⁰ Specifically, the court looked to the legislature’s intent in passing the WHWA to conclude that it was passed “to eliminate disparities between men and women in the cost of health care,” and hence, “[r]eligious beliefs were not the ‘target’ of the WHWA”; it was “not that law’s ‘object’ to interfere with plaintiffs’ or anyone’s exercise of religion.”¹¹¹ As such, the law passed muster as a “neutral law of general applicability” capable of withstanding a free-exercise challenge under *Smith*.

Given the similarity of the federal HHS mandate to these state-level regulations, it is likely that a court considering a First Amendment challenge from religious employers would also follow *Smith* and rule in favor of the government. This failure to move beyond the question of a law’s objective neutrality, however, would preclude a court from answering important questions about whether a generally applicable, facially neutral law can nevertheless impose a significant burden on religious exercise. To redress these concerns, it will be necessary for religious employers to attack the HHS mandate through a legal venue that subjects the government’s case to a higher level of judicial scrutiny.

IV. THE FEDERAL CONTRACEPTIVE COVERAGE MANDATE IN LIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT

A. *Congress’s Response to Smith: The Religious Freedom Restoration Act*

As the New York Court of Appeals noted in *Catholic Charities of Diocese of Albany*, “*Smith* is an insuperable obstacle” to religious employers challenging a facially neutral, generally applicable contraceptive-coverage mandate.¹¹² Recognizing that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,” Congress acted to redress this imbalance in federal free-exercise jurisprudence by passing the Religious Freedom Restoration Act in 1993.¹¹³

Importantly, Congress recognized that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to

109. See *supra* notes 9-10 (summarizing the exemption’s provisions).

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

111. *Id.*

112. *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465.

113. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(a)(4), (b)(1) (2008).

interfere with religious exercise.”¹¹⁴ After *Smith*, however, the burdens imposed on religious belief and practice by generally applicable, facially neutral laws could not be redressed by the courts. Nevertheless, Congress concluded that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing . . . governmental interests.”¹¹⁵

Accordingly, the RFRA sought to restore the strict-scrutiny analysis laid down in *Sherbert* by requiring that “the government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless it “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”¹¹⁶ The RFRA also provides a vehicle for obtaining “appropriate relief against a government” by “a person whose religious exercise has been burdened in violation of [the Act].”¹¹⁷

In *City of Boerne v. Flores*, the Supreme Court invalidated the RFRA as it applied against the states on the grounds that it exceeded Congress’ power to enforce the Fourteenth Amendment.¹¹⁸ Nevertheless, the Act has been applied to federal law as a valid exercise of Congress’ Article I enforcement power. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court applied the RFRA to the case of a religious sect that sought an exemption from the Controlled Substances Act in order to use a hallucinogenic tea (*hoasca*) in its rituals.¹¹⁹ Finding that the RFRA contemplated that the courts would create exemptions to generally-applicable federal laws in order to relieve the free-exercise burdens on individual claimants, the majority held that the government failed to demonstrate a compelling interest for prohibiting plaintiffs’ religious use of *hoasca*.¹²⁰ Significantly, the Court recognized that an analysis under the RFRA would have to be context-specific and tailored to the government’s interest in burdening the religious exercise of each specific plaintiff.¹²¹ As such, the justices ruled that it was not enough for the government to simply assert a general interest in the uniform application of the Controlled Substances Act.¹²²

114. § 2000bb(a)(2).

115. § 2000bb(a)(5).

116. §§ 2000bb-1(a)-(b).

117. § 2000bb-1(c).

118. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

119. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

120. *Id.* at 434, 439.

121. *Id.* at 430-31.

122. *Id.* at 435.

Rather, any law challenged under the RFRA must withstand a compelling interest analysis that is tailored to both the plaintiff's individual religious obligations and the government's interest in burdening those obligations in each case.

B. Preliminary Showings Required by the RFRA

Before a court can assess whether or not a federal law satisfies the compelling interest test laid down in the RFRA, a claimant must first show that his religious exercise has been substantially burdened. As a threshold matter, a plaintiff may be required to articulate the scope of his beliefs, show that these beliefs are indeed religious, and prove that they are sincerely held.¹²³ If he can then show that these beliefs have been substantially burdened, the government must demonstrate that the regulation or practice at issue furthers a compelling interest and employs the least restrictive means of doing so.¹²⁴

As discussed in Part I above, the Catholic Church has consistently condemned the use of contraception as an unnatural sexual practice that renders one guilty of grave sin.¹²⁵ Accordingly, Catholic employers who accept this teaching cannot materially cooperate in the sin of another by facilitating direct access to contraceptive products and services through their insurance plans.¹²⁶ Even though many Catholics do not consider this to be an obligatory or central teaching of their faith, the RFRA protects “any exercise of religion”¹²⁷ and does not “focus . . . on the centrality of the particular activity to the adherent's religion but rather on . . . whether the adherent's sincere religious exercise is substantially burdened.”¹²⁸

When considering whether a Catholic institution's religious exercise would be “significantly burdened” by the HHS mandate, it will be helpful to review the definitions and principles used by courts who have considered similar questions in the past. Although the “RFRA does not explain what constitutes a ‘substantial burden’ on the exercise of religion,” many courts have derived a useful definition from the Supreme

123. *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007).

124. *Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999).

125. *See supra* Part I.B. Courts analyzing RFRA claims frequently consider whether a religious practice is mandated or merely encouraged by a particular faith. *See, e.g.*, *Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D. Md. 1996). In this case, contraception has been unambiguously condemned by the Church, and Catholics are prohibited from using it under pain of mortal sin. CATECHISM, *supra* note 8, § 2370, at 570.

126. *See supra* Part I.B.

127. Protection of Religious Exercise in Land Use and By Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(a) (2008).

128. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008).

Court’s pre-*Smith* decisions.¹²⁹ Accordingly, a government regulation may run afoul of the RFRA if it “put[s] substantial pressure on an adherent to modify [her] behavior and to violate [her] beliefs” or “forces an individual to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion.”¹³⁰ Courts have also recognized that a substantial burden exists when a law “forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs.”¹³¹ Most recently, the Supreme Court’s opinion on the constitutionality of the ACA has made it clear that a federal mandate to purchase a product would not pass constitutional muster if it abridged the First Amendment’s guarantee of religious liberty.¹³²

Here, a case can be made that the HHS mandate will force a religious employer to engage in conduct contrary to her beliefs by compelling her to purchase a health insurance plan that provides free access to contraceptives and abortion-inducing drugs. As discussed above,¹³³ a government mandate that extends, through an employer’s insurer, contraceptives and abortion-inducing drugs to all employees “no matter where [they] work”¹³⁴ would render any Catholic employer who offers health insurance a material cooperator in sin, albeit an unwilling one.¹³⁵ Prior to this mandate, Church-affiliated institutions were free to limit their coverage so that employees who wanted contraception would have had to purchase it using their own funds and through a source unaffiliated with their employer.¹³⁶ Now, a religious institution will have

129. *United States v. Philadelphia Yearly Meeting of the Religious Soc’y of Friends*, 322 F. Supp. 2d 603, 608 (E.D. Pa. 2004).

130. *Id.*

131. *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996); *see Gibson v. Babbitt*, 72 F. Supp. 2d 1356, 1359 (S.D. Fla. 1999), *aff’d*, 223 F.3d 1256 (11th Cir. 2000).

132. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part and dissenting in part) (“A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.”).

133. *See supra* Part II.

134. Remarks, *supra* note 16.

135. *See Mann*, *supra* note 55 (acknowledging the argument that a religious employer “‘might not have involvement or knowledge of a separate contract . . . between employee and insurer’ to receive contraception without a co-pay, since these agreements would be strictly between the insurer and employee.”).

136. *See Radnofsky*, *supra* note 79.

no choice but to offer employees insurance that provides “free” birth control as a benefit of employment.¹³⁷ As one prominent Catholic employer surmised, “we would still be in the untenable position of facilitating access to drugs that go against our beliefs.”¹³⁸

Furthermore, although religious institutions are not forced to choose between acting in accordance with their faith and a government *benefit*, they would certainly be exposed to a government *penalty* if they chose not to provide health coverage because of their objections.¹³⁹ Undoubtedly, this is the kind of coercion and pressure that the RFRA seeks to alleviate when facially neutral regulations conflict with bona fide religious belief. Arguably, the Administration has conceded this point by retaining the mandate’s “religious employer” exemption in the wake of the President’s compromise.¹⁴⁰ Had his modification actually relieved the free-exercise burdens on non-exempt religious institutions, there would be no need to preserve an exemption that offers even more protection to qualifying organizations. Nevertheless, the fact that the Administration has finalized this exemption “without change”¹⁴¹ suggests that while the words used to describe the mandate may have been modified, its moral consequences for religious employers remain unaffected.¹⁴²

137. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (requiring that while a religious employer may be offered a policy that excludes contraception, the insurer shall simultaneously offer the employees of that institution any FDA-approved contraceptive drug or service free of charge).

138. Michael P. Warsaw, *Contraception, Against Conscience*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/22/opinion/why-ewtn-wont-cover-contraception.html>.

139. See CHAIKIND & PETERSON, *supra* note 82, at 136.

140. Garvey Letter, *supra* note 80. (“[I]t bears noting that by sustaining the original narrow exemptions for churches, auxiliaries, and religious orders, the Administration has effectively admitted that the new policy (like the old one) amounts to a grave infringement on religious liberty.”); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (indicating that the religious employer exemption to the HHS mandate is finalized “without change.”).

141. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

142. See Garvey Letter, *supra* note 80. (“This so-called “accommodation” changes nothing of moral substance and fails to remove the assault on religious liberty and the rights of conscience which gave rise to the controversy.”).

C. *The Burden Shifts: Does the HHS Mandate Survive the RFRA?*

If a religious employer is able to make a prima facie case that its free-exercise rights are burdened by the HHS mandate, the government will have had to show that the regulation satisfies the compelling interest test prescribed by the RFRA.

1. Does the Mandate Further a Compelling Government Interest?

The first prong of the RFRA’s compelling interest analysis focuses on whether the government regulation at issue furthers a compelling state interest. As the Supreme Court noted in *O Centro*, this analysis can only be satisfied through an application of the challenged law to the particular claimant whose sincere religious exercise is being substantially burdened.¹⁴³ As such, a court evaluating a challenge to the federal contraceptive mandate by a Catholic institution would have to consider whether the government has a compelling interest to require the extension of contraceptive benefits to a religious institution’s employees. In addition to being narrowly tailored to the limited scope of this analysis, the regulation in question would also have to advance interests of “the highest order.”¹⁴⁴ While the Supreme Court’s jurisprudence has yet to define what exactly those interests are, it has nevertheless made clear that a mere rational relationship to some colorable interest will not suffice.¹⁴⁵

In this case, the government has advanced the interest of promoting women’s health and saving healthcare costs by making preventive care, including contraception, more readily available.¹⁴⁶ This argument is,

143. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

144. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

145. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

146. See GUTTMACHER TESTIMONY, *supra* note 26, at 12. Other government efforts to mandate contraceptive coverage by employers have been justified as promoting the equal treatment of women in the workplace. These arguments have been based on Title VII as amended by the Pregnancy Discrimination Act, and in 2000 the Equal Employment Opportunity Commission ruled that employers who exclude contraception from prescription health plans discriminate along gender lines. EEOC Decision on Coverage of Contraception, EEOC (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html>. While some district courts have acknowledged that combating such discrimination is a “compelling state interest ‘of the highest order,’” *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)), the appellate courts have not accepted this argument. See *In re Union Pac. R.R. Emp’t Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (holding that the Pregnancy Discrimination Act does not encompass contraception and that the denial

among other things, premised on the proposition that unplanned pregnancies will lead to adverse health effects.¹⁴⁷ While this may very well be true, remedying the situation by making a religious employer facilitate access to contraception through its health plan would not further the government’s interest in any appreciable way.

First, it is not entirely clear that employed women who want to use prescription contraceptives are unable to do so because their employers do not cover them. While certain reports have indicated that women who have unintended pregnancies did not use birth control because of the financial cost, this data does not tell us whether these women are employed and, if so, whether their employer’s refusal to cover contraception was the cause of their inability to pay.¹⁴⁸ Rather, it is more likely that these statistics reflect the situation of *unemployed* women, who would not be affected in the least if the government required *employers* to facilitate access to birth control through their insurers. Academic analysis sympathetic to the government’s interest has even admitted that “women who are *most at risk* for unintended pregnancies are the *least likely* to gain any advantage” from compelling an employer to offer prescription contraceptives.¹⁴⁹ To show that the federal mandate would further the government’s interest of promoting greater access to women’s healthcare, it would be necessary to demonstrate that women who are beneficiaries of employer-sponsored health plans are unable to afford to access birth control because their plans do not cover it.¹⁵⁰ Given the number of private employers who already cover prescription contraceptives, this would be a difficult showing to make.

Today, 90 percent of private employers include contraception in their benefit packages.¹⁵¹ The federal government, the nation’s largest employer,¹⁵² also includes contraceptives in its employee health plans.¹⁵³ Requiring that this coverage also be provided by a small minority of employers who have chosen not to offer it would, per the Supreme Court’s own jurisprudence, hardly constitute a compelling state

of contraception coverage for both sexes does not discriminate against female employees in violation of Title VII).

147. Stabile, *supra* note 41, at 770-71.

148. *Id.* at 771.

149. Kuhn, *supra* note 28, at 367 (emphasis added).

150. Stabile, *supra* note 41, at 771.

151. GUTTMACHER INSTITUTE, IN BRIEF: FACTS ON CONTRACEPTIVE USE IN THE UNITED STATES (2012), *available at* http://www.guttmacher.org/pubs/fb_contr_use.pdf.

152. *Career Guide to Industries, 2010-11 Edition: Federal Government*, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oco/cg/cgs041.htm> (last visited Feb. 19, 2013) (noting that the federal government is the nation’s single largest employer).

153. GUTTMACHER TESTIMONY, *supra* note 26, at 11.

interest.¹⁵⁴ Even if it did, the government cannot defeat a claim under the RFRA by arguing that a compelling interest is served by the uniform application of a law. Rather, it has to show that the state has a significant interest in regulating the particular plaintiff who is challenging that law.¹⁵⁵

Furthermore, prescription contraceptives like the FDA-approved drugs encompassed by federal mandate are not the only means to regulate pregnancy. Just because the pill may be more convenient than a condom does not make it a basic health care need, especially when contraceptive drugs pose far more health risks¹⁵⁶ than these more affordable and more readily available methods of birth control.¹⁵⁷ Certainly, it is not the case that a woman would be foreclosed from regulating her pregnancies using these methods if her employer chose not to cover prescription contraceptives.

Finally, “a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”¹⁵⁸ Under the ACA, any “grandfathered” group health plans that were in effect on March 23, 2010, are not required to comply with the HHS mandate, and employers who retain less than fifty full time employees are not subject to penalties for failing to offer coverage.¹⁵⁹ This exemption, which has the potential to encompass tens of millions of Americans,¹⁶⁰ would necessarily defeat any

154. *See* *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2741 (2011) (noting that “[f]illing the remaining modest gap” in a government regulatory scheme “can hardly be a compelling state interest”).

155. *See* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006).

156. *The Dark Side of Birth Control: 17 Adverse Health Effects*, THE HEALTH CRAZIES (May 11, 2010), <http://mphdegree.org/2010/the-dark-side-of-birth-control-17-adverse-health-effects/> (collecting medical studies showing seventeen distinct health risks posed by oral contraceptives).

157. *Stabile*, *supra* note 41, at 772.

158. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. dissenting)).

159. *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA*, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (“The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.”); *see also* 26 U.S.C. § 4980H (2011) (providing shared responsibility for employers offering health coverage).

160. The US Census Bureau reports that over 20 million people are employed by firms with fewer than twenty employees. This figure does not consider the number employed by firms ranging from 20-49 employees, nor the number of employees whose health plans will be “grandfathered” under the ACA. *See Statistics about Business Size*, U.S. CENSUS BUREAU, <http://www.census.gov/econ/smallbus.html> (last visited Feb. 17, 2013).

claim that the government’s interest in mandating that Catholic employers facilitate access to contraceptive coverage through their insurers is one of the “highest order.” While the *O Centro* Court opined in dicta that the government might be able to demonstrate “a compelling interest . . . by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program,” the fact that the law in this case does not even apply uniformly to non-religious employers renders this argument untenable.¹⁶¹

2. Is the Mandate the Least Restrictive Means of Furthering a Compelling Governmental Interest?

Even if the HHS mandate did further a compelling governmental interest, it does not employ the least restrictive means of doing so. To be the least restrictive means of accomplishing the legislature’s goal, a law that burdens religious exercise must be both substantively and facially neutral. In terms of the First Amendment, a facially neutral law is one whose intent is neither to confer a benefit nor impose a burden on the practice of religion.¹⁶² Substantive neutrality, on the other hand, requires that the government “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”¹⁶³ By definition then, a law that is truly “substantively neutral” toward religion will use the least restrictive means to further a governmental interest. If not, courts may fashion exemptions to relieve claimants from these burdens.¹⁶⁴

In this case, the HHS mandate lacks substantive neutrality because it is not the least restrictive means of furthering the government’s interest. Specifically, its narrow “religious employer exemption” burdens religious exercise by imposing arbitrary distinctions between church-affiliated activities and institutions which the government has deemed to be “religious” and those which it has deemed to be “secular.” In doing so, the government has ignored the bona fide religious beliefs that form the core of these institutions’ mission, identity, and purpose, and has presented them with the choice of either modifying their religious practice or incurring substantial fines and penalties.

161. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006).

162. Craig W. Mandell, *Tough Pill to Swallow: Whether Catholic Institutions Are Obligated Under Title VII to Cover Their Employees’ Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 220-22 (2008).

163. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

164. *See Gonzales*, 546 U.S. at 434.

While hospitals, schools, and charities may not be “churches” in the strict sense of the word, their activities are central to a holistic understanding and practice of the Catholic faith. As such, they are not considered by the Church to be mere auxiliary or supplementary organizations simply related to Catholicism by historical accident. As Pope Benedict XVI taught in his encyclical letter *Deus caritas est*,

The Church’s deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God (*kerygma-martyria*), celebrating the sacraments (*leitourgia*), and exercising the ministry of charity (*diakonia*). These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.¹⁶⁵

Because the activities of Church hospitals, schools, and charities are inseparable from Catholic belief and worship, a “religious exemption” that excludes these bodies suffers from a “crabbed and constricted” view of religion that, in the words of California’s Justice Brown, would “define the ministry of Jesus Christ as a secular activity.”¹⁶⁶

Nevertheless, it would seem that the narrow exemption offered by the federal mandate is an attempt to do just that. Unfortunately, this is remarkably consistent with recent efforts by the Administration to downplay the role of religious exercise in the public square. Rather than embracing the freedom of *religion* guaranteed by the First Amendment, for example, the Administration’s use of the more restrictive term, “freedom of *worship*,” in many of its public statements reflects an understanding that legally protected religious exercise should be limited to the four walls of a church, synagogue, or mosque.¹⁶⁷ Not surprisingly, then, the religious employer exemption to the federal mandate was drafted to create a “religious accommodation that respects the unique relationship between a *house of worship* and its *employees in ministerial positions*.”¹⁶⁸ Because such an understanding fails to acknowledge that the free exercise of religion encompasses more than scheduled Sunday

165. BENEDICT XVI, *DEUS CARITAS EST* 25 (2005).

166. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 106 (Cal. 2004) (Brown, J., dissenting)

167. Ashley Samelson, *Why “Freedom of Worship” is Not Enough*, FIRST THINGS (Feb. 22, 2010), available at <http://www.firstthings.com/onthesquare/2010/02/why-ldquofreedom-of-worshiprdquo-is-not-enough> (analyzing the Obama Administration’s substitution of the term “freedom of religion” with the more restrictive “freedom of worship” and arguing that this rhetorical paradigm shift threatens to leave vital religious liberties unprotected).

168. *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the PPACA*, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (emphasis added).

worship services, it fails to respect the full breadth of legally protected religious freedom and, consequently, cannot be the least-restrictive means (in First Amendment terms) of furthering a governmental interest.¹⁶⁹

Even so, state courts upholding mandated contraceptive-coverage laws have argued that it would be impossible for a legislature to fashion a religious exemption if it were not permitted to determine which organizations are truly religious and which are secular.¹⁷⁰ These opinions have gone to great lengths to show that the line drawing that results from this determination is not religious discrimination of the sort that was condemned by the Supreme Court in *Larson v. Valente*.¹⁷¹ In that case, the Court held that a Minnesota statute that excluded the Unification Church from an exemption to registration and reporting requirements for charitable organizations constituted discrimination against a specific religion in violation of the Establishment Clause.¹⁷² Nevertheless, focusing on governmental bias against certain religions would tend to misconstrue the constitutional principles at stake in this debate. In asking for a broader exemption, Catholic employers are not insisting that legislatures abandon their duty of drawing sensible distinctions between those bodies deserving of exemption and those that are not.¹⁷³ Nor should they argue that these exemptions constitute religious discrimination. Unlike the Unification Church in *Larson*, Catholicism as a denomination is not entirely excluded from the federal mandate’s statutory exemption scheme.¹⁷⁴ Accordingly, the proper

169. It is a well-established principle of constitutional jurisprudence that religious exercise as protected by the First Amendment encompasses much more the freedom to worship as one chooses. *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (acknowledging that “religion includes important communal elements for most believers. They exercise their religion through religious organizations and these organizations must be protected by the [Free-Exercise] [C]lause.”)).

170. *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 79-80 (Cal. 2004); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468-69 (N.Y. 2006). It should be noted, however, that these cases were decided under *Smith* and therefore did not consider whether the exemptions at issue were the least restrictive means of furthering the government’s interest.

171. *See* *Larson v. Valente*, 456 U.S. 228, 228 (1982).

172. *Id.*

173. Indeed, the Supreme Court has sanctioned this as a “permissible legislative purpose.” *Amos*, 483 U.S. at 335.

174. The narrow exemption in the federal mandate may still protect Catholic institutions if their primary purpose is religious indoctrination and they do not hire and serve non-Catholics. Consequently, just because the

analysis in this case should focus not on whether the exemption fosters religious *establishment* (because it plainly does not), but on whether it sufficiently protects religious *exercise*. When viewed in this light, a narrow exemption that fails to alleviate the significant burdens on countless church-affiliated institutions cannot be said to protect the full scope of constitutionally protected religious freedom as it has been defined and understood by the courts.¹⁷⁵

When the state has attempted to stifle religious exercise by imposing narrow definitions of religion on faith-based institutions, it has consistently met with judicial rebuke. In *National Labor Relations Board v. The Catholic Bishop of Chicago*, for example, the Supreme Court considered whether Catholic high schools were entitled to an exemption from NLRB jurisdiction over collective bargaining units for lay teachers and staff.¹⁷⁶ While the NLRB maintained that its policy was to decline jurisdiction over religiously sponsored organizations “only when they are completely religious, not just religiously associated,”¹⁷⁷ the Court found that this determination would necessarily involve some degree of entanglement between church and state.¹⁷⁸ Accordingly, the Court affirmed the Seventh Circuit’s conclusion that the NLRB’s distinction between “completely religious” and “religiously associated” organizations was “a simplistic black or white, purported rule containing no borderline demarcation of where ‘completely religious’ takes over or, on the other hand, ceases.”¹⁷⁹ Because such an inquiry would implicate “very sensitive questions of faith and tradition,”¹⁸⁰ the Supreme Court declined to extend the NLRB’s authority to the schools for fear that “intrusion into this area could run afoul of the Religion Clauses and hence preclude [the NLRB’s] jurisdiction on constitutional grounds.”¹⁸¹

Lower courts have applied a similar analysis to cases involving government attempts to define religiosity. When, for example, Colorado sought to exclude “pervasively sectarian” institutions of higher education from its state scholarship program, the Tenth Circuit found that the

exemption does not cover all Catholic institutions does not mean that it discriminates against Catholicism along the lines condemned in *Larson*. See *Catholic Charities of Sacramento*, 85 P.3d at 85, n.10.

175. See *Amos*, 483 U.S. at 341-42 (Brennan, J., concurring).

176. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 491, 493 (1979).

177. *Id.* at 493 (quoting Roman Catholic Archdiocese of Baltimore, 216 NLRB 249, 250 (1975)).

178. See *id.* at 499.

179. *Id.* at 495 (quoting *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977)).

180. *Id.* (quoting *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977)).

181. *Id.* at 499.

state violated constitutional doctrine prohibiting government from measuring an institution’s religious beliefs and practices.¹⁸² By far, the “most potentially intrusive element” of Colorado’s statutory scheme was the requirement that the state determine whether the school in question had the “primary purpose” of proselytizing students.¹⁸³ Because these statutory metrics for determining whether an institution is sufficiently religious for the purposes of government regulation have been consistently condemned by the Supreme Court, the Tenth Circuit found that the Colorado statute at issue violated the First Amendment.¹⁸⁴

In *University of Great Falls v. National Labor Relations Board*, the United States Court of Appeals for the District of Columbia Circuit also applied the Supreme Court’s holding in *Catholic Bishop* to conclude that a church-affiliated university did not fall under the authority of the NLRB.¹⁸⁵ There, the Board asserted jurisdiction based on a finding that the university in question, owned by the Roman Catholic Sisters of Providence, did not have “a substantial religious character” because “the propagation of a religious faith” was not “the primary purpose” of the school.¹⁸⁶ In making this determination about the religious mission of the university, however, the D.C. Circuit concluded that the Board had “engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid.”¹⁸⁷ Because the Board’s “substantial religious character” test boiled down to the question of whether an institution is “sufficiently religious,” the court denounced it as an inquiry into religious views that is “not only unnecessary but also offensive.”¹⁸⁸ Deciding that this test would create the same constitutional concerns that the Supreme Court sought to avoid in *Catholic Bishop*, the court roundly denounced the NLRB’s practice of “trolling through the beliefs of the University, making determinations about its religious mission, and that mission’s centrality to the ‘primary purpose’” of the school.¹⁸⁹

Importantly, and germane to the federal mandate at issue here, the court acknowledged that narrow definitions of religion fail to consider the breath of religious freedom protected by the First Amendment. Just because the University of Great Falls was “ecumenical and open-minded” did not “make it any less religious, nor NLRB interference any

182. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (quoting *Mitchell v. Helms*, 530 U.S. 793, 795 (2000)).

183. *Id.*

184. *Id.* at 1263.

185. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1347-48 (D.C. Cir. 2002).

186. *Id.* at 1340.

187. *Id.* at 1341.

188. *Id.* at 1341, 1343.

189. *Id.* at 1342.

less a potential infringement of religious liberty.”¹⁹⁰ Analogously, limiting an exemption to religious institutions that engage in “hard-nosed proselytizing,” limit their enrollment “to members of their religion,” and have “no academic freedom,” would be “an unnecessarily stunted view of the law.”¹⁹¹ This, in turn, would threaten to violate the basic premise underlying the First Amendment’s religion clause—not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.¹⁹² Because the NLRB’s narrow definition of a religious institution mirrors the standard articulated by the “religious employer” exemption to the HHS mandate, it is likely that the denunciation of that test as “constitutionally infirm” would similarly apply to the government’s exemption scheme in this case.

To determine eligibility for the HHS mandate’s religious employer exemption, for example, the government will necessarily have to decide whether an institution’s understanding and practice of its religious mission translates into a primary purpose of “inculcating religious values.”¹⁹³ For a Catholic hospital, school, or charity that inculcates religious values by serving others, the answer is quite obvious. Nevertheless, the federal government would probably disagree, and because “the prospect of church and state litigating . . . about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment,” a court is likely to find that the HHS mandate’s narrow exemption is not the “least restrictive” means of furthering a governmental interest.¹⁹⁴

V. A “SENSIBLE” SOLUTION

If Catholic institutions are able to demonstrate that the HHS mandate significantly burdens their free-exercise rights in violation of the RFRA, federal courts are empowered to create individualized exemptions that will be as numerous as there are Catholic hospitals, universities, and charities that choose to challenge the mandate in court.¹⁹⁵ While some initial challenges to the mandate have been dismissed because the rulemaking process is not yet complete (and therefore claims by religious organizations are arguably not yet ripe), other federal courts have indicated that employers challenging the mandate have a high likelihood

190. *Id.* at 1346.

191. *Id.*

192. *Id.*

193. 45 C.F.R. § 147.130(a)(iv)(B)(1) (2011).

194. *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

195. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (“RFRA, however plainly contemplates that courts would recognize exceptions—that is how the law works.”).

of success on the merits.¹⁹⁶ To avoid the litigious and administrative nightmare that would result from this scenario, it is in the Administration’s best interests to fashion a broader exemption that would encompass organizations that, while not “churches” in and of themselves, derive their purpose and mission from religious principles.

A. Federalism-Based Solutions to the Contraceptive Coverage Dilemma

Expounding on the genius of the federalist system, the Supreme Court described state sovereignty in *New York v. United States* as “not just an end in itself: rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”¹⁹⁷ As the Court would later explain, this emphasis on subsidiarity in our federal system has encouraged local policies “more sensitive to the diverse needs of a heterogeneous society,” including “innovation and experimentation,” which enables “greater citizen involvement in democratic processes” and makes government “more responsive by putting the States in competition for a mobile citizenry.”¹⁹⁸

Consistent with their role as legislative laboratories that reflect the diverse values and needs of the American people, many state legislatures have already addressed the issue of prescription contraceptive coverage by effectively balancing calls for equity in employee health care with the moral concerns of their constituents. Although its exact origins are unclear, it appears that the campaign for mandated prescription contraceptive coverage began soon after insurance plans started covering

196. Two federal district courts have dismissed, for now, challenges to the mandate on the grounds that because the Administration’s rule-making process for applying the mandate to non-exempt religious employers is not yet complete, religious institutions cannot satisfy “injury in fact” or ripeness requirements for standing. *See Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012); *Nebraska ex rel. Bruning v. U.S. Dept. of Health & Human Services*, 877 F. Supp. 2d 777 (D. Neb. 2012). It should be noted that neither of these courts reached the merits of the plaintiffs’ First Amendment and RFRA claims. Because the temporary enforcement safe-harbor only applies to non-exempt religious organizations, however, private employers challenging the mandate on free-exercise grounds have not been affected by standing or ripeness concerns. In *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), for example, Judge John L. Kane of the US District Court for the District of Colorado granted a temporary restraining order prohibiting the government from enforcing the mandate against Hercules Industries Inc., a private employer challenging the mandate on free-exercise grounds. In his opinion, Judge Kane found that any alleged governmental interest in enforcing the mandate against Hercules “pales in comparison to the possible infringement upon Plaintiffs’ constitutional and statutory rights.” *Id.* at 1295.

197. *New York v. United States*, 505 U.S. 144, 181 (1992) (citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

198. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (internal citations and quotations omitted).

the male impotency drug Viagra.¹⁹⁹ To date, twenty-eight states require insurers who cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices.²⁰⁰ Twenty of these states exempt certain employers from the mandate, usually for religious reasons.²⁰¹ In providing such an exemption, these state legislatures have engaged in what the Supreme Court has sanctioned as “a permissible legislative purpose” in order to “alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”²⁰² Of these states, only five have defined a “religious employer” using the terms adopted by the Federal Government in the current mandate implementing the ACA.²⁰³ These include California, Hawaii, New York, North Carolina, and Oregon.²⁰⁴ Another five have used a similarly restrictive definition taken from Section 3121 of the Internal Revenue Code.²⁰⁵ The remaining ten

199. Kuhn, *supra* note 28, at 355; *see also* Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing the link between Viagra coverage and the demand for contraceptive coverage). *But see* Stabile, *supra* note 41, at 770 (arguing that there is no validity to the claim that contraceptive coverage is necessary to promote equal treatment of women because Viagra coverage is not analogous to contraceptive coverage).

200. These states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. It should be noted, however, that Michigan and Montana require insurance coverage of contraceptives as a result of an administrative ruling or an Attorney General opinion. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF, INSURANCE COVERAGE OF CONTRACEPTIVES (2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

201. *Id.*

202. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1978).

203. *See supra* notes 9-10.

204. *See* CAL. INS. CODE §§ 10123.196(d)(1)(A)-(D) (West 2012); HAW. REV. STAT. § 431:10A-116.7(a) (1999); N.Y. INS. LAW § 4303(cc)(1)(A) (McKinney 2012); N.C. GEN. STAT. ANN. § 58-3-178 (West 2012); OR. REV. STAT. ANN. § 743A.066 (West 2008).

205. Federal Insurance Contributions Act, 26 U.S.C.A. §§ 3121(w)(3)(A)-(B) (2011) (defining a “church” as “a church, convention, or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches” and a “qualified church-controlled organization” as any tax-exempt organization described in § 501(c)(3) other than an organization which “offers goods, services, or facilities for sale . . . to the general public” and “normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in

states employ a wide variety of religious exemptions, all of which use broad language to define a religious employer that can claim an exemption from the contraceptive coverage mandate.²⁰⁶ Many of these states do not even attempt to define “religious employer” and accept any bona fide religious objection as grounds for exemption from the mandate.

Arizona’s contraceptive coverage law, for example, provides that “a religious employer whose religious tenets prohibit the use of prescribed contraceptive methods may require that the accountable health plan provide a health benefits plan without coverage for all federal Food and Drug Administration approved contraceptive methods.”²⁰⁷ Under this exemption, all a religious employer is required to do is submit an affidavit to the health plan provider stating that it is a religious employer, at which point “the accountable health plan shall issue to the employer a health benefits plan that excludes coverage of prescription contraceptive methods.”²⁰⁸

Similarly, Delaware’s mandate provides an exemption to employers if “the required coverage conflicts with the religious organization’s bona fide religious beliefs and practices.”²⁰⁹ As with many other state exemption statutes, the employer is then required to provide its employees reasonable and timely notice of the exclusion. Missouri’s statute extends the exemption from its contraceptive mandate beyond churches and organizations to cover individual conscientious objectors as well. In pertinent part, it provides that “[a]ny health carrier may issue to any person or entity purchasing a health benefit plan, a . . . plan that excludes coverage for contraceptives if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity.”²¹⁰

The success that many states have had in balancing prescription contraceptive coverage with bona fide religious objections is evident from

activities which are not unrelated trades or businesses, or both.”). This language would suggest that Catholic hospitals and universities, which provide services for sale to the general public, would not be exempt from state mandates using this definition of a “religious employer.”

206. These states include Arizona, Arkansas, Connecticut, Delaware, Maryland, Missouri, Nevada, New Mexico, Texas, and West Virginia. *See* ARIZ. REV. STAT. ANN. § 20-2329(F) (West 2011); ARK. CODE ANN. § 23-79-1104 (West 2007); CONN. GEN. STAT. ANN. § 38a-530e (West 2010); DEL. CODE ANN. tit. 18, § 3559 (West 2010); MD. CODE ANN., INS. § 15-826(c)(1) (West 2012); MO. ANN. STAT. § 376.119 (West 2012); NEV. REV. STAT. ANN. § 689A.0417 (West 1999); N.M. STAT. ANN. § 59A-46-44 (West 2012); TEX. INS. CODE ANN. § 1369.108 (West 2012); W. VA. CODE ANN. § 33-16E-7 (LexisNexis 2011).

207. ARIZ. REV. STAT. ANN. § 20-2329(B) (West 2011).

208. *Id.*

209. DEL. CODE ANN. tit. 18, § 3559 (West 2010).

210. MO. ANN. STAT. § 376.119 (West 2012).

the lack of any substantive legal or political challenges that have arisen in the states that include a broad conscience clause in their mandate. To date, the only evidence of political upheaval at the state level has been found in New York and California, where institutional Catholic employers have challenged their respective state contraceptive mandates in court. Significantly, both of these states enforce the narrow “religious employer” exemption that is currently codified in the federal mandate. Looking to the example of states that have codified broader exemptions, the federal government can avoid costly and time-consuming litigation (and preserve goodwill with religious institutions) by adopting a more inclusive exemption that would accommodate the conscientious objections of institutional Catholic employers.

*B. Avoiding “Excessive Entanglement” Between Church and State:
Modeling a Broader Exemption on Section 414(e) of the
Internal Revenue Code*

When he offered his accommodation to religious employers, President Obama did not broaden the exemption already codified in the HHS mandate.²¹¹ Rather, as discussed above, non-exempt religious employers will still be compelled to facilitate access to “free” contraceptive coverage for their employees simply by offering a health plan.²¹² This modification, however, fails to alleviate significant free-exercise concerns because it compels a Catholic institutional employer to materially cooperate in a practice that the Church condemns as “intrinsically evil.”²¹³

In his letter to HHS Secretary Kathleen Sibelius, Notre Dame President Fr. John Jenkins suggested that the Administration look to the language of Section 414(e) of the Internal Revenue Code as one possibility for a broader religious exemption to the federal mandate.²¹⁴ Defining religious organizations that are exempt from certain provisions of the Internal Revenue Code, Section 414(e) deems an organization to be “associated with a church” and thus subject to exemption “if it shares common religious bonds and convictions with that church.”²¹⁵ Focusing

211. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (indicating that the religious employer exemption to the HHS mandate is finalized “without change.”).

212. *Id.* at 8728. The HHS mandate requires that insurers simultaneously offer health plans without contraceptive coverage to religious employers while offering contraceptives free of charge to their employees. Such a scenario guarantees free access to contraceptives for employees of Catholic institutions so long as their employer offers health insurance.

213. CATECHISM, *supra* note 8, § 2370, at 570.

214. Jenkins Letter, *supra* note 12.

215. 26 U.S.C. § 414(e)(3)(D) (2006).

on an institution’s organizational ties to religion rather than the nature of its religious practice, such an exemption would avoid excessive entanglement between church and state and, in doing so, further the government’s interest in a less-restrictive manner.

In construing this Section, courts have articulated various tests that expound on the letter and spirit of Section 414(e). The Fourth Circuit, for example, has held that a determination of whether an organization shares common bonds and convictions with a church turns on three factors: “(1) whether the religious institution plays any official role in the governance of the organization; (2) whether the organization receives assistance from the religious institution; and (3) whether a denominational requirement exists for any employee or patient/customer of the organization.”²¹⁶ Importantly, this analysis “does not ask about the centrality of beliefs or how important the religious mission is to the institution” and thus avoids excessive entanglement between church and state.²¹⁷

Because of their organizational ties with the Church, Catholic hospitals, schools, and charities would likely be included in an exemption based on institutional and organizational ties to religion. First, the Catholic Church plays a direct and official role in the governance of its hospitals, schools, charities, and other social service organizations. The US Conference of Catholic Bishops, for example, promulgates *Ethical and Religious Directives for Catholic Health Care Services*, which, in addition to defining the theological and moral principles underlying Catholic health care, stipulate that “Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for Administration, medical and nursing staff, and other personnel.”²¹⁸ Furthermore, Catholic universities are governed by the Apostolic Constitution *Ex corde ecclesiae*, which mandates that church-affiliated institutions of higher learning “must have the following *essential characteristics*”:

- (1) A Christian inspiration not only of individuals but of the university community as such; (2) A continuing reflection in the light of the Catholic faith upon the growing treasury of human knowledge, to which it seeks to contribute by its own research; (3) Fidelity to the Christian message as it comes to us through the

216. *Lown v. Cont’l Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001).

217. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002).

218. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 12 (2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

Church; (4) An institutional commitment to the service of the people of God and of the human family in their pilgrimage to the transcendent goal which gives meaning to life.²¹⁹

Additionally, theology professors at Catholic universities must receive a mandate to teach from the local bishop, and non-Catholic academics are not permitted to comprise a majority of the institution’s faculty.²²⁰

These definitions of what constitutes an authentically Catholic institution are by no means simple guidelines or suggestions. The Code of Canon Law provides that “no undertaking is to claim the name Catholic without the consent of competent ecclesiastical authority,”²²¹ and in recent times Catholic bishops have acted to sever organizational ties with institutions that have acted contrary to Church teaching.²²² Additionally, many Catholic bishops and priests often serve as presidents, trustees, and chief executive officers of Catholic hospitals, universities, and charities.²²³ These institutions also receive direct financial assistance from the Church and operate under the authority of local bishops and other competent ecclesiastical authorities.²²⁴

In some cases, the organizational ties demanded by a Section 414(e)-style exemption may not cover all employers objecting to the mandate on free-exercise grounds. If such an exemption failed to alleviate a burden on an organization’s bona fide religious exercise, however, it

219. JOHN PAUL II, EX CORDE ECCLESIAE 13 (1990).

220. *Id.* at Article IV, §§ 3-4, at 33.

221. THE CATHOLIC CHURCH, CODE OF CANON LAW § 216 (1983), available at http://www.vatican.va/archive/ENG1104/___PU.HTM.

222. See, e.g., ROMAN CATHOLIC DIOCESE OF PHOENIX, DECREE REVOKING EPISCOPAL CONSENT TO CLAIM THE “CATHOLIC” NAME ACCORDING TO CANON 216 (2010), <http://www.washingtonpost.com/wp-srv/health/documents/abortion/bishopdecree.pdf> (explaining a Catholic bishop’s decision to revoke the name “Catholic” from a hospital in his diocese that provided contraceptive services and abortion).

223. See, e.g., *Our Leadership*, CATHOLIC CHARITIES USA, <http://www.catholiccharitiesusa.org/who-we-are/our-leadership/> (last visited Feb. 17, 2013) (noting that as of February 2013, the President of Catholic Charities USA is Rev. Larry Snyder); *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience? Before the H. Committee on Oversight & Government Reform*, 112th Cong. (2012) (statement of John Garvey, President of the Catholic University of America), available at http://oversight.house.gov/images/stories/Testimony/2-16-12_Full_HC_Mandate_Garvey_Complete.pdf (noting that twenty-four of CUA’s forty-eight elected board members must be Catholic clerics).

224. Fred Kammer, *10 Ways Catholic Charities are Catholic*, CATHOLIC CHARITIES USA 3 (1998), available at <http://www.ccmke.org/CatholicCharities/pdf/TenWays.pdf>.

could still have recourse to the courts, which may grant individual exemptions to the mandate.²²⁵ Indeed, initial challenges to the law have shown that despite their lack of institutional ties to religion, private employers objecting to the mandate on free-exercise grounds may nevertheless have a high likelihood of success on their claims.²²⁶

The adoption of a Section 414(e)-style exemption would, however, relieve the courts of adjudicating the most serious claims brought by institutional religious employers whose structural ties to the Catholic Church require that they either break the law or act contrary to the religious teachings that form the basis of their identity.

CONCLUSION

Ultimately, the balance between the interests of the secular state and the conscientious objections of religious institutions cannot be achieved by simple attempts to legislate “a wall of separation” between the two. What the founders of this nation accomplished, and what we can strive to achieve today, however, is a “sensible” balance between the interests represented by these separate, yet equally important participants in American democracy.²²⁷

Given the strength and vitality of religious institutions in American life, this is a compromise that we cannot afford to put off. To date, the emerging tensions between the Obama Administration and the Catholic Church in the United States have led to increasingly strained relations between the two.²²⁸ In response to the present controversy, Pope Benedict XVI has asked that “the entire Catholic community in the United States come to realize the grave threats to the Church’s public moral witness presented by a radical secularism which finds increasing expression in the political and cultural spheres.”²²⁹ Making an oblique

225. The Supreme Court has specifically acknowledged that the existence of a legislative exemption does not preclude the courts from creating additional exemptions under the RFRA. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

226. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (granting preliminary injunctive relief to a private employer challenging the mandate under the RFRA).

227. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 99 (Cal. 2004) (Brown, J., dissenting) (“By protecting religious groups from gratuitous state interference, we convey broad benefits on individuals and society. By underestimating the transformative potential of religious organizations, we impoverish our political discourse and imperil the foundations of liberal democracy.”).

228. Jerry Markon, *Catholic Groups’ Ire at Obama Is Growing*, WASH. POST, Nov. 1, 2011, at A1.

229. Pope Benedict XVI, Address to the Bishops of the United States of America on Their “*Ad Limina*” Visit (Jan. 19, 2012), *available at*

reference to the HHS mandate, the Pope expressed his concern about “certain attempts being made to limit that most cherished of American freedoms, the freedom of religion,” including “efforts . . . to deny the right of conscientious objection on the part of Catholic individuals and institutions with regard to cooperation in intrinsically evil practices.”²³⁰ This, he noted, is indicative of a “tendency to reduce religious freedom to mere freedom of worship without guarantees of respect for freedom of conscience.”²³¹ Pope Benedict’s sentiments have been echoed by a variety of religious leaders, both Catholic and non-Catholic, who have made it very clear that the controversy over the HHS mandate is not so much about contraception as it is about the freedom of religious institutions to determine their own policies on matters implicating faith and morals.²³²

This, of course, can be a difficult balance to strike when a religious institution’s beliefs intersect with its responsibilities to provide adequate health insurance coverage to its employees. Ultimately, however, a religious institution being forced to cooperate in the proliferation of what it deems to be sinful products and services simply by offering a health plan raises concerns that transcend the morality of birth control. Rather, this issue speaks to the right of all Americans to act in accordance with their conscience without fear of governmental pressure or intrusion. In asking for a broader exemption to the HHS mandate, Catholic institutions are not demanding that their employees refrain from using contraception. They are simply asking that the government acknowledge their free-exercise interest in not cooperating with those who choose to do so. Precisely because the HHS mandate’s narrow exemption places Catholic institutions that reach out to the world in the “impossible position” of offering such cooperation, Congress should act to repeal it; given the political realities currently foreclosing that outcome,²³³ however, the rule should at least be modified with a “sensible” conscience clause that will avert unnecessary conflict between Church and State.

http://www.vatican.va/holy_father/benedict_xvi/speeches/2012/january/documents/hf_ben-xvi_spe_20120119_bishops-usa_en.html.

230. *Id.*

231. *Id.*

232. Michelle Bauman, *US Clergy Declare ‘State of Emergency’ Over Contraception Mandate*, CATHOLIC NEWS AGENCY (Feb. 23, 2012, 2:05 AM), <http://www.catholicnewsagency.com/news/us-clergy-declare-state-of-emergency-over-contraception-mandate/>.

233. Michelle Bauman, *Senate Rejects Blunt Amendment to Defend Religious Freedom*, CATHOLIC NEWS AGENCY (Mar. 1, 2012, 1:31 PM), <http://www.catholicnewsagency.com/news/senate-rejects-blunt-amendment-to-defend-religious-freedom/>.