

2020

## Of Mosquitoes and "Moral Convictions" in the Age of Zika: How the Trump Administration's Gutting of the Affordable Care Act's Contraceptive Mandate Jeopardizes Women's and Children's Health

Linda C. Fentiman

Follow this and additional works at: <https://scholarlycommons.law.case.edu/healthmatrix>

 Part of the [Health Law and Policy Commons](#), and the [Medical Jurisprudence Commons](#)

---

### Recommended Citation

Linda C. Fentiman, *Of Mosquitoes and "Moral Convictions" in the Age of Zika: How the Trump Administration's Gutting of the Affordable Care Act's Contraceptive Mandate Jeopardizes Women's and Children's Health*, 30 Health Matrix 85 (2020)

Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol30/iss1/5>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Health Matrix: The Journal of Law-Medicine by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

OF MOSQUITOES AND “MORAL  
CONVICTIONS” IN THE AGE OF  
ZIKA: HOW THE TRUMP  
ADMINISTRATION’S GUTTING OF  
THE AFFORDABLE CARE ACT’S  
CONTRACEPTIVE MANDATE  
JEOPARDIZES WOMEN’S AND  
CHILDREN’S HEALTH

*Linda C. Fentiman*<sup>†</sup>

ABSTRACT

The Trump Administration’s efforts to undo the contraceptive mandate, a key component of the Affordable Care Act (ACA), threaten a major public health emergency, as well as the rule of law and separation of powers. The Trump Administration’s Rules greatly expand the grounds for exemption from the contraceptive mandate: they allow even publicly traded corporations to assert religious beliefs as a ground for exemption and exempt all employers except publicly traded corporations from compliance with the contraceptive mandate if they hold “moral convictions” in opposition to contraception. By denying women access to effective, affordable contraception, these Rules increase the odds that women who are at risk for Zika infection will become pregnant and thus increase the chances that children will be born with Zika-related injuries. Instead of responding to this public health challenge, the Trump Administration has erected major barriers to family planning, impeding women’s

---

<sup>†</sup> Copyright 2019 Linda C. Fentiman, Professor Emerita, Elisabeth Haub School of Law at Pace University; LL.M. Harvard University Law School, 1983; J.D. SUNY Buffalo Law School, 1975; B.S. Cornell University, 1970. The author gratefully acknowledges the insightful comments of Professors Mary Anne Case, Bennett Gershman, and Elizabeth Sepper. She is also grateful for the excellent research assistance provided by her research assistants at Pace: Zach Berliner, Kaitlyn Capasso, Emily Rawdon, and Lauren Schnoebelen.

ability to make informed decisions about the risk of bringing a disabled child into the world. These Rules are unconstitutional and contravene several federal statutes; they are also extremely short-sighted health policy. Although two federal district courts issued injunctions against their enforcement, the Supreme Court has granted certiorari in one of them, *Trump v. Pennsylvania*, and a decision is expected by the summer of 2020. This article first explores Zika’s health risks, examining the harms suffered by children exposed to Zika in utero and the difficult choices faced by pregnant and potentially pregnant women and their families. A recent CDC study shows that one in seven (14%) of children born to mothers infected with Zika suffer from Zika-related birth defects, with some injuries not apparent until the child’s first birthday. Under these circumstances, access to certain contraceptive methods, especially long-acting reversible contraception, is essential for women to be able to prevent pregnancy.

The article then turns to the legal and constitutional issues raised by the Rules’ expansion of employers’ ability to opt out of the contraceptive mandate. It argues that:

- 1) the Rules violate the Administrative Procedure Act, because they were promulgated without notice and the opportunity for public comment, without good cause, and because they are contrary to the statutory authority granted the executive by the Affordable Care Act,
- 2) the Religious Freedom Restoration Act (RFRA) does not justify the Rules,
- 3) the Rules violate the Establishment Clause by advancing a particular sectarian religious viewpoint as government policy,
- 4) the Rules violate the equal protection clause of the Fifth Amendment by carving out only women’s reproductive health care as a medical service an employer can choose not to provide,
- 5) the Rules conflict with Title VII of the Civil Rights Act of 1964, by authorizing employers to discriminate on the basis of sex in providing employee benefits, and
- 6) the Rules deny women their constitutional rights to privacy and procreative liberty, guaranteed by the due process clause of the Fifth Amendment.

After explaining why the Rules are unconstitutional and unlawful, the article concludes with concrete recommendations for a national health policy that is both lawful and effective, protecting American children by allowing their mothers to be

autonomous decision-makers, who can act to limit the risks of becoming infected with the Zika virus and transmitting the virus to their children.

## CONTENTS

CONTENTS .....	87
INTRODUCTION.....	88
A ROAD MAP .....	102
I. THE RISKS OF ZIKA INFECTION AND HOW TO REDUCE THEM.....	103
A. <i>History of the Zika Epidemic</i> .....	103
B. <i>Consequences of Zika Infection</i> .....	105
C. <i>Why Contraceptive Access and Efficacy Matter</i> .....	111
II. THE PUBLIC HEALTH RESPONSE TO ZIKA—WHO, THE CDC, AND STATE AND LOCAL GOVERNMENTS .....	116
III. THE RULES PERMITTING EXEMPTION FROM THE CONTRACEPTIVE MANDATE FOR RELIGIOUS AND MORAL OBJECTIONS ARE UNCONSTITUTIONAL AND UNLAWFUL .....	120
A. <i>The Religious Freedom Restoration Act Does Not Justify the Trump Administration’s Rules</i> .....	122
1. The Genesis of RFRA—Employment Division v. Smith.....	122
2. RFRA’s Enactment and Initial Judicial Interpretations .....	124
3. Hobby Lobby’s Extraordinary Expansion of RFRA .....	127
4. Hobby Lobby’s Consequences: Wheaton College v. Burwell, Zubik v. Burwell, and the Unsuccessful Quest for Compromise .....	137
5. The Trump Administration Issues Regulations Gutting the Contraceptive Mandate.....	140
6. RFRA Neither Supports nor Necessitates the Rules’ Expansion of the Ability to Opt-Out of the Contraceptive Mandate.....	143
a. <i>The Rules Should Not Have Extended Hobby Lobby to Publicly Traded Corporations</i> .....	147
b. <i>RFRA Does Not Protect “Moral Convictions”</i> .....	148
B. <i>The Final Rules Violate the Establishment Clause of the First Amendment, By Promoting the Sectarian Religious Views of Certain Religious Denominations as Government Policy</i> .....	151
C. <i>The Government Has a Compelling Interest in Making Contraceptive Care Available to All Women; A</i>	

*Wholesale Exemption of For-Profit and Not-for-Profit Corporations Defeats that Interest*.....155

D. *The IFRs and Final Rules Deny Women the Equal Protection of the Laws* .....160

E. *The IFRs and Final Rules Violate Title VII of the Civil Rights Act of 1964*.....162

F. *The Rules Violate Women’s Constitutional Right to Due Process, Personal Privacy, and Procreative Liberty*.....164

G. *Rolling Back the Contraceptive Mandate Via IFR Violates the Administrative Procedure Act Because the Government Did Not Demonstrate Good Cause for Dispensing with Notice and Comment Rulemaking* .....165

IV. RECOMMENDATIONS FOR PUBLIC HEALTH POLICY THAT IS LAWFUL, CONSTITUTIONAL, AND EFFECTIVE .....169

#### INTRODUCTION

The mosquito is said to be “the world’s deadliest animal,” due to its ability to infect humans with fatal diseases, including yellow fever, malaria, dengue fever, chikungunya, and, most recently, the Zika virus.<sup>1</sup> Over the last several years, an exponentially expanding Zika epidemic has spread across Latin America, the Caribbean, the United States and its territories; as a result, physicians, public health authorities, and the public have learned just how devastating Zika can be.<sup>2</sup> The Zika virus has

- 
1. Blair J. Wylie et al., *Insect Repellents During Pregnancy in the Era of the Zika Virus*, 128 *OBSTETRICS AND GYNECOLOGY* 1111, 1114 (2016) (noting that the mosquito is responsible for “more than 725,000 deaths each year”).
  2. Zulal Ozkurt & Esral Cinar Tanriverdi, *Global Alert: Zika Virus— an Emerging Arbovirus*, 49 *EURASIAN J. OF MED.* 142, 142–43 (2017); see also *Virus & Contagious Disease Surveillance: 2016 Zika Outbreak*, HEALTH MAP, <https://www.healthmap.org/zika/#timeline> [<https://perma.cc/LG8Y-9TKJ>] (last visited June 20, 2018) (documenting the global spread of Zika infections from March 2014 through March 2017); Carrie K. Shapiro-Mendoza et al., *Pregnancy Outcomes After Maternal Zika Infection During Pregnancies—U.S. Territories, January 1, 2016–April 25, 2017*, 66 *MORBIDITY AND MORTALITY WKLY. REP.* 615 (June 16, 2017); see also Victoria Hall et al., *Update: Noncongenital Zika Virus Disease Cases—50 U.S. States and the District of Columbia, 2016*, 67 *MORBIDITY MORTALITY WKLY REP.* 265 (2018); Augustina Delaney et al., *Population-Based Surveillance of Birth Defects Potentially*

infected millions of adults and children globally, leading to thousands of children being born with microcephaly and other severe neurological abnormalities, as well as higher than normal incidence of miscarriages and stillbirths among pregnant women infected with Zika.<sup>3</sup> From 2015 to 2018, in the continental United States, 116 infants were born with Zika-associated birth defects; in Puerto Rico, the U.S. Virgin Islands, and other American territories, the number is nearing 170.<sup>4</sup> In response to the epidemic, the World Health Organization (WHO), the Centers for Disease Control (CDC), and other health agencies have rushed to implement effective public-health strategies to minimize the risk of Zika transmission by controlling mosquitoes and attempting to minimize the risk of sexual transmission of the Zika virus.<sup>5</sup> The CDC have consistently highlighted the potential dangers of Zika for a developing fetus, advising women contemplating child-bearing, as well as their partners, to consider those dangers in making plans to travel to a destination where

---

*Related to Zika Virus Infection—15 States and U.S. Territories, 2016*, 67 MORBIDITY AND MORTALITY WKLY. REP. 91, 93 (Jan. 26, 2018).

3. See Shapiro-Mendoza et al., *supra* note 2; Irfan A. Rather et al., *Zika Virus Infection during Pregnancy and Congenital Anomalies*, 8 FRONTIERS IN MICROBIOLOGY 581, 581 (2017); Elizabeth K. Nugent et al., *Zika Virus: Epidemiology, Pathogenesis and Human Disease*, 353 AM. J. MED. SCI. 466, 470 (2017).
4. CDC, *Outcomes of Pregnancies with Laboratory Evidence of Possible Zika Virus Infection, 2015–2018*, <https://www.cdc.gov/pregnancy/zika/data/pregnancy-outcomes.html> [<https://perma.cc/W2LY-QZMR>] (last updated Oct. 30, 2018).
5. WHO Statement On The First Meeting Of The International Health Regulations (2005) (IHR 2005) Emergency Committee On Zika Virus And Observed Increase In Neurological Disorders And Neonatal Malformations, WORLD HEALTH ORG. (Feb. 1, 2016), <http://www.who.int/mediacentre/news/statements/2016/1st-emergency-committee-zika/en/> [<https://perma.cc/LN84-HYS5>] [hereinafter *WHO Statement—IHR 2005*]; Denise V. D’Angelo et al., *Measures Taken to Prevent Zika Virus Infection During Pregnancy—Puerto Rico, 2016*, 66 MORBIDITY AND MORTALITY WKLY. REP. 574, 576–77 (2017); Wylie et al., *supra* note 1, at 1111; Emily E. Peterson et al., *Update: Interim Guidance for Healthcare Providers Caring for Women of Reproductive Age with Possible Zika Virus Exposure—United States, 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP. 315, 315 (April 2016) [hereinafter *Peterson—April 2016*].

Zika is prevalent, have sex with a partner who may be infected, and, indeed, whether to become pregnant at all.<sup>6</sup>

Throughout the world, including the United States, the poor face the greatest risk of contracting Zika and transmitting it to a fetus during pregnancy. Not only are poor people most likely to live in dilapidated housing, where mosquitoes can breed and readily enter, but they also are the least likely to be able to access healthcare, including abortion and contraception.<sup>7</sup> Yet even financial means do not provide protection against Zika infection and its consequences. American women and girls living in more than half the states currently face substantial legal and logistical barriers to receiving the full range of reproductive healthcare services, even if they can afford it.<sup>8</sup> For example, Florida and Texas are both states where Zika has been prevalent and whose legislatures have repeatedly enacted restrictive laws on family planning and abortion.<sup>9</sup> Other states have enacted laws that

- 
6. See Peterson—April 2016, *supra* note 5, at 317; Titilope Oduyebo et al., *Update: Interim Guidance for Healthcare Providers Caring for Pregnant Women with Possible Zika Virus Exposure—United States (Including U.S. Territories)*, 66 MORBIDITY AND MORTALITY WKLY. REP. 781 (2017); see, e.g., *Women & Their Partners Trying to Become Pregnant*, CDC, <https://www.cdc.gov/pregnancy/zika/women-and-their-partners.html> [https://perma.cc/KVQ9-DCHW] (last visited Dec. 1, 2019).
  7. Sheree L. Boulet et al., *Contraceptive Use Among Non-pregnant and Postpartum Women at Risk for Unintended Pregnancy and Female High School Students*, 65 MORBIDITY & MORTALITY WKLY. REP. 780, 783–84 (2016).
  8. See *id.* at 783–84; see also Andrew D. Maynard et al., *Mitigating Risks to Pregnant Teens from Zika Virus*, 44 J. L., MED. & ETHICS 657, 658–59 (2016); *State Abortion Policy Landscape: From Hostile to Supportive*, GUTTMACHER INST. (Aug. 29, 2019), <https://www.guttmacher.org/article/2019/08/state-abortion-policy-landscape-hostile-supportive> [https://perma.cc/4JAT-A9H9]; Rick Rojas & Alan Binder, *Alabama Abortion Ban is Temporarily Blocked by a Federal Judge*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html?searchResultPosition=2> [https://perma.cc/LP5F-G75D].
  9. See, e.g., *State Facts About Abortion: Florida*, GUTTMACHER INST. (Sept. 2019), [https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida?gclid=CjwKCAiAjuPRBRBxEiwAeQ2QPh2SY2aem2p228xTH-H0oHuWwZ8NQVgy8ceRjuEMMIyNmsGF3rCdQRoCIB4QAvD\\_BwE](https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida?gclid=CjwKCAiAjuPRBRBxEiwAeQ2QPh2SY2aem2p228xTH-H0oHuWwZ8NQVgy8ceRjuEMMIyNmsGF3rCdQRoCIB4QAvD_BwE) [https://perma.cc/TTS4-3ZYF]; *State Facts About Abortion: Texas*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/fact-sheet/state-facts-about->

dramatically curtail abortion access, with the apparent goal of having a more conservative Supreme Court, which is seen as more likely to overturn *Roe v. Wade*, review the constitutionality of such statutes.<sup>10</sup> A striking illustration of how legal and economic barriers intersect is found in Puerto Rico, where a 2016 report estimated that two-thirds of all pregnancies are unintended and found that poor women have difficulty obtaining effective, long-acting contraception.<sup>11</sup> More than a year after the destruction wrought by Hurricanes Irma and Maria, Puerto-Rican women—

---

abortion-texas?gclid=CjwKCAiAjuPRBRBxEiwAeQ2QPzZm26zO3zllLEoQmcmHDkCCoXjdRI\_\_Fo0hv43kiZSDvOHZ7NVZFB0CG90QAvD\_BwE [https://perma.cc/2KUQ-LVTM]. Florida law states that all abortion counselling and referral agencies “shall furnish such person[s] with a full and detailed explanation of abortion, including the effects of and alternatives to abortion.” FLA. STAT. § 390.025(2) (2019). While both states allow minors to seek abortion without parental permission, each state has a very demanding judicial bypass procedure. FLA. STAT. § 390.01114 (4) (2019); TEX. FAM. CODE § 33.003 (2016).

10. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); Niraj Chokshi, *Ohio’s Fetal Heartbeat Abortion Ban is Latest Front in Fight over Roe v. Wade*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/ohio-abortion.html?searchResultPosition=6> [https://perma.cc/9GYQ-6SBY]; K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html?searchResultPosition=5> [https://perma.cc/U92V-U2LJ]; Julie Bosman & Mitch Smith, *Iowa Lawmakers Pass Abortion Bill With Roe v. Wade in Sights*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/iowa-abortion-law-bill.html> [https://perma.cc/N3PV-SA7J]. The Iowa legislature enacted, and its governor signed, separate laws prohibiting abortion after there is a detectable fetal heartbeat (in most cases, six weeks), and requiring pregnant women to wait 72 hours before receiving an abortion. An Iowa District Court temporarily enjoined enforcement of the fetal heartbeat law with the Iowa Supreme Court later invalidating the 72-hour waiting period as violating the Iowa Constitution’s guarantees of due process and equal protection of the laws. *See Planned Parenthood of the Heartland v. Reynolds*, 915 N.W. 2d 206, 246 (Iowa 2018).
11. Naomi K. Tepper et al., *Estimating Contraceptive Needs and Increased Access to Contraception in Response to the Zika Virus Disease Outbreak—Puerto Rico, 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP. 311, 314 (Apr. 1, 2016) (attempting to quantify the need for effective contraception in relying on some earlier studies in Puerto Rico and elsewhere).



of all economic strata—still face significant obstacles in reducing their exposure to mosquitoes and gaining access to health care.<sup>12</sup>

In the face of the devastating Zika epidemic, whose extent and long-term consequences are still not fully understood,<sup>13</sup> the Trump Administration’s decision to roll back the contraceptive coverage required by the Affordable Care Act (ACA) is both flawed health policy and legally unsound. The ACA contraceptive mandate made it possible, for the first time, for all American women to have access to the most effective contraceptive methods available<sup>14</sup>—without cost sharing.<sup>15</sup> Thus, the mandate enabled many women who could not previously afford effective

- 
12. Cf. Richard Fausset, *A Doctor’s Abandoned Journey into Isolated Puerto Rico*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/us/puerto-rico-doctors-storm.html> [<https://perma.cc/HG3P-WK7V>]; Carl Hulse, *In Puerto Rico, the Drive for Statehood Gains Momentum*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/09/us/politics/advocates-of-puerto-rico-statehood-plan-to-demand-representation.html> [<https://perma.cc/4NMP-P2T6>]; Patricia Mazzei, *U.S. Islands Say Lights Are Coming Back On*, N.Y. TIMES (Jan. 10, 2018), <https://www.wral.com/u-s-virgin-islands-say-lights-are-coming-back-on/17245615/> [<https://perma.cc/4SJB-5CYZ>] (discussing the lack of electrical power in Puerto Rico more than three months after Hurricanes Irma and Maria).
  13. Suzanne M. Gilboa et al., *Population-Based Pregnancy and Birth Defects Surveillance in the Era of Zika Virus*, 109 BIRTH DEFECTS RES. 372, 376 (2017). What is known is that at least some infants born with microcephaly suffer profound physical and mental impairments and are significantly delayed in their development; thus, they will require a lifetime of expensive medical and rehabilitative services. Pam Belluck, *As Zika Babies become Toddlers, Some Can’t See, Walk or Talk*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/health/zika-babies-brazil.html> [<https://perma.cc/S7HM-WJU3>]; see also Ashley Satterfield-Nash et al., *Health and Development at Age 19–24 Months of 19 Children Who Were Born with Microcephaly and Laboratory Evidence of Congenital Zika Virus Infection During the 2015 Zika Virus Outbreak—Brazil, 2017*, 66 MORBIDITY AND MORTALITY WKLY. REP. 1347, 1350 (2017).
  14. Frances Robles, *Puerto Rico Spent 11 Months Turning the Power Back On. They Finally Got to Her*, N.Y. TIMES (Aug 14, 2018), <https://www.nytimes.com/2018/08/14/us/puerto-rico-electricity-power.html> [<https://perma.cc/7W39-2Z28>].
  15. No-cost contraceptive care is required as part of a broad array of preventative health services mandated for all health plans. See 42 U.S.C. §§ 300gg-13(a)(1), (4), and (5) (2018).

contraception to do so. Women were now empowered to control the number and timing of their pregnancies,<sup>16</sup> including pregnancy when they were at risk for contracting Zika. There are many other reasons why women may want to avoid pregnancy, including being able to space their children to minimize adverse birth outcomes,<sup>17</sup> wanting to complete their education, financial difficulties, domestic violence, and a desire not to conceive if they are struggling with substance abuse.<sup>18</sup> As the Supreme Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, “[t]he ability of women to participate equally in the economic life of the nation has been facilitated by their ability to control their reproductive lives.”<sup>19</sup>

Unfortunately, the Trump Administration has taken drastic action, on multiple fronts, to imperil women’s access to reproductive health care, including contraception, which in turn puts children’s health at risk. On October 6, 2017, the Trump Administration announced two Interim Final Rules (the IFRs), exempting employers and other health insurance plan sponsors<sup>20</sup>

- 
16. Laurie Sobel et al., *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*, KAISER FAM. FOUND. (Oct. 2017), <https://www.kff.org/womens-health-policy/issue-brief/new-regulations-broadening-employer-exemptions-to-contraceptive-coverage-impact-on-women/> [<https://perma.cc/F2V3-E3Z8>].
  17. Being able to space the birth of one’s children reduces the risk of stillbirth and delivering a premature or low birth weight infant. Spacing pregnancies to allow at least 18 to 23 months between them minimizes the risk of preterm birth, low birthweight, and fetal death (stillbirths and miscarriages). Aparna Sridhar and Jennifer Salcedo, *Optimizing Maternal and Neonatal Outcomes with Postpartum Contraception: Impact on Breastfeeding and Birth Spacing*, 3: 1 MATERNAL HEALTH, NEONATOLOGY, AND PERINATOLOGY 2 (2017) (discussing review of 77 studies).
  18. Adam Sonfield, *Why Family Planning Policy and Practice Must Guarantee a True Choice of Contraceptive Methods*, 20 Guttmacher Pol’y Rev. 103, 104–05 (2017); LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN’S HEALTH* 12–13 (2017); cf. Melissa B. Alexander, *Denying the Dyad: How Criminalizing Pregnant Drug Use Harms the Baby, Taxpayers and Vulnerable Women*, 82 Tenn. L. Rev. 745, 774 (2015).
  19. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).
  20. *Trump Administration Issues Rules Protecting the Conscience Rights of All Americans*, U.S. DEP’T OF HEALTH AND HUM. SERVS. (Oct. 6, 2017), <https://www.hhs.gov/about/news/2017/10/06/>

from their obligation to provide all health-plan enrollees with preventative healthcare, including access to any FDA-approved contraception prescribed by their physicians, if the employer claims that compliance would burden its religious beliefs or “moral convictions.”<sup>21</sup> No exemption was provided for any other healthcare service covered under the ACA, although there are other medical procedures, including court-ordered blood transfusions, Caesarean sections, and mandatory vaccination, that have previously faced legal challenges on the basis of litigants’ religious or “moral” beliefs.<sup>22</sup> On November 6, 2018, the

---

trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html [https://perma.cc/LR82-QW3J]. Note that most health-plan sponsors under the ACA are employers; however, a relatively small number, such as colleges and universities, also provide health insurance for their students. For the sake of simplicity, this article will refer to all health-plan sponsors as employers unless there is a reason to distinguish between them.

21. Robert Pear et al., *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [https://perma.cc/V7X7-35P9]; *See also Fact Sheet: Final Rules on Religious and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, U.S. DEPT. OF HEALTH & HUM. SERVS. (Nov. 7, 2018), <https://wayback.archive-it.org/3926/20191016193511/https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html> [https://perma.cc/26DG-5A5T] [hereinafter *HHS Fact Sheet*]. The Interim Final Rules were published at 82 Fed. Reg. 47,658 (Oct. 13, 2017) and 82 Fed Reg. 47,838 (Oct. 13, 2017).
22. Challenges to court-ordered blood transfusions have largely been brought on religious grounds by Jehovah’s Witnesses. *See, e.g.*, *Raleigh Fitkin-Paul Memorial Hospital v. Anderson*, 201 A.2d 537, 537 (N.J. 1964); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (Sup. Ct. Queens Cty. 1985); *cf. In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994). Additionally, *Jefferson v. Griffin Cty. Hosp. Auth.* is a notable case in which a pregnant woman unsuccessfully challenged a court-ordered Caesarean sections on religious grounds. 274 S.E.2d 457, 459–60 (Ga. 1981). Exemplary cases challenging vaccinations are *Boone v. Boozman*, 217 F. Supp. 2d 938, 942 (E.D. Ark. 2002) and *Check ex rel. MC v. N.Y. City Dep’t of Ed.*, No. 13-cv-791 2013, WL 2181045 at \*10–11 (E.D. N.Y. 2013). All but five states provide exemptions for mandatory childhood vaccination based on a parent’s religious beliefs; an additional 15 states allow exemption based on “moral, philosophical or other personal beliefs . . .” *See States with Religious and Philosophical*

day after the mid-term-Congressional elections, the Trump Administration issued Final Rules (the Final Rules) that reaffirmed the IFRs with only minor changes.<sup>23</sup>

Under the Final Rules, many women, both poor and middle-income, will be unable to receive effective contraception and family planning services, despite the claim in a “Fact Sheet” issued by the Trump Administration that “over 99.9 percent of the 165 million women in the U.S” would be unaffected by the this rule.<sup>24</sup> In addition, the Regulatory Impact Analysis for the IFRs estimated that between 31,700 and 120,000 women nationwide would be affected by the proposed enlargement of the contraceptive mandate’s exemptions, with an annual price tag of \$18.5 to 63.8 million in costs for women no longer eligible to receive contraceptive services through their employers, which would be transferred directly to these women or to the states.<sup>25</sup> The Regulatory Impact Analysis acknowledged that the lack of contraceptive access would impose an additional burden on individual women as well as the states to pay for pregnancy-

---

*Exemptions from School Immunization Requirements*, NAT’L CONF. OF ST. LEGIS. (Jan. 3, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/JNX8-YN9N>].

23. Amy Goldstein, *Trump Administration Issues Rules Letting Some Employers Deny Contraceptive Coverage*, WASH. POST (Nov. 7, 2018), [https://www.washingtonpost.com/national/health-science/trump-administration-issues-rules-letting-some-employers-deny-contraceptive-coverage/2018/11/07/9402173a-e2d7-11e8-8f5f-a55347f48762\\_story.html](https://www.washingtonpost.com/national/health-science/trump-administration-issues-rules-letting-some-employers-deny-contraceptive-coverage/2018/11/07/9402173a-e2d7-11e8-8f5f-a55347f48762_story.html) [<https://perma.cc/PE3U-EBJJ>]; *Trump Administration Issues Final Rules Protecting Conscience Rights in Health Insurance*, U.S. DEP’T OF HEALTH AND HUM. SERVS. (Nov. 7, 2018), <https://www.hhs.gov/about/news/2018/11/07/trump-administration-issues-final-rules-protecting-conscience-rights-in-health-insurance.html> [<https://perma.cc/Y54D-2AWG>]. The regulations were published at 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 45 C.F.R. § 147.132) and the “moral exemption” at 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 45 C.F.R. § 147.133).
24. *HHS Fact Sheet*, *supra* note 21. The Fact Sheet for the final Rules admitted that many women could be affected by the Rules, estimating that between 6400 and 127,000 women could lose coverage.
25. *See Massachusetts v. U.S. Dep’t of Health and Hum. Services*, 923 F.3d 209, 216–17 (1st Cir. 2019) (citing 82 Fed. Reg. 47,658, 47,817–24 and 82 Fed. Reg. 47,838, 47,856–59).

related medical services for women who would not have become pregnant but for the contraceptive rollback; but they did not attempt to quantify those costs.<sup>26</sup> In the Fact Sheet, the government asserted that, even if employers opted out of the contraceptive mandate, community health centers would offer contraceptives to low-income women.<sup>27</sup> However, it overlooked Republican lawmakers’ efforts to slash federal funding for family planning services<sup>28</sup> and their recent push for the states to determine issues of Medicaid eligibility and services, with the goal of limiting the impact of federal requirements that adolescents and older women be able to obtain reproductive-health services at low or no cost.<sup>29</sup>

In May 2018 the Department of Health and Human Services (HHS) took concrete steps to implement this strategy, issuing new grant-making criteria for Title X, the federal program that funds family planning services.<sup>30</sup> The Final Rules emphasized “fertility awareness,” a synonym for the ineffective “rhythm method.” At the same time, they failed to mention contraception—a striking omission for a family-planning program.<sup>31</sup> Planned Parenthood immediately filed suit, alleging that these new funding criteria

- 
26. *Id.* at n. 113 (citing 82 Fed. Reg. 47,658, 47,828).
  27. *Id.*
  28. *See, e.g.*, H.R. 354, 115th Cong. (2017); Paige Winfield Cunningham, *Planned Parenthood Defunded for One Year Under GOP Health Bill*, WASH. POST (May 4, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/05/04/planned-parenthood-defunded-for-one-year-under-gop-health-bill/> [<https://perma.cc/2TGB-QB7B>].
  29. Medicaid covers 75% of all publicly funded family-planning services. *Medicaid’s Role for Women*, KAISER FAM. FOUND. (June 2019), <http://files.kff.org/attachment/Fact-Sheet-Medicoids-Role-for-Women> [<https://perma.cc/ZYF5-U6BP>]; *See* Jennifer Steinhauer, *Senate Lets States Defund Clinics that Perform Abortions*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/30/us/politics/pence-congress-family-planning-money.html> [<https://perma.cc/8TLC-76KV>].
  30. *Planned Parenthood of Wisconsin, Inc. v. Azar*, 316 F. Supp. 3d 291, 298 (D. D.C. 2018).
  31. Sarah McCammon, *Planned Parenthood Sues to Block Trump’s ‘Radical Shift’ in Family Planning Program*, NPR (May 2, 2018), <https://www.npr.org/2018/05/02/604153496/planned-parenthood-sues-to-block-trumps-radical-shift-in-family-planning-program> [<https://perma.cc/4N3N-JUEN>].

contravene the purpose of the Title X statute and threaten the health of tens of thousands of low-income women.<sup>32</sup> The federal district court granted the government’s summary judgment motion on the ground that the proposed change in criteria did not constitute “final agency action” and was thus non-reviewable.<sup>33</sup>

The Trump Administration attempts to justify its radical reinterpretation of the ACA’s preventative healthcare mandate as necessary to safeguard employers’ freedom of religion and conscience. The three agencies issuing the IFRs rely heavily on the Religious Freedom Restoration Act (RFRA)<sup>34</sup> and essentially assert that, because the contraceptive mandate has been the subject of contentious litigation, the government should no longer enforce it.<sup>35</sup> The IFRs and the Final Rules (collectively, the Rules) significantly expand the exemptions and accommodations available to employers mandated by the ACA to provide preventative healthcare services to women.<sup>36</sup> They authorize a large number of employers to opt out of providing *any* contraceptive coverage at all or to opt to provide only certain

---

32. Complaint at 5, *Planned Parenthood of Wisconsin*, 316 F. Supp. 3d at 298. Other reproductive-rights organizations condemned this dramatic restriction of federal family-planning policy. *See, e.g.*, Spencer S. Hsu, *Groups Suing Trump Administration Over Family Planning Express Optimism*, WASH. POST (June 22, 2018, 9:33 AM), <https://www.washingtonpost.com/news/to-your-health/wp/2018/06/22/groups-suing-trump-administration-over-family-planning-express-optimism/> [<https://perma.cc/N26F-EWCT>].

33. *Planned Parenthood of Wisconsin*, 316 F. Supp. 3d at 294, 304.

34. 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

35. *Coverage of Preventive Services*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-of-preventive-services> [<https://perma.cc/X4MN-TVA9>] (last visited Nov. 24, 2019).

36. *See generally* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54). The three agencies that issued the Interim Final Rules and the Final Rules are the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury, all of which are involved in the implementation and enforcement of the ACA.

types of contraceptives.<sup>37</sup> Yet, allowing employers to pick and choose among the types of contraceptive care they will offer is antithetical to the ACA’s goal of providing preventative health care to *all* Americans,<sup>38</sup> with insured individuals making decisions about what care is appropriate after consulting with their physicians.

The Rules provide three distinct ways for employers to avoid providing contraceptive coverage to their employees. First, they greatly enlarge the grounds for opting out, encompassing not only those who object to contraceptive coverage on religious grounds, but also those who object “based on sincerely held moral convictions but not religious beliefs.”<sup>39</sup> This group is potentially much larger. Second, the Rules expand the category of exempt employers far beyond the non-profit religious organizations that were originally exempted by the Obama Administration’s regulations (including houses of worship)<sup>40</sup> and the closely held corporations<sup>41</sup> deemed to be eligible by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*<sup>42</sup> The IFRs expanded the

---

37. *Id.*

38. Joshua M. Adkinson & Kevin C. Chung, *The Patient Protection and Affordable Care Act: A Primer for Hand Surgeons*, 30 *HAND CLIN.* 3, 10 (Aug. 2014).

39. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 *Fed. Reg.* 47,838, 47,844 (Oct. 6, 2017) (to be codified at 45 C.F.R. pt. 147).

40. *Id.* at 47842.

41. In contrast to publicly traded corporations, which, by definition, have shares of stock that are freely traded on an open market, there is no public market for the sale of shares of closely held corporations. Other factors that commonly distinguish closely held corporations from publicly traded ones are that the former: (1) have few shareholders; (2) are managed by or under the direct supervision of its shareholders; (3) Their shares often are subject to transfer restrictions; and (4) Their shares are not registered under any state or federal securities acts. BRENT A. OLSEN, *PUBLICLY TRADED CORPORATIONS HANDBOOK*, § 1:4 IDENTIFYING THE PUBLICLY TRADED CORPORATION (Oct. 2019).

42. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014). At least one commentator has questioned whether Hobby Lobby and Mardel were in fact closely held among a small group of family members, noting that the companies’ corporate filings indicated, instead, that the companies were “privately held,” from which one could infer that there were other, minority shareholders. Robert M. Ackerman & Lance Cole, *Making Corporate Law More*

categories of exempt employers to include publicly traded corporations and unspecified “non-federal governmental plan sponsors” claiming to “hold” religious beliefs in opposition to contraceptive coverage.<sup>43</sup> By contrast, the Final Rules do not permit non-federal government entities to claim “moral” objections to providing contraceptive coverage.<sup>44</sup>

Third, the Final Rules make it much easier to opt out by seeking an “accommodation,” which eliminates the requirement that an employer with religious or moral objections to providing contraception notify the government or its health-plan administrator that it seeks to opt out.<sup>45</sup> After the decision in *Hobby Lobby*,<sup>46</sup> some health plan sponsors claimed that the obligation to notify the government that they were seeking an accommodation was *itself* a burden on their free exercise of religion, making them “complicit” in the furnishing of contraceptives.<sup>47</sup> They theorized that, by notifying the government that they wanted to opt out, thus triggering their health plan administrator’s obligation to provide contraceptive services, they were indirectly making contraceptives available to

---

*Communitarian: A Proposed Response to the Roberts Court’s Personification of Corporations*, 81 BROOK. L. REV. 895, n. 263 (2016).

43. 83 Fed. Reg. 57,536, 57,563 (Nov. 15, 2018).
44. Under the Interim Final Rules, all corporate and other non-governmental entities that would object on the basis of their religious beliefs were authorized to opt out. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,811 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54). For plan sponsors whose objection is based on moral convictions, all entities may opt out except publicly traded corporations. In addition, the IFRs envisioned that “non-federal governmental plan sponsors . . . may have objections based on sincerely held moral convictions.” Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,808, 47,810–11 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54). The final Rules have slightly limited those who may claim exemption based on religious or moral beliefs. *HHS Fact Sheet*, *supra* note 21.
45. This issue—accommodation versus exemption—will be explored in greater detail in Part III, *infra*.
46. *Hobby Lobby*, 573 U.S. at 688–91.
47. See discussion in Part III. A. 4, *infra*.



their employees or students.<sup>48</sup> The Final Rules respond to these claims by eliminating *any* obligation on health-plan sponsors to “self-certify” their objections on either religious or moral grounds.<sup>49</sup> As a result, not only will some women, whose employers have determined not to provide contraceptive coverage, *not receive services* mandated by the ACA, but their employers will also not be obligated to inform the government, or the affected women, that they will not be providing these services.<sup>50</sup>

These Final Rules, which affect only *women’s* access to healthcare, raise serious constitutional and statutory concerns. The Final Rules implicate several constitutional provisions, including the Fifth Amendment guarantees of equal protection, due process, and personal privacy and the First Amendment. By bending over backwards to accommodate the religious beliefs and moral convictions of *certain* employers, the Final Rules actually prefer certain religious beliefs over others. This may violate the First Amendment’s Establishment Clause, which requires government neutrality toward religions.<sup>51</sup> Finally, in asserting that the Final Rules are mandated by RFRA, the executive branch agencies issuing the Final Rules have arrogated to

- 
48. *See, e.g.,* Dordt College v. Burwell, 801 F.3d 946, 949 (8th Cir. 2015) *vacated*, Burwell v. Dordt College, 136 S.Ct. 2006 (2016); *cf.* Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014) *vacated sub nom.*, Notre Dame v. Burwell, 136 S.Ct. 2007 (2016).
49. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,806 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54) (discussing religious beliefs); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,844 (Oct. 6, 2017) (discussing moral convictions).
50. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,808–09 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54) (discussing religious beliefs); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,849 (discussing moral convictions).
51. *Establishment Clause Overview*, FREEDOM FORUM INST. (Sept. 16, 2011), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/establishment-clause-overview/> [<https://perma.cc/3FEC-R4QM>].

themselves the role of the judiciary, raising a serious separation of powers issue. It is for the courts, not executive agencies, to interpret RFRA in the context of a particular plaintiff’s claim.

Further, the Final Rules violate two separate provisions of the Administrative Procedure Act (APA).<sup>52</sup> First, promulgating these regulations as IFRs, which eliminated the opportunity for public notice and comment before the Rules became effective, contravenes the explicit requirements of the APA and undermines the rule of law. The APA allows for promulgation of rules without notice and comment only for “good cause.”<sup>53</sup> Second, the agencies acted beyond the scope of their statutory authority.<sup>54</sup> There is no support in the language of the ACA for the Final Rules’ creation of a massive exemption from compliance with the contraceptive mandate. The ACA established only two groups that were exempt from compliance—those employers whose health plans were “grandfathered,” and those who had fewer than fifty employees. These APA violations are likely to prove determinative in litigation challenging the Rules, since courts prefer not to decide constitutional questions when they can be avoided by deciding on statutory grounds.<sup>55</sup> Finally, the Final Rules are in tension with Title VII of the Civil Rights Act of 1964 (Title VII)<sup>56</sup> because they permit employers to discriminate on the basis of sex in their provision of employee benefits by

---

52. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2018).

53. 5 U.S.C. § 553(b) (2018). *See* discussion, *infra*, in Part III. A. 5.

54. The APA commands administrative regulations to be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 816–17 (E.D. Pa. 2019) (citing 5 U.S.C. §§ 706 (2) (A), (C)). This decision was upheld by the Third Circuit, 930 F.3d 543 (3d Cir. 2019), but the Supreme Court issued a writ of certiorari in January 2020, *Trump v. Pennsylvania*, 2020 U.S. LEXIS 531 (Jan. 17, 2020), and *Little Sisters of the Poor v. Pennsylvania*, 2020 U.S. LEXIS 535 (Jan. 17, 2020). *See* Section III. G., *infra*.

55. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, HARVARD L. REV. FORUM (June 9, 2015), <https://harvardlawreview.org/2015/06/avoiding-constitutional-questions-versus-avoiding-unconstitutionality/> [<https://perma.cc/CM56-GCKA>].

56. 42 U.S.C. § 2000e (2018).

authorizing them to elect not to provide health care services to their female, but not male, employees.<sup>57</sup>

The Trump Administration’s actions are also inimical to fundamental public health law principles, in which governments are empowered to act to protect the population’s health, because individuals acting alone cannot do so.<sup>58</sup> It is precisely in the case of infectious diseases like Zika and COVID-19 that citizens rely on their government to act: intervening directly to reduce exposure to mosquitoes carrying the virus; advising people about how to protect themselves; providing them with the tools to do so, either directly or through another government-sponsored program.<sup>59</sup> By eviscerating the ACA contraceptive mandate and privileging the religious and moral objections of a few over the autonomous decisions of millions of American women, the Trump Administration is precluding exactly the kind of individual self-determination and responsibility that Republicans frequently tout as the hallmark of American liberty.<sup>60</sup>

#### A ROAD MAP

This article proceeds in four parts. Part I explores the health risks posed by the Zika epidemic, focusing on the harmful consequences for children exposed to the Zika virus in utero and the difficult choices confronting pregnant and potentially pregnant women and their families. Part I also examines the

---

57. *Id.*

58. See WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 1–2 (2009); *Cf.* *Jacobson v. Massachusetts*, 197 U.S. 11, 28–31 (1905).

59. See, e.g., Jose A. Del Real et al., *Without Guidance from the Top, Americans Have Been Left to Figure Out Their Own Coronavirus Solutions*, WASH. POST (Mar. 15, 2020), [https://www.washingtonpost.com/politics/without-guidance-from-the-top-americans-have-been-left-to-figure-out-their-own-coronavirus-solutions/2020/03/15/9875aa64-6550-11ea-845d-e35b0234b136\\_story.html](https://www.washingtonpost.com/politics/without-guidance-from-the-top-americans-have-been-left-to-figure-out-their-own-coronavirus-solutions/2020/03/15/9875aa64-6550-11ea-845d-e35b0234b136_story.html) [<https://perma.cc/Z55E-YT69>].

60. *Cf.* Amy Goldstein, *More than 4,300 Arkansas Residents Lose Medicaid under Work Requirements*, WASH. POST (Sept. 12, 2018),

[https://www.washingtonpost.com/national/health-science/more-than-4300-arkansas-lose-medicaid-under-work-requirements/2018/09/12/168bedce-b5f2-11e8-94eb-3bd52dfe917b\\_story.html](https://www.washingtonpost.com/national/health-science/more-than-4300-arkansas-lose-medicaid-under-work-requirements/2018/09/12/168bedce-b5f2-11e8-94eb-3bd52dfe917b_story.html) [<https://perma.cc/W9ZA-4END>].

efficacy of different contraceptive methods. Part II discusses the multi-pronged public health strategies adopted by the WHO, the CDC, and other government health agencies to contain the spread of the Zika virus. They do so both through “vector control,” which reduces the number of mosquitoes who can transmit Zika, and through maximizing the options for pregnant and potentially pregnant women to bear children who are not afflicted by Zika infection. Part II also addresses physicians’ response to Zika’s threat and examines the recommendations of the American Congress of Obstetrics and Gynecology (ACOG) and the American Academy of Pediatrics (AAP) on how to care for pregnant women, their developing fetuses, and children—all of whom are particularly vulnerable to the Zika virus. Parts I and II also examine the experience of women in Florida, New York, Puerto Rico, and Texas, all hit hard by the Zika epidemic. Part III addresses the constitutional and legal issues raised by the Rules’ enormous expansion of employers’ ability to opt out of the ACA contraceptive mandate enumerated above. Part IV concludes with recommendations for a national healthcare policy that is both lawful and effective: protecting American children by allowing their mothers to be autonomous decisionmakers. These women can then minimize the risks of becoming infected with the Zika virus and transmitting the virus to their children.

## I. THE RISKS OF ZIKA INFECTION AND HOW TO REDUCE THEM

### A. *History of the Zika Epidemic*

The Zika virus was first identified in monkeys in 1947 and in humans in 1952.<sup>61</sup> Thereafter, the virus mutated into two different “lineages,” one that emerged in Africa and another in Asia.<sup>62</sup> The first major outbreak of Zika was in Micronesia in 2007, followed by outbreaks in French Polynesia in 2013 and 2014.<sup>63</sup>

---

61. Ozkurt & Tanriverdi, *supra* note 2, at 142.

62. *Id.* at 143.

63. *Id.* at 142; Jason Beaubien, *Zika in French Polynesia: It Struck Hard In 2013, Then Disappeared*, NPR (Feb. 9, 2016), <https://www.npr.org/sections/goatsandsoda/2016/02/09/466152313/zika-in-french-polynesia-it-struck-hard-in-2013-then-disappeared> [<https://perma.cc/HH39-KGZM>]; Rather et al., *supra* note 3, at 581; Geraldo Duarte et al., *Zika Virus Infection in*

But it was not until early 2016 that the WHO and the CDC raised the alarm about the risks of Zika infection. This was prompted by the 2015 epidemic of infants born with microcephaly<sup>64</sup> in Brazil whose mothers had been infected with the Zika virus during pregnancy.<sup>65</sup> From 2015 to 2016, there were almost 2000 infants diagnosed with microcephaly in Brazil; by December 2017, the number had risen to nearly 3,000.<sup>66</sup> The epidemic spread rapidly throughout Latin America and the Caribbean,<sup>67</sup> but more slowly in the United States, Europe, and Africa, as travelers who visited areas of Zika infection brought the disease home with them.<sup>68</sup> Initially, most cases of Zika infection and “vertical transmission” of the Zika virus—an infection transmitted by a pregnant women to her fetus—reported in the United States were from women who had lived or travelled in areas where Zika was prevalent, primarily South and Central America and the Caribbean, but also the American territories of

---

*Pregnant Women and Microcephaly*, 39 BRAZILIAN GYNECOLOGY AND OBSTETRICS 235, 237 (2017).

64. Microcephaly is a serious medical condition in which a child has an unusually small head, usually at least two standard deviations from the norm. Duarte et al., *supra* note 63, at 238, 241. It can be diagnosed by prenatal ultrasound or at the time of birth, but the severity of the condition is often unknown for some time. *Facts about Microcephaly*, CDC, <https://www.cdc.gov/ncbddd/birthdefects/microcephaly.html> [<https://perma.cc/8QWH-BDP6>] (last updated Dec. 7, 2016).
65. See *WHO Statement—IHR 2005*, *supra* note 5; See Emily E. Peterson et al., *Interim Guidelines for Pregnant Women During a Zika Virus Outbreak—United States, 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP. 30, 30 (2016).
66. Yui-Wing Kam et al., *Specific Biomarkers Associated with Neurological Complications and Congenital Central Nervous System Abnormalities from Zika Virus-Infected Patients in Brazil*, 216 J. INFEC. DISEASES 172, 172 (July 2017); Belluck, *supra* note 13.
67. Peterson—*April 2016*, *supra* note 5, at 315; See *WHO Statement—IHR 2005*, *supra* note 5.
68. See Donald G. McNeil, Jr., *Houston Braces for Zika*, *Round 2*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/health/zika-virus-houston-texas.html> [<https://perma.cc/89L2-E88E>]. Commercial shipment of goods can also transport Zika-infected mosquitoes with them. Nugent, *supra* note 3, at 466.

Puerto Rico and the United States Virgin Islands.<sup>69</sup> Zika-infected blood donors can also transmit the virus; in Puerto Rico in 2016, up to 1.1% of donated blood was found to contain the Zika virus.<sup>70</sup>

*B. Consequences of Zika Infection*

Most adults infected with the Zika virus display few symptoms of infection, with about one fifth experiencing a mild rash and a low-grade fever.<sup>71</sup> A very small number of adults infected with the Zika virus have developed Guillain-Barré syndrome, a serious neurological condition in which an individual’s immune system attacks the peripheral nerves, leading to muscle weakness and loss of feeling in the arms or legs.<sup>72</sup> In rare cases, this can cause paralysis.<sup>73</sup>

The most significant risk from Zika occurs via vertical transmission—when pregnant women transmit the virus to their developing fetus.<sup>74</sup> In many cases, this can lead to microcephaly and other severe brain and central-nervous-system abnormalities, as well as miscarriages and stillbirths.<sup>75</sup> In Brazil, the incidence of microcephaly among infants due to vertical transmission was estimated to be as high as 48 per 10,000—twenty-four times the

- 
69. See Donald G. McNeil, Jr., *What We Know and What We Don’t Know About the Zika Cases in South Florida*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/health/the-zika-virus-in-south-florida.html> [<https://perma.cc/J4NM-WYQE>].
70. Nugent, *supra* note 3, at 471. As a result of this discovery, all blood donated in the United States is now screened for the Zika virus. Dennis Thompson, *Are U.S. Blood Donations Safe from Zika*, CBS NEWS (Apr. 10, 2017), <https://www.cbsnews.com/news/zika-blood-donations-safe/> [<https://perma.cc/8LJP-NPTD>].
71. *Zika Virus*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/zika-virus/symptoms-causes/syc-20353639> [<https://perma.cc/P46U-SDZZ>] (last visited Dec. 1, 2019).
72. *Guillain-Barre Syndrome*, WORLD HEALTH ORG. (Oct. 31, 2016), <http://www.who.int/mediacentre/factsheets/guillain-barre-syndrome/en/> [<https://perma.cc/LN84-HYS7>].
73. *Id.*
74. Cf. Tolulope Adebajo et al., *Update: Interim Guidance for the Diagnosis, Evaluation, and Management of Infants with Possible Congenital Zika Virus Infection—United States, October 2017*, 66 MORBIDITY AND MORTALITY WKLY. REP. 1089, 1090 (2017).
75. Nugent, *supra* note 3, at 470.

normal background rate of microcephaly.<sup>76</sup> Although other studies have not found the incidence of microcephaly to be quite so high, they have identified a significant risk of vertical transmission of the Zika virus from pregnant women to the fetus.<sup>77</sup> Among women in the continental United States with laboratory evidence of Zika infection, for example, the risk of giving birth to a child with birth defects potentially related to Zika was twenty times higher than the baseline prevalence of such abnormalities.<sup>78</sup> A recent CDC study that examined infants born to Zika-exposed mothers in Puerto Rico, the U.S. Virgin Islands, and other U.S. territories, found that *one in seven (about fourteen percent)* of these children developed serious health problems attributable to Zika by their first birthday.<sup>79</sup> Further, many of these problems were not identified at birth, but only became apparent later.<sup>80</sup> Several studies have shown that the Zika virus continues to replicate in

- 
76. Warderson Kleber de Oliveira et al., *Infection-Related Microcephaly After the 2015 and 2016 Zika Virus Outbreak in Brazil: A Surveillance-Based Analysis*, 390 THE LANCET 861, 864–65 (2017). Other studies have found lower incidence of microcephaly and/or another birth defect among the fetuses and infants of women known to have been infected with Zika. See, e.g., Margaret A. Honein et al., *Birth Defects Among Fetuses and Infants of US Women with Evidence of Possible Zika Virus Infection During Pregnancy*, 317 JAMA 59, 62 (2017).
77. Cynthia A. Moore et al., *Characterizing the Pattern of Anomalies in Congenital Zika Syndrome for Pediatric Clinicians*, 171 JAMA PEDIATRS. 288, 292 (2017); Honein, *supra* note 76, at 62–3.
78. Delaney et al., *supra* note 2, at 93.
79. The Centers for Diseases Control study examined children born in United States territories. It found that one in seven infants whose mothers were exposed to Zika while pregnant developed significant cognitive or physical problems by their first birthday. Rob Stein, *Babies Who Seem Fine at Birth May Have Zika-Related Problems Later, Study Finds*, NPR: ALL THINGS CONSIDERED (Aug. 7, 2018), <https://www.npr.org/sections/health-shots/2018/08/07/636055558/babies-who-seem-fine-at-birth-may-have-zika-related-problems-later-study-finds> [https://perma.cc/5U58-5XCB]; See also *Zika in Babies in U.S. Territories: Monitoring Early Health and Development*, CDC (Aug. 2018), <https://www.cdc.gov/vitalsigns/pdf/vs-0818-zika-territories-H.pdf> [https://perma.cc/GX5D-EL8V] [hereinafter *Zika in Babies in U.S. Territories*].
80. Anne C. Wheeler, *Development of Infants with Congenital Zika Syndrome: What Do We Know and What Can We Expect?*, 141 PEDIATRICS S154, S156 (2018).

the brains of infants infected prenatally, causing further diminution of brain growth after birth.<sup>81</sup>

These studies expand our understanding of Zika’s impacts on fetal and infant development. At a minimum, Zika infection of pregnant women can result in a distinctive constellation of adverse-birth outcomes, sometimes referred to as congenital Zika syndrome, all of which involve damage to the brain and the central nervous system.<sup>82</sup> These include microcephaly, thin cerebral cortexes, macular scarring, congenital contractures (shortening of the muscles that leads to permanent deformity) and hypertonia (a condition in which muscles are very tight and less able to stretch, caused by damage to motor nerve pathways), as well as blindness and hearing impairments.<sup>83</sup> Children born with microcephaly and other neurological deficits are likely to suffer from cognitive and physical impairments;<sup>84</sup> they will need a lifetime of expensive medical care, rehabilitation services, and educational support.<sup>85</sup> The incidence of microcephaly is

- 
81. *Zika in Babies in U.S. Territories*, *supra* note 79.
82. *See, e.g., Data & Statistics on Zika and Pregnancy*, CDC, <https://www.cdc.gov/pregnancy/zika/data/index.html> [<https://perma.cc/VJU7-3LH3>] (last visited Oct. 31, 2019) (citing *Zika in Babies in U.S. Territories*, *supra* note 79).
83. Moore et al., *supra* note 77, at 288; *See also* Adebajo et al., *supra* note 74, at 1090; Laura J. Hockey et al., *Vaginal Exposure to the Zika Virus During Pregnancy Leads to Fetal Brain Infection*, 166 CELL 1247, 1250, 1252 (2016) (noting, in a study of mice, that Zika appears to trigger abnormal immune-system responses, leading to microcephaly); Nicholas J.C. King et al., *Zika Virus: Mechanisms of Infection During Pregnancy*, 25 TRENDS IN MICROBIOLOGY 701, 701 (Sept. 2017); *See also Contracture*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/contracture> [<https://perma.cc/manage/create?folder=19896-64296-66828>] (last visited Feb. 27, 2020); *See also* William Shiel Jr., *Medical Definition of Hypertonia*, MEDICINET, <https://www.medicinenet.com/script/main/art.asp?articlekey=3850> [<https://perma.cc/manage/create?folder=19896-64296-66828>] (last visited Jan. 5, 2020).
84. Wheeler, *supra* note 80, at S155–58.
85. Dr. Anna Schuchat, Acting Director of the CDC, estimated that the cost of caring for a child born with microcephaly was nearly \$4 million, reaching up to \$10 million if the child survives to adulthood. Daniel Chang, *One in 10 Pregnant Women with Zika Had Fetus or Baby with Birth Defects, CDC Says*, MIAMI HERALD (Apr. 4, 2017), <https://www.miamiherald.com/news/health-care/>



considerably higher in children born to women who are known to have been infected in the first trimester of pregnancy.<sup>86</sup> These studies highlight the risks of unintended pregnancies, since a woman or her partner may be infected with the Zika virus without developing any symptoms and, thus, may not be aware that the pregnancy is imperiled.<sup>87</sup> Here, it is significant that researchers have found no difference in the incidence of Zika-related birth defects between infants whose mothers displayed symptoms of Zika infection and those who did not.<sup>88</sup>

Research on the relationship between the Zika virus, microcephaly, and other neurological deficits has not yet identified the precise mechanism by which the Zika virus causes these harms, although mounting evidence points to the virus' role in causing chronic inflammation in the fetus' brain and central nervous system.<sup>89</sup> Some preliminary research suggests that the

---

article142594664.html [https://web.archive.org/web/20190924075446/https://www.miamiherald.com/news/health-care/article142594664.html]. A recent study of infants in Brazil with severe microcephaly found that most of these children, now about two years old, had “severely impaired motor skills,” “difficulty eating or swallowing,” and hearing and vision problems that impeded their learning and development. Belluck, *supra* note 13. More recent research with animal models suggests that Zika infection in humans will have long-term neurological and developmental effects, going far beyond microcephaly, although much is still unknown. *See, e.g.,* Adebajo et al., *supra* note 74, at 1091; Maud Mavigner et al., *Postnatal Zika Virus Infection is Associated with Persistent Abnormalities in Brain Structure, Function, and Behavior in Infant Macaques*, 10 SCI. TRANSLATIONAL MED. 1 (Apr. 4, 2018).

86. One review of partial 2016 data from the United States found that microcephaly among infants born to women known to have been infected with Zika in the first trimester was 11%, compared with 5% born to women infected with Zika when the timing of infection was unknown. Honein, *supra* note 76, at 62.
87. Kate Whittemore et al., *Zika Virus Knowledge Among Pregnant Women Who Were in Areas with Active Transmission*, 23 EMERGING INFEC. DISEASES 164, 165 (2017); *See also* Sonja A. Rasmussen et al., *Studying the Effects of Emerging Infections on the Fetus: Experience with West Nile and Zika Viruses*, 109 BIRTH DEFECTS RES. 363, 369 (2017).
88. Honein, *supra* note 76.
89. Morganna C. Lima et al., *The Transcriptional and Protein Profile from Human Infected Neuroprogenitor Cells is Strongly Correlated to Zika Virus Microcephaly Cytokines Phenotype Evidencing a*

Zika virus is readily transmitted to the fetus through the vaginal tract, crossing the placenta to enter the fetus’ bloodstream,<sup>90</sup> and that the virus is able to replicate without triggering the body’s typical immune response.<sup>91</sup> Additionally, it appears that Zika infection in the developing brain and central-nervous system results in damage to multiple types of neurons, leading in turn to injuries to a newborn’s brain, central nervous system, and eyes, and potentially affecting multiple organ systems.<sup>92</sup> Children who are born afflicted by Zika may need a lifetime of special medical care, requiring consultation with multiple medical specialists.<sup>93</sup> What’s more, clinical trials of a potential vaccine to prevent Zika infection are in their early stages.<sup>94</sup>

Further, current methods of determining when and whether a pregnant woman has been infected with Zika are expensive and often inaccurate.<sup>95</sup> The laboratory tests necessary to determine

---

*Persistent Inflammation in the CNS*, 10 FRONTIERS IN IMMUNOLOGY 1, 9–10 (Aug. 2019).

90. See, e.g., Hockey et al., *supra* note 83, at 1252–54 (applying findings from animal studies to human infants); Moore et al., *supra* note 77, at 290; King et al., *supra* note 83, at 701–02.
91. Christie L. Walker et al., *Zika Virus and the Nonmicrocephalic Fetus: Why We Should Still Worry*, AM. J. OBSTETRICS & GYNECOLOGY 45, 52–53 (2019).
92. See, e.g., Hockey et al., *supra* note 83, at 1250, 1252–53 (applying findings from animal studies to human infants); Moore et al., *supra* note 77, at 290; King et al., *supra* note 83, at 702; See also CDC, *Care for Babies with Congenital Zika Syndrome*, <https://www.cdc.gov/pregnancy/zika/family/care-for-babies-with-congenital-zika.html> [<https://perma.cc/56TQ-SHF3>] (last visited May 8, 2019) [hereinafter *Care for Babies with Congenital Zika Syndrome*].
93. *Care for Babies with Congenital Zika Syndrome*, *supra* note 92.
94. The National Institute of Health and the National Institute of Allergies and Infectious Diseases launched clinical trials of a Zika vaccine in August 2016. E.g. *Zika Virus Vaccines*, NAT’L INST. ALLERGY & INFECTIOUS DISEASES, <https://www.niaid.nih.gov/diseases-conditions/zika-vaccines> [<https://perma.cc/T9C6-WL8A>] (last visited Feb. 20, 2020). Stage 2 clinical trials are underway. Amanda Grenell, *What Happened to Zika?*, PBS NEWS HOUR (July 6, 2018), <https://www.pbs.org/newshour/science/what-happened-to-zika> [<https://perma.cc/7KWL-5T9M>].
95. Epidemiologists use the terms “sensitivity” and “specificity” to describe the accuracy of a particular screening test. Sensitivity refers to the “extent to which a screening test detects the proportion of true cases of the disease being screened.” *Sensitivity*,

whether pregnant women are in fact infected with the virus are frequently unreliable and inaccurate, generating numerous false positives. At the same time, because Zika antibodies can persist in the blood for more than twelve weeks, test results do not always reliably indicate whether a woman was infected before or during her pregnancy.<sup>96</sup> Many women have found it difficult to obtain even basic testing to determine *if* they have been infected with Zika;<sup>97</sup> and even then, the test results have frequently been unavailable in a timely manner.<sup>98</sup>

The CDC have struggled to determine when pregnant women should be tested for the Zika virus and, if the test is positive, how often the women should be monitored to determine if their fetus is developing normally.<sup>99</sup> Their recommendations have been criticized because laboratory and ultrasonic-screening services are often unavailable to many women or provide inaccurate results.<sup>100</sup> Women who undergo fetal diagnostic screening are often not

---

BLACK'S MEDICAL DICTIONARY (40th ed. 2004). Specificity measures “the extent to which a screening test for the presence of the precursors of disease . . . throws up false positives. A specific test has few false positives.” *Id.* at *Specificity*.

96. Lena H. Sun, *New Zika Testing Recommendations Issues for Pregnant Women*, WASH. POST (July 24, 2017), [https://www.washingtonpost.com/news/to-your-health/wp/2017/07/24/zika-testing-guidance-revised-for-pregnant-women/?utm\\_term=.3bf93cc86088](https://www.washingtonpost.com/news/to-your-health/wp/2017/07/24/zika-testing-guidance-revised-for-pregnant-women/?utm_term=.3bf93cc86088) [<https://perma.cc/V74C-P4SR>].
97. See Ozkurt & Tanriverdi, *supra* note 2, at 145; D'Angelo et al., *supra* note 5, at 577.
98. See, e.g., Sammy Mack, *Reporter's Notebook: Pregnant and Caught in Zika Test Limbo*, NPR (Sept. 20, 2016), <http://www.npr.org/sections/health-shots/2016/09/20/494592598/reporters-notebook-pregnant-and-caught-in-zika-test-limbo> [<https://perma.cc/KL6K-37X4>] (describing difficulty in getting test results in Florida).
99. See Peterson—April 2016, *supra* note 5, at 318–21; Ozkurt & Tanriverdi, *supra* note 2, at 781–82; see also Aaron C. Davis, *D.C.'s Botched Zika Testing Leaves Dozens of Families Monitoring for Symptoms*, WASH. POST (May 9, 2017), [https://www.washingtonpost.com/local/dc-politics/dcs-botched-zika-testing-leaves-dozens-of-families-monitoring-for-symptoms/2017/05/09/3ab24958-34db-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/local/dc-politics/dcs-botched-zika-testing-leaves-dozens-of-families-monitoring-for-symptoms/2017/05/09/3ab24958-34db-11e7-b373-418f6849a004_story.html) [<https://perma.cc/Z3AX-PEN2>].
100. Ernest Tambo, *Ethical, Legal and Societal Considerations on Zika Virus Epidemics Complications in Scaling-Up Prevention and Control Strategies*, 12 PHIL., ETHICS, AND HUMAN. IN MED. 2 (Aug. 2017).

reassured by a negative result, since fetal ultrasounds are “more accurate in detecting the absence of microcephaly than its presence.”<sup>101</sup> Thus, women and their partners face significant challenges to making thoughtful healthcare decisions about whether to avoid becoming pregnant or to terminate a wanted pregnancy.<sup>102</sup> As a result, only two options are currently available to prevent harm to a developing fetus: (1) preventing infection in pregnant women or (2) preventing conception in the first place.

C. *Why Contraceptive Access and Efficacy Matter*

A major goal of the Affordable Care Act was to ensure that all Americans have access to appropriate health care, including treatment for acute illnesses and injuries, chronic diseases, and preventative health care.<sup>103</sup> Because the majority of Americans with health insurance received it through an employer, and the idea of single-payor (i.e., government-funded) health care was not seen as politically viable in 2010, Congress structured the ACA to build on the existing American health insurance system, by imposing an employer mandate.<sup>104</sup> All employers (except for employers with “grandfathered” plans<sup>105</sup> and employers with

- 
101. Ezinne C. Chibueze et al., *Diagnostic Accuracy of Ultrasound Scanning for Prenatal Microcephaly in the Context of Zika Virus Infection: A Systematic Review and Meta-analysis*, 7 SCI. REP. 1, 2–4, 13 (May 23, 2017); Lin H. Chen & Mary E. Wilson, *Zika Circulation, Congenital Syndrome, and Current Guidelines: Making Sense of It All for the Traveler*, 32 CURRENT OP. INFECTIOUS DISEASES 381, 386 (2019).
  102. See, e.g., Tambo, *supra* note 100, at 2; Lizette Alvarez, *Pregnant Women Anxious as Florida’s Zika Test Results Take Weeks*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/us/zika-test-delays-florida-pregnant.html> [<https://perma.cc/5LAQ-443L>]; Kelly G. Vest, *Zika Virus Update: More on an Emerging Arboviral Disease in the Western Hemisphere*, 11 DISASTER MED. AND PUB. HEALTH PREP. 163, 163 (2017).
  103. See *Why Do We Need the Affordable Care Act?*, AM. PUB. HEALTH ASS’N, [https://www.apha.org/~media/files/pdf/topics/aca/why\\_need\\_aca\\_2017.ashx](https://www.apha.org/~media/files/pdf/topics/aca/why_need_aca_2017.ashx) [<https://perma.cc/4VP3-S38X>] (last visited June 22, 2018).
  104. Theodore R. Marmor & Jonathan Oberlander, *The Health Bill Explained at Last*, N.Y. REV. OF BOOKS (Aug. 19, 2010), <https://www.nybooks.com/articles/2010/08/19/health-bill-explained-last/> [<https://perma.cc/2HQQ-RWWY>].
  105. A “grandfathered” plan is one that was in existence at the time the Affordable Care Act was enacted and has not been modified in

fewer than fifty employees<sup>106</sup>) were required to provide health insurance coverage for their employees.<sup>107</sup> The ACA required all health plans to cover a broad array of preventative, acute, and chronic care services, to protect American workers and families against a wide range of anticipated illnesses and injuries.<sup>108</sup> Congress recognized that many women faced substantial barriers to obtaining essential preventative care. It found that women of childbearing age “spen[t] 68 percent more in out-of-pocket health care costs than men,” and copayments were frequently so high that many women chose not to get the recommended preventative and screening services.<sup>109</sup> As a result, Congress determined that requiring all health plans to provide no-cost-contraceptive services met an important public-health need, reducing unintended pregnancies and their adverse consequences for

---

significant ways. Grandfathered plans are exempt from certain ACA requirements, including the contraceptive mandate. The purpose of grandfathering was to “provide . . . for a smoother transition by allowing health plans to remain as is and not be required to implement certain aspects of the law’s new rules and protections.” *Grandfathering Explained*, KAISER FAM. FOUND. (Sept. 8, 2011), <https://www.kff.org/health-reform/perspective/grandfathering-explained/> [<https://perma.cc/2MNB-HYJ7>]; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 763–64 (2014) (Ginsburg, J., dissenting) (“The ACA’s grandfathering provision, 42 U.S.C. § 18011, allows a phasing-in period for compliance with a number of the Act’s requirements . . . . Once specified changes are made, grandfathered status ceases . . . . The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013.”). In 2018, only 16% of covered workers were in a grandfathered plan. *2018 Employer Health Benefits Survey*, KAISER FAM. FOUND. (Oct. 3, 2018), <https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-13-grandfathered-health-plans/> [<https://perma.cc/37M3-RF2Q>].

106. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

107. *Id.*

108. The ACA also included an individual mandate, requiring individuals and families to purchase health insurance if they did not have employer-based insurance. Marmor & Oberlander, *supra* note 104.

109. S. Con. Res. 6, 111th Cong. (Feb. 11, 2009) (remarks of Sen. Stabenow).

women and children.<sup>110</sup> Substantial research has shown that family planning permits women and their partners to space their children’s births, protects women’s health, promotes their ability to further their education and career, and reduces the risk that babies will be born prematurely, or at low birthweight (conditions that can lead to lifelong health problems and death).<sup>111</sup> Indeed, preterm birth is the leading cause of death, injury, and illness among infants.<sup>112</sup>

In response to this significant gender disparity in access to health care, the Women’s Health Amendment was enacted, adding important preventative services to the ACA coverage mandate.<sup>113</sup> Under that amendment, the Health Resources and Services Administration (HRSA)—an agency within HHS—consulted with the Institute of Medicine to develop guidelines for appropriate preventative care services for women, including contraception.<sup>114</sup> HRSA recommended that all contraceptive methods approved by the Food and Drug Administration (FDA) be covered under the contraceptive mandate.<sup>115</sup> This would leave it up to each individual woman to decide, in consultation with her physician, whether she wanted to use contraception and, if so, which method best met her needs.<sup>116</sup>

---

110. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 741–42 (Ginsburg, J., dissenting) (discussing the Congressional debate).

111. Sonfield, *supra* note 18, at 103–04.

112. *Id.* (“[E]very dollar spent on publicly funded family planning services saves \$7 in federal and state spending on medical care related to unintended pregnancies.”); See C.P. Howson, Mary Kinney & Joy Lawn, *Preterm Birth Matters*, in *BORN TOO SOON: THE GLOBAL ACTION REPORT ON PRETERM BIRTH* 9, 12 (World Health Org., ed., 2012), available at [https://www.who.int/maternal\\_child\\_adolescent/documents/born\\_too\\_soon/en/](https://www.who.int/maternal_child_adolescent/documents/born_too_soon/en/) [<https://perma.cc/C7AY-D2BH>].

113. *Hobby Lobby*, 573 U.S. at 742.

114. *Id.*; INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, *CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1–2* (2011) (outlining guidelines on preventative care for women).

115. *Women’s Preventive Services Guidelines*, U.S. HEALTH RES. & SERV. ADMIN., <https://www.hrsa.gov/womens-guidelines/index.html> [<https://perma.cc/VC5Y-8J7Z>] (last visited Oct. 13, 2019).

116. *Id.*; see also *Women’s Preventive Services Guideline—2016*, U.S. HEALTH RES. & SERV. ADMIN., <https://www.hrsa.gov/womens-guidelines-2016/index.html> [<https://perma.cc/8GBL-N27H>] (last

These methods vary widely in their efficacy. Long-acting reversible contraception, including intra-uterine devices (IUDs) and hormonal implants, reduces the risk of pregnancy to less than one percent, compared to the use of condoms, where the risk of pregnancy is eighteen percent.<sup>117</sup> Even oral contraceptives, used by millions of American women over the last six decades, have a nine percent risk of pregnancy.<sup>118</sup>

The ACA’s contraceptive mandate has had a major impact on women’s health. More than 62 million American women have benefited from the contraceptive mandate.<sup>119</sup> The number of women of child-bearing age who lack health insurance has fallen more than forty percent since the ACA provided for enhanced coverage—although women of color, immigrants, and poor women are still much more likely to lack insurance coverage.<sup>120</sup> Once the mandate became effective, in 2012, women’s out-of-pocket costs for contraception fell dramatically, with one study estimating that, in the aggregate, women saved \$1.4 billion annually.<sup>121</sup> More than ninety-nine percent of American women who have ever had sexual intercourse have used birth control at some point in their

---

visited Oct. 13, 2019) (noting the changes announced in the Interim Final Regulations).

117. *Contraception: Birth Control Methods*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/contraception/index.htm> [<https://perma.cc/3D8K-9LXL>] (last visited Feb. 11, 2019).
118. *Effectiveness of Family Planning Methods*, CDC, [https://www.cdc.gov/reproductivehealth/unintendedpregnancy/pdf/contraceptive\\_methods\\_508.pdf](https://www.cdc.gov/reproductivehealth/unintendedpregnancy/pdf/contraceptive_methods_508.pdf) [<https://perma.cc/LMH7-ZA27>] (last visited Dec. 7, 2018); *Birth Control*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> [<https://perma.cc/EH5B-W4NQ>] (last visited Feb. 11, 2020).
119. *Congress Moves to Make Birth Control More Accessible*, PLANNED PARENTHOOD (June 13, 2019), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/congress-moves-to-make-birth-control-more-accessible> [<https://perma.cc/B9HA-CUZH>].
120. *Gains in Insurance Coverage for Reproductive-Age Women at a Crossroads*, GUTTMACHER INST. (Dec. 4, 2018), <https://www.guttmacher.org/article/2018/12/gains-insurance-coverage-reproductive-age-women-crossroads> [<https://perma.cc/JB35-EC4S>].
121. Sobel et al., *supra* note 16, at 4.

lives, with little difference across religions.<sup>122</sup> In recent years fifteen percent of American women have chosen long-acting reversible contraception (LARC),<sup>123</sup> because they do not need to worry about it once it is in place, which gives them the peace of mind to continue their education or work without the fear of unintended pregnancy.<sup>124</sup> Prior to the ACA’s enactment, choosing LARC was impossible for many women because of its high upfront costs; the typical price of an IUD ranges from \$937 to \$1494 across the United States.<sup>125</sup> For someone working full-time at a minimum-wage job, that is the equivalent of nearly a month’s salary.<sup>126</sup> By permitting women to choose whether and when to bring a child into the world, the increased contraceptive access made possible by the ACA has had a significant impact on the public’s, as well as individual, health.

---

122. Walecia Konrad, *How Much More Will You Have to Pay for Birth Control*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/how-much-more-will-you-pay-for-birth-control/> [<https://perma.cc/VK4X-US7C>];

*See also Fact Sheet: Contraceptive Use in the United States*, GUTTMACHER INST. (July 2018), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states> [<https://perma.cc/E6CY-UZ8S>] (“Some 68% of Catholics, 73 % of Mainline Protestants, and 74% of Evangelicals who are at risk of unintended pregnancy use a highly effective [birth control] method . . . . Only 2% of at-risk Catholic women rely on natural family planning . . .”).

123. Alexandra Sifferlin & Pratheek Rebala, *Your IUD May Get a Lot More Expensive. Here’s How Much It Could Cost in Every State*, TIME (Oct. 18, 2017), <http://time.com/4985605/iud-birth-control-health-insurance/> [<https://perma.cc/XYR9-GPRR>].

124. *See* Elizabeth O. Schmidt et al., *Adolescent Experience with Intrauterine Devices: A Qualitative Study*, 57 J. ADOLESCENT HEALTH 381, 383 (2015).

125. Sifferlin & Rebala, *supra* note 123.

126. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 (2014) (Ginsburg, J., dissenting); Madeleine Schwartz, *IUDs Are More Affordable Than Ever, So Will More Women Get Them?*, ABC NEWS: FIVETHIRTYEIGHT (May 11, 2015), <https://fivethirtyeight.com/features/iuds-are-more-affordable-than-ever-so-will-more-women-get-them/> [<https://perma.cc/4E5R-X2JQ>].



## II. THE PUBLIC HEALTH RESPONSE TO ZIKA—WHO, THE CDC, AND STATE AND LOCAL GOVERNMENTS

Initially, the CDC and other public health agencies considered mosquito bites<sup>127</sup> to be the primary vector for Zika transmission in the Americas.<sup>128</sup> The first efforts to limit the spread of Zika sought to limit the mosquito population by removing standing water and spraying pesticides to kill adult mosquitoes and their larvae.<sup>129</sup> Other efforts included advising the public to take personal protective measures, such as sleeping under a mosquito netting, wearing long sleeved shirts and long pants, and using insect repellants containing DEET.<sup>130</sup> Subsequently, however, it became clear that the Zika virus was readily transmitted through sexual contact,<sup>131</sup> so that even

- 
127. At present, the *aedes Egyptiae* mosquito, which prefers humans to other animals, is the species primarily responsible for transmitting the Zika virus to its human bite victims. Fortunately, the *aedes Egyptiae* is relatively rare in the continental United States. *ESTIMATED Potential Range of Aedes Egyptiae and Aedes Albopictus in the United States, 2017, Zika Virus: Estimated Range in US*, CDC (Feb. 16, 2018), <https://www.cdc.gov/zika/pdfs/Zika-mosquito-maps.pdf> [<https://perma.cc/UKT6-44GB>]; *Potential Range in US*, CDC, <https://www.cdc.gov/zika/vector/range.html> [<https://perma.cc/3T3Q-A9FT>] (last visited July 5, 2018). However, there is increasing concern that another mosquito species, *aedes Albopictus*, which is common in more temperate areas of the continental United States and Mediterranean areas of Europe, could become a vector for the spread of the Zika virus, greatly expanding the area of potential infection. *Id.*; see Flavio Codeco Coelho et al., *Higher Incidence of Zika in Adult Women Than Adult Men in Rio de Janeiro Suggests a Significant Contribution of Sexual Transmission from Men to Women*, 51 INT’L J. INFECTIOUS DISEASES 128, 132 (2016).
128. Ozkurt & Tanriverdi, *supra* note 2, at 143. Mosquitoes become infected by biting a Zika-infected person; they then transmit the virus to other people whom they bite. Nugent, *supra* note 3, at 467.
129. See Wylie et al., *supra* note 1, at 1111; *Zika Virus*, BALTIMORE CITY HEALTH DEP’T, <https://health.baltimorecity.gov/zika-virus> [<https://perma.cc/XKM4-H9BC>] (last visited Nov. 27, 2019) [hereinafter BALTIMORE CITY HEALTH DEP’T].
130. See Wylie et al., *supra* note 1, at 1112; Duarte et al., *supra* note 63, at 240–41.
131. Coelho, *supra* note 127, at 130–32; *Prevention of Sexual Transmission of Zika Virus, Interim Guidance Update*, WORLD HEALTH ORG. (Sept. 6, 2016), archived at [perma.cc/E68X-EF34](https://perma.cc/E68X-EF34).

pregnant women who had not been bitten by a Zika-carrying mosquito could become infected through sexual relations with a partner who had.<sup>132</sup>

As a result of this new understanding and expanded knowledge of Zika’s devastating consequences, the CDC issued more pointed warnings that urged couples contemplating childbearing to consider using contraception to postpone pregnancy.<sup>133</sup> They also advised already pregnant women and potentially infected partners to use condoms for at least six months or to abstain completely from sex during pregnancy.<sup>134</sup> The CDC were silent about the option for women to seek an abortion if their fetus was identified as likely to be born with microcephaly,<sup>135</sup> although public health experts in the United States and abroad noted the difficulty faced by many women in states, territories, and nations where abortion is illegal.<sup>136</sup> In the summer and autumn of 2016, the CDC ramped up warnings after mosquitoes carrying the Zika virus were discovered in Miami-Dade County, Florida and Brownsville, Texas.<sup>137</sup> Although the

---

132. See Emily E. Petersen et al., *Update: Interim Guidance for Preconception Counseling and Prevention of Sexual Transmission of Zika Virus for Persons with Possible Zika Exposure—United States, September 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP. 1077, 1077 (2016) [hereinafter *Peterson—September 2016*].

133. See *id.* at 1077; see also *Women and Their Partners Trying to Become Pregnant*, CDC, <https://www.cdc.gov/Zika/pregnancy/women-and-their-partners.html> [<https://perma.cc/K9BP-J9BK>] (last updated Feb. 26, 2019).

134. See *Peterson—September 2016*, *supra* note 132, at 1077; see also *Women and Their Partners Trying to Become Pregnant*, *supra* note 133. Recent CDC recommendations are slightly more permissive, reducing the recommended wait time to three months if the man or both partners have traveled to an area of Zika risk and to two months if only the woman has travelled there. *Zika and Pregnancy*, CDC, <https://www.cdc.gov/pregnancy/zika/women-and-their-partners.html> [<https://perma.cc/AW4G-GFFX>] (last visited Dec. 11, 2018) [hereinafter *Zika and Pregnancy*].

135. See *Peterson—September 2016*, *supra* note 132; *Zika and Pregnancy*, *supra* note 134.

136. Maynard et al., *supra* note 8, at 658; Tambo, *supra* note 100, at 4.

137. *Advice for People Living in or Traveling to South Florida*, CDC, <https://www.cdc.gov/zika/intheus/florida-update.html> [<https://perma.cc/69UM-R3T3>] (last visited Dec. 19, 2017); *CDC Issues Advice for People Living in or Traveling to Brownsville, Texas*,

warnings were lifted on June 2, 2017 and August 29, 2017, respectively, the CDC and other health agencies continue to urge residents and visitors to take extra precautions against Zika infection, particularly in regard to pregnancy.<sup>138</sup> Zika also affected other areas with high international travel rates. For example, during 2016-2017, 439 pregnant women in New York City had laboratory-confirmed evidence of Zika infection and at least thirty-four children were born with Zika-related birth defects.<sup>139</sup> As a result, the New York City Health Department warns pregnant and potentially pregnant women against traveling to any area where Zika is prevalent, including Mexico, the Caribbean, Central America, and parts of Florida.<sup>140</sup>

Women living in Puerto Rico have faced the risk of contracting Zika and being unable to control their reproductive health, long before Hurricanes Irma and Rita. Since Zika infections were first reported in Puerto Rico in December 2015, health authorities have confirmed more than 35,000 cases of Zika.<sup>141</sup> From January 1, 2016, through March 29, 2017, 3,300 pregnant Puerto Rican women had documented Zika infections.<sup>142</sup> As of October 2018, nearly 170 infants had been born with microcephaly as well as other neurological problems suspected to

---

CDC, <https://www.cdc.gov/zika/intheus/texas-update.html> [<https://perma.cc/FTE7-DAVX>] (last visited Dec. 19, 2017).

138. BALTIMORE CITY HEALTH DEP'T, *supra* note 129.

139. *Travel Warning: Zika is Still a Risk*, NYC HEALTH, archived at <https://perma.cc/G7PB-43EW> (last visited Dec. 12, 2018).

140. *Id.*

141. *2016 Case Counts in the US*, CDC, <https://www.cdc.gov/zika/reporting/2016-case-counts.html> [<https://perma.cc/5HWE-AYPR>] (last visited Mar. 16, 2020); *but see* Bara Vaida, *Zika Still a Threat in Puerto Rico, but Government Stopped Tracking It*, ASS'N OF HEALTH CARE JOURNALISTS (Feb. 4, 2019), <https://healthjournalism.org/blog/2019/02/zika-still-a-threat-in-puerto-rico-but-government-stopped-tracking-it/> [<https://perma.cc/6FST-EE4M>] (noting that the Zika virus looms in Puerto Rico even after Hurricane Maria, as “[a]bout 9 percent of pregnant women tested were diagnosed with Zika in the summer of 2018—about the same number of women that were testing positive in 2016. The figures suggest Zika is still lurking and threatening in Puerto Rico.”).

142. D'Angelo et al., *supra* note 5, at 574–76.

have been caused by Zika.<sup>143</sup> And as of August, 2018, there have been more than seventy infants born with Zika-related birth defects in Puerto Rico, the Virgin Islands, and other U.S. territories.<sup>144</sup>

Many Puerto Rican women, including married women, want to use contraception. However, it is frequently difficult to obtain, particularly LARC, which is the most effective method for preventing pregnancy.<sup>145</sup> LARC’s high initial cost made it largely out of reach for middle income and poor women in Puerto Rico.<sup>146</sup> In addition, many healthcare providers simply failed to offer it to their patients.<sup>147</sup> Reflecting this problem, a 2016 study estimated that nearly two thirds of the pregnancies of Puerto Rican women living on the island were unplanned.<sup>148</sup> Officials from the CDC and Puerto Rico’s Department of Health (Departamento de Salud de Puerto Rico) worked during 2016 and 2017 to increase public awareness of the risks of Zika to women’s and children’s health, expand women’s access to effective contraception, and minimize the transmission of the Zika virus to pregnant women.<sup>149</sup> Officials emphasized a multi-pronged strategy, encompassing personal and public health actions ranging from eliminating mosquito breeding sites, increasing the use of insect repellents and mosquito nets, and informing couples of the need to abstain from sex during pregnancy or use condoms to prevent sexual transmission of the

---

143. Marion E. Rice et al., *Vital Signs: Zika-Associated Birth Defects and Neurodevelopmental Abnormalities Possibly Associated with Congenital Zika Virus Infection—U.S. Territories and Freely Associated States*, 67 MORBIDITY AND MORTALITY WKLY. REP. 858, 860 (2018) (citing patients’ concern for privacy, the CDC does not provide data for individual states and territories).

144. Rice et al., *supra* note 143, at 860; *see also* Ariana Eunjung Cha, *1 in 7 Babies Exposed to Zika in U.S. Territories Have Birth Defects, Nervous System Problems*, WASH. POST (Aug. 7, 2018, 1:00 PM), <https://www.washingtonpost.com/news/to-your-health/wp/2018/08/07/1-in-7-babies-in-u-s-territories-exposed-to-zika-have-birth-defects-nervous-system-problems/> [<https://perma.cc/Q2BE-P89E>].

145. Tepper et al., *supra* note 11, at 312–13.

146. *Id.* at 312–14.

147. *Id.* at 312.

148. *Id.* at 312.

149. D’Angelo et al., *supra* note 5, at 574.

Zika virus.<sup>150</sup> However, since Hurricane Maria struck Puerto Rico in September 2017, most federal and Commonwealth actions have emphasized immediate needs, like food and safe drinking water, as well as restoring electricity and other infrastructure repair.<sup>151</sup>

Today, there is still reason for concern about Zika. As the planet continues to warm, the range of the mosquito *aedes aegyptiae*, the primary carrier, is expected to grow. At the same time, scientists have expressed concern that the Zika virus may mutate so that it will be carried by *aedes aldopictus*, which is prevalent throughout the United States.<sup>152</sup> International travel destinations, like Hawai'i and Florida, as well as many Caribbean islands, may expand the locations for disease transmission.<sup>153</sup>

### III. THE RULES PERMITTING EXEMPTION FROM THE CONTRACEPTIVE MANDATE FOR RELIGIOUS AND MORAL OBJECTIONS ARE UNCONSTITUTIONAL AND UNLAWFUL

The Trump Administration claims that its extraordinary expansion of employers' ability to opt out of the ACA's preventative healthcare mandate is authorized by the RFRA.<sup>154</sup> Apart from the significant separation of powers issue raised by

---

150. *See, e.g., id.* at 575–77.

151. Patricia Mazzei, *Battered Island Braces for a New Storm Season*, N.Y. TIMES (May 15, 2018), <https://www.wral.com/puerto-rico-nervously-prepares-for-hurricane-season/17553430/> [<https://perma.cc/KBN3-ZAAL>]; Frances Robles, *11 Months in the Dark; Then Click, Brightness*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/puerto-rico-electricity-power.html> [<https://perma.cc/A9X3-RVPQ>].

152. *See generally* Sadie J. Ryan et al., *Global Expansion and Redistribution of Aedes-Borne Virus Transmission Risk with Climate Change*, 13 *PLOS NEGLECTED TROPICAL DISEASES* (Mar. 28, 2019); EURO. COMM'N JOINT RES. CENTRE, *Climate Change Promotes the Spread of Mosquito and Tick-borne Viruses*, SCIEDAILY (March 16, 2018), [www.sciencedaily.com/releases/2018/03/180316111311.htm](http://www.sciencedaily.com/releases/2018/03/180316111311.htm) [<https://perma.cc/D9EA-2HP5>]; Andrew Jacobs, *The Zika Virus Is Still a Threat, Here's What the Experts Know*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/health/zika-virus.html?searchResultPosition=1> [<https://perma.cc/CET2-SJ37>].

153. *Cf.* William J. Lew et al., *Zika Virus: Relevance to the State of Hawai'i*, 78 HAW. J MED. & PUB. HEALTH 123, 126 (2019).

154. 83 Fed. Reg. 57,536, 57,539, 57,544–45 (Nov. 15, 2018).

these executive agencies’ arrogation of judicial authority to apply RFRA, the agencies are simply wrong in their interpretation of the law. The avowed goal of RFRA is to protect people’s right to freely exercise their religious beliefs *and* to ensure that courts will apply a stringent legal standard to evaluate these free exercise claims.<sup>155</sup> This Part will demonstrate that RFRA does *not* justify the Final Rules’ expanded exemption from the ACA contraceptive mandate and, indeed, that the Final Rules violate the Establishment Clause by advancing a particular sectarian religious viewpoint as government policy. In addition, the singling out of *women’s* reproductive health care as the sole medical service that a health plan sponsor can elect *not* to provide violates the equal protection clause of the Fifth Amendment. In the same way, the Rules conflict with Title VII, by enabling employers to discriminate on the basis of sex in providing employee benefits. Further, the Rules make it harder for women to exercise their constitutional rights to privacy and procreative liberty, guaranteed by the due process clause of the Fifth Amendment, since the government is empowering employers to withhold medical services necessary to exercising these rights.<sup>156</sup> Finally, the Final Rules violate the APA in three clear ways: (1) they exceed the Trump Administration’s authority to implement the provisions of the ACA; (2) they are contravened by specific statutory language requiring employers to provide women with access to all preventative health care services without cost sharing; and (3) they were promulgated without notice and the opportunity for public comment—without good cause—before they became effective.

---

155. See *City of Boerne v. Flores*, 117 S.Ct. 2157, 2162 (1997).

156. In *Harris v. McRae*, the Supreme Court held that a woman’s substantive due process right to an abortion was not violated when Congress enacted the Hyde Amendment, declaring that no federal funds could be used to provide abortions. *Harris v. McRae*, 100 S.Ct. 2671, 2687 (1980). But this situation is distinguishable. Here, Congress *has mandated* that all women have access to the full range of contraceptive methods approved by the FDA, without cost-sharing, and the Trump Administration’s Rules will make it impossible for many women to exercise their constitutional right to choose whether or not to use contraception.

A. *The Religious Freedom Restoration Act Does Not Justify the Trump Administration’s Rules*

1. The Genesis of RFRA—*Employment Division v. Smith*

The RFRA was a Congressional effort to provide statutory protection for the “free exercise” of religion extending beyond the Supreme Court’s First Amendment jurisprudence.<sup>157</sup> Yet, RFRA cannot justify the Trump Administration’s extraordinary expansion of health plans sponsors’ ability to seek exemption from the contraceptive mandate based on “religious beliefs” or “moral convictions.” RFRA was enacted in 1993, in reaction to the Supreme Court’s decision in *Employment Division v. Smith*.<sup>158</sup> In *Smith*, two drug counsellors were fired after they ingested peyote in a ceremony of the Native American Church.<sup>159</sup> Oregon contended that they were not entitled to state unemployment benefits, because using peyote was a felony under Oregon law.<sup>160</sup> The employees challenged that decision, asserting that their right to the free exercise of religion included their use of peyote during a religious service.<sup>161</sup> The Oregon Supreme Court agreed.<sup>162</sup> It held that Oregon’s failure to provide an exemption under the criminal code for “sacramental use” of peyote violated the Free Exercise Clause, and thus the state’s denial of unemployment benefits violated the claimants’ First Amendment rights as well.<sup>163</sup>

The United Supreme Court reversed, providing more narrow protection for free exercise rights.<sup>164</sup> Ruling for the majority, Justice Scalia declared that applying the state criminal code to these employees did not violate the Free Exercise Clause even

---

157. *See generally*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 440–45 (1994).

158. *See City of Boerne*, 117 S.Ct. at 2162 (discussing *Emp. Div. v. Smith*, 494 U.S. 872 (1990)).

159. *Emp. Div. v. Smith*, 494 U.S. 872, 874 (1990).

160. *Id.*

161. The First Amendment provides, *inter alia*, that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . .” U.S. CONST. AMEND. I.

162. *Emp. Div. v. Smith*, 494 U.S. at 875.

163. *Id.*

164. *Id.* at 878.

though it impeded their ability to exercise their religious beliefs without suffering a criminal or financial consequence.<sup>165</sup> Justice Scalia emphasized that the Supreme Court had “consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”<sup>166</sup> He quoted with approval an earlier free exercise case, *Gillette v. United States*, which declared, “[o]ur cases do not . . . support the proposition that a stance of conscientious opposition relieve an objector from any colliding duty fixed by a democratic government.”<sup>167</sup> Justice Scalia distinguished other free exercise cases, including *Sherbert v. Verner*<sup>168</sup> and *Wisconsin v. Yoder*,<sup>169</sup> on factual and legal grounds, ultimately rejecting the use of the compelling state interest test to evaluate the claimed free exercise infringement.<sup>170</sup>

Justice Scalia articulated the need for uniform application of the law, reasoning that allowing any person to assert his religious beliefs as grounds for exemption from the commands of a validly enacted general law (as opposed to a statute aimed at a particular

---

165. *Id.* at 893.

166. *Id.* at 878 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

167. *Id.* at 886 (quoting *Gillette v. United States*, 401 U.S. 437, 461 (1971)).

168. *Sherbert v. Verner*, 383 U.S. 1790, 1797 (1963) (holding that South Carolina could not deny unemployment benefits to an employee who refused, because of her religious beliefs as a Seventh Day Adventist, to work on Saturdays).

169. *Wisconsin v. Yoder*, 406 U.S. 1526, 1531 (1972) (holding that a Wisconsin law requiring all children to attend school until they were 16 could not be enforced against Amish parents who argued that their children need not attend school past eighth grade, because of the parents’ religious beliefs that high school taught “worldly” values, in conflict with Amish community-focused religious beliefs).

170. Justice Scalia distinguished *Sherbert* on the ground that it implicated only an unemployment statute, and not a violation of the criminal code, as was the case in *Emp. Div. v. Smith* at 886. He distinguished *Yoder* on the ground that it involved a “hybrid” free exercise and parental rights claim at 872.



religion) would eviscerate the rule of law.<sup>171</sup> He pointed to *United States v. Lee* as the quintessential free exercise case, in which a plaintiff's interest in exercising his religious beliefs was *not* sufficient to trump the government's interest in collecting taxes.<sup>172</sup> In *Lee*, the Court rejected an Amish employer's claim that he was exempt from the general obligation to collect and pay Social Security taxes because his religion “prohibited participation in governmental support programs.”<sup>173</sup> The Court ruled that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”<sup>174</sup> Further, *Lee* acknowledged the danger in carving out exceptions to a uniform law based on individual religious beliefs, holding that “[g]ranteeing an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.”<sup>175</sup> In short, *Smith* holds that the mere fact that a neutral statute, of general application, imposes an obligation that a person feels is contrary to his religious beliefs does not violate that person's free exercise rights.

## 2. RFRA's Enactment and Initial Judicial Interpretations

*Smith* generated an enormous public and political outcry. Congress responded by enacting the Religious Freedom Restoration Act, which President Bill Clinton signed into law. The statute sought explicitly to change the standard of review for free exercise claims, ostensibly codifying pre-*Smith* free exercise jurisprudence, as embodied in *Sherbert* and *Yoder*.<sup>176</sup> The RFRA

---

171. *Emp. Div. v. Smith*, 494 U.S. at 886 (1990).

172. *Id.* at 880 (citing *United States v. Lee*, 102 S.Ct. 1051 (1982)).

173. *Id.* (citing *Lee*, 102 S.Ct. at 1051).

174. *Lee*, 102 S.Ct. at 1056.

175. *Id.* at 1053.

176. See Eisgruber & Sager, *supra* note 157 (critiquing RFRA and addressing the problems inherent in a decision by the legislative and executive branches to require the judicial branch to use an extra-constitutional standard of review). RFRA declares that it seeks to enhance protections of individual religious liberty by restoring prior free exercise jurisprudence, requiring government to meet two separate burdens in order to sustain a law that is alleged to violate an individual's religious rights. It begins with “Findings,” stating:

requires courts to undertake an individualized assessment of the burden that a facially neutral law imposed on an individual’s ability to act in accordance with his religious beliefs.<sup>177</sup> Courts interpreting RFRA<sup>178</sup> have employed an exacting standard to

---

The Congress finds that—

- (1) “the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment” to the Constitution;
- (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”; and
- (5) 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 prior governmental interests. 42 U.S.C. § 2000bb (a).

42 U.S.C. § 2000bb (b). The law then announces a methodology:

The purposes of this chapter are—

- (1) “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)” and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

*Id.*

177. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014).

178. RFRA was held unconstitutional as applied to the states in *City of Boerne v. Flores* on the ground that Congress lacked the authority, under Section 5 of the Fourteenth Amendment, to make RFRA applicable to the states. *City of Boerne v. Flores*, 117 S.Ct. 1257, 1270 (1997); see also *Hobby Lobby*, 573 U.S. at 695; Leslie C. Griffin, *Hobby Lobby, The Crafty Case That Threatens Women’s Rights and Religious Freedom*, 42 HASTINGS CONST. L. Q. 641, 670 (2015) (“Central to [*City of Boerne*] holding was the Court’s ruling that Congress’s action in passing RFRA was disproportionate and incongruent because there was insufficient evidence of religious discrimination nationwide to justify the sweeping legislation.”). The Court’s decision in *Boerne* led Congress to enact the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42

review laws that allegedly infringe on a person’s free exercise rights, a standard that in practice has been even more stringent than the tests used in *Sherbert* and *Yoder*.<sup>179</sup>

For example, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,<sup>180</sup> decided in 2006, the Supreme Court upheld a lower court’s grant of a preliminary injunction to prevent U.S. Customs officials from enforcing the Controlled Substances Act<sup>181</sup> against a small Brazilian Christian Spiritist church that was importing hoasca, a prohibited hallucinogenic drug, for use in religious ceremonies.<sup>182</sup> The Court ruled that RFRA requires the government to show that a challenged law serves a compelling governmental interest, not only in the abstract, *but also under the circumstances being litigated*, and, further, that enforcing the law is the least restrictive means of advancing that compelling interest.<sup>183</sup> The Court held that while Congress and U.S. Customs officials might have a compelling interest in preventing the importation of hoasca—and Schedule I drugs generally—the government had failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the sacramental use of hoasca to the small O Centro congregation, a group of about 130 individuals.<sup>184</sup> In the Court’s view, the general goal of uniform enforcement of the law was not sufficient for the

---

U.S.C. 2000cc *et seq.*, and many states to enact their own “mini-RFRAs” to protect the religious freedom of their citizens. 42 U.S.C. § 2000cc-5; see Griffin, *supra* note 178; Ira C. Lupu, *Symposium: Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 56–67 (2015). The details of these developments are beyond the scope of this article.

179. See, e.g., *Hobby Lobby*, 573 U.S. at 695 n. 3.

180. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S.Ct. 1211 (2006).

181. See The Controlled Substances Act, 21 U.S.C. §§ 801, 812(c) (2018).

182. *Gonzales*, 126 S.Ct. at 1216.

183. *Id.*

184. The Supreme Court did not reach the question of whether declining to provide an exemption from the Controlled Substance Act for this sacramental use met RFRA’s “least restrictive means” test. *Id.* at 1225.

government to meet its burden in this particular case.<sup>185</sup> There was little litigation under RFRA for the next few years.

### 3. Hobby Lobby’s Extraordinary Expansion of RFRA

*Burwell v. Hobby Lobby Stores, Inc.*<sup>186</sup> dramatically changed the legal landscape concerning free-exercise rights. In that case, the Supreme Court ruled for the first time that *for-profit corporations* had religious “free exercise” rights that could be asserted by their owners.<sup>187</sup> In *Hobby Lobby*, three closely-held corporations, employing more than 14,000 workers in all, sought to avoid complying with the ACA contraceptive mandate.<sup>188</sup> The corporations, which were wholly owned by two families, claimed that their owners<sup>189</sup> held deeply-felt religious objections to certain forms of contraception, which they contended were actually abortifacients, drugs designed to terminate, rather than prevent, pregnancy.<sup>190</sup> Several aspects of the owners’ beliefs were open to challenge. First, their concern with providing contraception was newfound. They were solicited to bring the case by lawyers seeking to bring a “religious liberty” claim.<sup>191</sup> Until the ACA was

---

185. *Id.* at 1216, 1224.

186. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708, 717 (2014).

187. *Id.* at 719.

188. *Id.* at 700, 702.

189. The three closely held corporations are wholly owned by two families. Conestoga Wood Specialties Corporation is owned by the family of Norman Hahn and had about 950 employees at that time. *Id.* David and Barbara Green, along with their adult children, operate Hobby Lobby Stores, Inc., with more than 13,000 employees. *Id.* One of their adult sons also started Mardel, a Christian bookstore chain, which employs almost 400 people. *Id.* All three companies are organized as for-profit companies. *Id.* Conestoga Wood Specialties had 1200 employees and sales of \$140 million in 2016. *Conestoga Wood Specialties Inc.—2016*, WOODWORKING NET., <https://www.woodworkingnetwork.com/fdmc-300/2016/conestoga-wood-specialties-inc> [<https://perma.cc/8AR9-G4AA>] (last visited Nov. 17, 2018).

190. Brief for Appellants, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, WL 1193682, at \*10–11 (3d Cir. 2013); Reply Brief of Appellants, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744, WL 1950924, at \*13–14 (3d Cir. 2013).

191. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2551 n.147 (2015).

enacted, the owners were apparently unaware that their employee health plans covered contraceptives.<sup>192</sup> Hobby Lobby had also invested, and continued to invest, in companies that made some of the very contraceptives to which it now objected.<sup>193</sup> Perhaps coincidentally, two of the contraceptives to which they objected were among the most expensive contraceptive methods.<sup>194</sup>

Further, the owners’ beliefs were undercut by the clear scientific evidence that “morning after pills” and most types of intrauterine devices (IUDs) act to *prevent* implantation of a fertilized egg and thus, cannot cause an abortion.<sup>195</sup> Medical authorities view pregnancy as beginning “after a fertilized egg is implanted in the uterus, not before [, since] . . . many, probably most, fertilized eggs naturally fail to implant in the uterus on their own.”<sup>196</sup> One contraceptive, the copper IUD, acts primarily to prevent fertilization but can also prevent a fertilized egg from being implanted.<sup>197</sup> In contrast, the owners asserted *religious beliefs* that life begins at conception and that any drug or device that prevents a fertilized egg from being implanted in the uterus is the equivalent of an abortion.<sup>198</sup> Whether the idea that certain

---

192. Mary Anne Case, “A Patchwork Array of Theocratic Fiefdoms?” *RFRA Claims against the ACA Contraceptive Mandate as Examples of the New Feudalism*, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES 237 (Holly F. Lynch et al, eds. 2017) [hereinafter *Case, A Patchwork Array*]; see also Nejaime & Siegel, *supra* note 191, at 2551.

193. Gregory Lipper, *Contraceptive-Coverage Cases and Politicized Free Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1336 (Sept. 2016).

194. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 761 (2014); see also Julie Beck, *What’s So Controversial About the Contraceptives in Hobby Lobby*, THE ATLANTIC (June 30, 2014), <https://www.theatlantic.com/health/archive/2014/06/whats-so-controversial-about-the-contraceptives-in-the-hobby-lobby-case/373709/> [https://perma.cc/CW96-QD4Z].

195. Pam Belluck, *Science Does Not Support Claims that Contraceptives Are ‘Abortion-Inducing’*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/health/kavanaugh-abortion-inducing-contraceptives.html> [https://perma.cc/9EYW-ZXNY].

196. *Id.*

197. *Id.*

198. *Hobby Lobby*, 573 U.S. at 701. Notably, the asserted concern about these methods being equivalent to abortion did not prevent the corporations from investing in pension fund options for its

contraceptives constitute abortifacients is a protected religious *belief* or an objectively ascertainable scientific *fact* is hotly contested. Professor Wendy Mariner has asserted, “[e]veryone is entitled to his own opinion, but not to his own facts.”<sup>199</sup> In contrast, Hobby Lobby’s owners contended that the law requiring them to provide health insurance covering all types of contraception burdened their exercise of this religious belief, asserting that it coerced them because they would have to choose between complying with the ACA contraceptive mandate or paying a hefty fine for non-compliance.<sup>200</sup>

The corporations asserted that their situation was analogous to that of religious *non-profits*, such as religiously affiliated universities, to whom the Obama Administration had given the opportunity to seek an “accommodation.” Under the regulations implementing the ACA, certain religious non-profit organizations, such as houses of worship, were exempt from complying with the contraceptive mandate,<sup>201</sup> while others were not exempt but could request an accommodation based on their religious beliefs.<sup>202</sup> Exempt organizations were excused altogether from the obligation to provide their employees with contraceptives without cost-sharing; in contrast, organizations seeking an accommodation needed to certify to the government or the third-party administrator of their employee health plan that they were

---

employees that included investments in drug companies that manufactured these contraceptives. Heather Long, *Hobby Lobby Does Invest in Birth Control*, CNN (July 2, 2014), <http://money.cnn.com/2014/07/01/investing/hobby-lobby-401k-contraception> [<https://perma.cc/DCP5-DY3S>].

199. Wendy Mariner, *Hobby Lobby—Part 2: Do Religions Get Their Own Facts?*, HEALTHLAWPROF: BLOG, [http://lawprofessors.typepad.com/healthlawprof\\_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-2-do-religions-get-their-own-facts.html](http://lawprofessors.typepad.com/healthlawprof_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-2-do-religions-get-their-own-facts.html) [<https://perma.cc/V4G6-HK2A>] (last visited Feb. 12, 2018) (quoting Senator Daniel Patrick Moynihan).
200. Accepting the corporations’ claims at face value, the Court found that Hobby Lobby, Conestoga Wood, and Mardel would face annual fines under the ACA of up to \$475 million, \$33 million, and \$15 million, respectively. *Hobby Lobby*, 573 U.S. at 720.
201. These included churches, synagogues, mosques, and other houses of worship. See 45 C.F.R. §§147.131(a)–(c) (2018).
202. 45 C.F.R. § 147.131 (2018).

opting out.<sup>203</sup> After such “self-certification,” the administrator would arrange for insurance coverage of contraceptive services without cost sharing for those employees who wanted them.<sup>204</sup>

In *Hobby Lobby*, the Supreme Court first found that the corporations were “persons” within the meaning of RFRA.<sup>205</sup> As a result, the Court ruled that they were entitled to an individualized assessment of (1) whether the regulations placed a substantial burden on their exercise of religious belief; (2) whether the government had a compelling interest in making no-cost contraception available to all women as part of comprehensive preventative health care; and (3) whether the government’s insistence that the corporations not be exempt from the contraceptive mandate was the least restrictive means of protecting that interest.<sup>206</sup>

Justice Alito’s plurality opinion interpreted the RFRA expansively, concluding that the corporations’ asserted religious beliefs prevailed over the ACA contraceptive mandate.<sup>207</sup> In his view, in enacting RFRA, Congress intended to go far beyond its stated purpose of “restoring” pre-*Smith* First Amendment free exercise jurisprudence.<sup>208</sup> Instead, citing *O Centro*, he determined

---

203. *Id.*

204. 45 C.F.R. §§147.131(a)–(d) (2018). Organizations eligible for accommodation included hospitals, schools, colleges, and universities. *Id.*

205. Justice Alito ruled that corporations were persons within the meaning of RFRA, relying on his understanding of the purposes of RFRA and the definition of “person” in the Dictionary Act. *Hobby Lobby*, 573 U.S. at 707–08. In dissent, Justice Ginsburg sharply contested the notion that corporations, organized in that form precisely to make profits and obtain other business and tax benefits, could exercise any religious belief. *Id.* at 751–52 (Ginsburg, J., dissenting). Dissenting Justices Breyer and Kagan did not reach the question of whether for-profit corporations were persons for the purposes of RFRA. *Id.* at 772 (Breyer, J., dissenting).

206. *Id.* at 688–92.

207. *Id.* at 708–19.

208. *Id.* at 706 n.18. As Justice Ginsburg pointed out, “RFRA’s purpose is specific and written into the statute itself. The Act was crafted to ‘restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 . . . (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 . . . (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” *Id.* at 746 (Ginsburg, J., dissenting) (citing 42 U.S.C. § 2000bb(b) (2018)).

that RFRA required a highly fact-specific evaluation of the government’s interest in enforcing a neutral law over a person’s religious interests; not the government’s interest in enforcement of that law in the abstract, but its marginal interest in insisting that *these* corporations must comply.<sup>209</sup> This was consistent with *Sherbert* and *Yoder*, in which the Supreme Court implicitly determined that allowing these particular claimants, adherents of non-mainstream religions, to be exempt from general laws governing unemployment benefits and mandatory school attendance, respectively, would not burden identifiable third parties, but rather would impose a negligible burden on a government program. This is a very different situation from either *Hobby Lobby* or the Rules, where an employer is allowed to impose a burden on its female employees and insureds when the employer declines to make contraceptives available to women, who are thereby denied access to a benefit guaranteed by statute.<sup>210</sup>

Justice Alito took pains to distinguish *Hobby Lobby* from *Lee*, the case on which Justice Scalia had relied in *Smith*. In *Lee*, the Court ruled that individual religious *beliefs* could be required to give way to the government’s interest in uniform enforcement of a neutral law of general applicability.<sup>211</sup> In that case, the federal social security laws, which the *Lee* Court characterized as “a comprehensive insurance system,” provided “a variety of benefits to all participants . . . .”<sup>212</sup> Justice Alito distinguished *Lee* on the ground that it turned on “the special problems associated with a national system of taxation.”<sup>213</sup> But, of course, “a national system of taxation” is at the heart of the ACA.<sup>214</sup> The ACA was structured to tax employers and individuals as a means of ensuring that all citizens receive health care and it was a tax penalty that the *Hobby Lobby* plaintiffs objected to paying.<sup>215</sup>

---

209. *Id.* at 726.

210. Nejaime & Siegel, *supra* note 191, at 2525–26.

211. *United States v. Lee*, 455 U.S. 252, 260–62 (1982).

212. *Id.*

213. *Hobby Lobby*, 573 U.S. at 734.

214. *Cf. Nat’l Fed’n. of Indep. Bus. v. Sebellius*, 567 U.S. 519, 574 (2012).

215. The Supreme Court upheld the individual mandate as a valid exercise of Congress’ power to tax. *Nat’l Fed’n. of Indep. Bus. v. Sebellius*, 567 132 S.Ct. 2566, 2600 (2012). However, in *Texas v. United States*, 340 F. Supp. 3d 579 (Dec. 14, 2018), a Texas federal



Reflecting the decision that creating a single-payor health care system was not politically feasible, due to concern that it would be seen as “socialized medicine,” Congress chose instead to build on the existing, employer-based, American health care system.<sup>216</sup>

In assessing whether the ACA contraceptive mandate substantially burdened the plaintiff corporations’ exercise of their religious beliefs, Justice Alito first framed the question as a factual one—did the corporate owners *believe* that compliance with the ACA mandate would impede their free exercise of religion. In response, the Obama Administration asserted that the question of compliance was a legal one—because the contraceptive mandate required only that the corporations *pay for* comprehensive insurance coverage, their religious beliefs were not burdened. The Obama Administration argued that any connection between the employers’ obligation to provide complete insurance coverage and the individual medical decisions made by employees was simply too attenuated to find that the contraceptive mandate burdened the organizations’ exercise of religious belief.<sup>217</sup> Justice Alito rejected that argument, however, declaring in essence that as long as the corporate owners *felt* burdened,<sup>218</sup> the contraceptive mandate *did* substantially burden their religious exercise.<sup>219</sup> In Justice Alito’s view, any inquiry into the connection between the employers’ compliance with the ACA mandate and the likelihood that employees would choose

---

district court ruled that because Congress had repealed the tax penalty for non-compliance with the individual mandate in the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017), the ACA no longer functioned as Congress had intended. Because the other provisions of the ACA were not severable from the tax penalty, it invalidated the ACA in its entirety. *Id.* at 608. The court stayed its ruling pending appeal. *Id.* at 619. The Supreme Court has granted certiorari in this case, *sub nom.* California v. Texas, 2020 WL 981804 (Mar. 2020).

216. Marmor & Oberlander, *supra* note 104.
217. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723, 760 (2014) (Ginsburg, J., dissenting).
218. As will be discussed shortly, Justice Alito elaborated on the financial consequences to the employers of deciding not to comply with the contraceptive mandate, but also emphasized their concern at being complicit in the provision of contraceptives that they viewed as immoral. *Id.* at 720–21.
219. *Id.* at 719.

particular contraceptive methods was a forbidden inquiry into the sincerity of the employers’ beliefs.<sup>220</sup> The dissenting Justices vehemently denied the assertion.<sup>221</sup> Further, Justice Alito’s burden analysis focused on the tax penalty that Hobby Lobby’s owners would have to pay if they failed to comply with the ACA mandate, rather than the extent of imposition on their beliefs imposed by the regulatory obligation.<sup>222</sup> This is contrary to the approach that the Supreme Court took in *Wisconsin v. Yoder* and other free exercise cases decided prior to *Employment Division v. Smith*, the ostensible golden age of free exercise jurisprudence to which RFRA’s drafters sought to return.<sup>223</sup>

Asking whether the government had a compelling interest in ensuring that all employers complied with the contraceptive mandate, Justice Alito assumed that it did, without addressing the merits. Had he done so, he could have found ample evidence demonstrating the government’s compelling interest in ensuring that women have full access to reproductive health care. The ACA, including the Women’s Health Amendment, required that all necessary preventative care services be provided without cost-sharing precisely because women, in contrast to men, frequently spend so much of their own money on health care, including contraception.<sup>224</sup> The cost of co-payments and co-insurance is often so high that many women “avoid getting [preventive and screening services] in the first place.”<sup>225</sup> Further, lawmakers observed that enabling women to avoid unintended pregnancies had significant public health benefits for both women and their children, which include avoiding the exacerbation of certain conditions by pregnancy, as well as adequate spacing between

---

220. *Id.* at 723–24.

221. *Id.* at 760 (Ginsburg, J., dissenting) (“[T]oday’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.”).

222. *Id.* at 720.

223. See Elizabeth Sepper, *The Risky Business of RFRA After Hobby Lobby*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 26–31 (Robin Fretwell Wilson ed. 2018).

224. *Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting); 42 U.S.C. § 300gg-13(a)(4) (2018).

225. *Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting); 42 U.S.C. § 300gg-13(a)(4) (2018).

children, which leads to fewer low birth-weight and pre-term births.<sup>226</sup> Unfortunately, Justice Alito implied that the government interest was *not* compelling, because the interests asserted by the government were “couched in very broad terms, such as promoting ‘public health’ and ‘gender equality.’”<sup>227</sup> Justice Alito also pointed to the fact that certain employers, those with “grandfathered plans” and those with fewer than fifty workers, did not have to meet the ACA’s preventative health coverage requirements, including the contraceptive mandate.<sup>228</sup> In essence, he argued that, because the ACA did not require all employers to comply with the contraceptive mandate, the government must not have a compelling interest in its enforcement.<sup>229</sup> This ignores the legislative reality that legislation often has a phase-in period to minimize disruption, and that employment laws frequently limit their scope to larger employers, to minimize the regulatory burdens on smaller entities.<sup>230</sup>

Yet, the court did not ultimately rely on this reasoning since Justice Alito also concluded that the government had not met the RFRA’s third criterion: that the decision not to exempt for-profit corporations from the ACA contraceptive mandate be the least restrictive means of achieving its interest.<sup>231</sup> He offered two grounds for this conclusion. First, he found that the government had failed to meet this standard because it had not shown why *the government* should not simply pay for any contraceptive method that these (or any) employers objected to on the grounds of religious beliefs.<sup>232</sup> He then proffered an alternative, suggesting that there was an even easier way of achieving this government

---

226. The Congressional debate about the Women’s Health Amendment, 42 U.S.C. § 300gg-13(a)(4) (2018), emphasized the need to ensure that all women had access to preventative-health-care services without cost-sharing, as well as the benefits such access would provide for both women and their children. *Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting).

227. *Hobby Lobby*, 573 U.S. at 726.

228. *Id.* at 727.

229. *Id.*

230. See Sepper, *supra* note 223, at 34–5 (noting that the employment requirement for Title VII is 15 employees and for the ADA is 50 employees).

231. *Hobby Lobby*, 573 U.S. at 728.

232. *Id.* at 729.

interest: permitting the corporations to use the same accommodation available to *non*-profit religious organizations. Under the Obama Administration’s regulations, religiously based non-profits that objected to providing contraceptives needed only to certify their objection in order for the third party insurer to pay for contraceptive coverage.<sup>233</sup> In his view, *this* would constitute the least restrictive means, because the impact on Hobby Lobby’s employees of allowing their employer to use this accommodation would be “precisely zero.”<sup>234</sup>

Justice Kennedy’s concurrence was slightly more measured. He noted that “in a complex society and era of pervasive government regulation, defining the proper realm for free exercise can be difficult.”<sup>235</sup> He accepted the government’s compelling interest in enacting the contraceptive mandate, “to protect the health of female employees, coverage which is significantly more costly than for a male employee,” and noted that there were “many medical conditions for which pregnancy is contraindicated.”<sup>236</sup> Nonetheless, he agreed with Justice Alito that the government had not satisfied the “least restrictive means” test and concurred in the suggestion that there *was* a less burdensome option—for the government to offer the same accommodation to for-profit corporations that it provided to non-profit religious organizations.<sup>237</sup>

In dissent, Justice Ginsburg pushed back against Justice Alito on every point. Reviewing decades of free exercise jurisprudence, she asserted that for-profit corporations like Hobby Lobby had *never* been treated as persons, either under the First Amendment’s free exercise class, or under the statutory protections contained in RFRA.<sup>238</sup> Presciently, Justice Ginsburg predicted that “[t]he Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects.”<sup>239</sup>

---

233. *Id.* (citing 45 C.F.R. § 147.131 (2014) and 26 C.F.R. § 54.9815–2713A (2013)).

234. Nejaime & Siegel, *supra* note 191, at 2531, 2581–85.

235. *Hobby Lobby*, 573 U.S. at 737.

236. *Id.*

237. The significance of the Court’s reliance on this accommodation will be discussed in Part III. A. 4, *infra*.

238. *Hobby Lobby*, 573 U.S. at 751 (Ginsburg, J., dissenting).

239. *Id.* at 756.

She observed, “[a]lthough the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. . . . RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood . . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.”<sup>240</sup>

Justice Ginsburg directed most of her criticism at the plurality opinion’s construction of RFRA, particularly its interpretation of RFRA’s test for determining whether a law imposes a substantial burden on religious exercise.<sup>241</sup> First, she asserted that it was not enough for the corporate owners to *feel* that their religious beliefs were burdened; as plaintiffs, they were obligated to show an *actual* burden on their exercise of religious beliefs.<sup>242</sup> She roundly rejected the plaintiffs’ argument of “complicity” in furnishing contraceptives. Ginsburg found the connection between complying with the ACA mandate and the choices that employees might ultimately make about contraception far too attenuated to constitute a burden, any more than an employer would be complicit in other health care decisions made by the employee and her physician—to “treat an infection, or have a hip replaced.”<sup>243</sup>

Second, Justice Ginsburg challenged the plurality’s suggestion that if the government had a compelling interest in providing all women with contraceptive access, the government should simply pay for it.<sup>244</sup> She noted that many prior decisions of the Court had declared that “[a]ccommodations to religious beliefs . . . must not significantly impinge on the interests of third parties.”<sup>245</sup> Here, the third parties were all the women insured by Hobby Lobby’s health plans, a significant number given the three corporations’ 14,000 plus employees.<sup>246</sup> In light of the fundamental

---

240. *Id.* at 756–57.

241. *Id.* at 745–50.

242. *Id.*

243. *Id.* at 760 (citing *Grote v. Sebelius*, 708 F. 3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)).

244. *Id.* at 732.

245. *Id.* at 745.

246. Igor Volsky & Tara Culp-Ressler, *What the Hobby Lobby Decision Means for your Health Care*, THINK PROGRESS (June 30, 2014), <https://thinkprogress.org/what-the-hobby-lobby-decision-means->

structure of the ACA, which built on America’s existing employer-based health insurance system,<sup>247</sup> the only way to ensure that *all* employees and their families had access to the full array of acute, chronic, and preventative healthcare services was to require employers to provide them. For employers to be able to deny one group of insureds—women — access to contraceptive care completely undermines the important governmental interests in providing comprehensive care in general and in promoting women’s health in particular, including the avoidance of unintended pregnancies and their potentially adverse consequences for women and their children.<sup>248</sup>

Finally, Justice Ginsburg identified the slippery slope on which the plurality opinion had launched RFRA jurisprudence. She asserted that there was no way to limit the opinion’s reasoning to contraceptives and suggested that the Court had “ventured into a minefield.”<sup>249</sup> Identifying a host of other health care services including blood transfusions, antidepressants, medications derived from pigs, and vaccinations, to which employers might potentially raise religious objections, she argued that there was an “overriding interest . . . in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims.’”<sup>250</sup>

#### 4. Hobby Lobby’s Consequences: *Wheaton College v. Burwell*, *Zubik v. Burwell*, and the Unsuccessful Quest for Compromise

Only three days after *Hobby Lobby* was decided, the Court decided *Wheaton College v. Burwell*, which threw a monkey wrench into the debate over how to accommodate an organization’s religious objections to the ACA contraceptive mandate. In *Wheaton College*, the Court ruled that the very accommodation that it had approved in *Hobby Lobby* as a “least restrictive means” meeting RFRA’s requirements was itself inadequate.<sup>251</sup> *Wheaton College*, a small religious college in

---

for-your-health-care-790d730ef93e/ [https://perma.cc/FR8L-JLEE].

247. Marmor & Oberlander, *supra* note 104.

248. *Hobby Lobby*, 573 U.S. at 742–43 (Ginsburg, J., dissenting).

249. *Id.* at 771.

250. *Id.* at 770–71.

251. *Wheaton College v. Burwell*, 134 S.Ct. 2806, 2807 (2014).

Illinois, sued Sylvia Mathews Burwell, the Secretary of HHS.<sup>252</sup> The college asserted that the mere act of complying with Obama Administration regulations that granted an accommodation to religious non-profits seeking to opt out of the contraceptive mandate would make it complicit in providing contraceptives, and, thus, violated its religious freedom.<sup>253</sup> The college argued that because the third-party insurance administrator would not have to furnish contraceptives to the college health plan's enrollees unless Wheaton self-certified, the act of self-certifying was *itself* a substantial burden on its exercise of religion.<sup>254</sup> The Court accepted Wheaton's argument, taking the extraordinary step of granting an interlocutory injunction in Wheaton's favor.<sup>255</sup> By reasoning in such sharply contrasting ways in *Hobby Lobby* and *Wheaton College*, the Court effectively deployed bait-and-switch tactics. Justice Sotomayor, joined by Justices Ginsburg and Kagan, wrote a biting dissent, contending that in rejecting the very accommodation that it had suggested would be satisfactory in *Hobby Lobby*, the Court majority had undermined respect for the law and the Supreme Court itself.<sup>256</sup>

The issue of whether the mere act of requesting an accommodation makes an organization complicit in provision of contraceptives, thus substantially burdening the organization's religious exercise under RFRA,<sup>257</sup> finally arrived at the Supreme

---

252. *Id.* at 2806, 2808.

253. *Id.* at 2809.

254. *Id.* at 2807–08.

255. *Id.*

256. *Id.*

257. Professor Case contends that the organizations objecting to the Obama Administration's proffered accommodation are also making a deeper argument, one sounding in property and quasi-sovereignty:

[t]hey . . . [argued] that nothing tangible or intangible which they could possibly be seen to control, no part of 'their plan infrastructure,' . . . could be allowed a role in providing the objected-to contraceptives. As the opening page of Archbishop Zubik's brief put it, their religious objections extended to any 'actions that cause the objectionable coverage to be delivered to *Petitioners'* own employees and students by *Petitioners'* own insurance companies in connection with *Petitioners'* own health plans.'

Court in the spring of 2016. In *Zubik v. Burwell*,<sup>258</sup> the Court considered seven separate cases from four circuit courts of appeal, the majority of which had held that the Obama Administration’s regulations did not improperly burden the claimants’ religious exercise.<sup>259</sup> After oral argument, a potentially split Court, sitting with only eight justices, remanded the cases in a *per curium* opinion, relying on the parties’ supplemental briefs and statements at oral argument that they had agreed that a compromise was feasible and that they could work out the details at the circuit court level.<sup>260</sup> While the Court declined to express any view on the merits of the case, it stated that “[n]othing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by petitioners’ health plans ‘obtain, without cost, the full range of FDA approved contraceptives.’”<sup>261</sup>

However, on remand, the parties could not agree upon a middle ground that would permit women covered by the petitioner’s health plan to receive no-cost contraceptives in a “seamless” manner, without having to obtain a separate insurance policy and find a physician willing to accept it.<sup>262</sup> The failure to

---

*Case, A Patchwork Array, supra* note 192, at 233 (emphasis original).

258. *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

259. *See, e.g., Little Sisters of the Poor Home v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), vacated and remanded *sub nom. Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

260. The Court stated that the petitioners had agreed that “contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies,” without the petitioners providing the notice to the government which they asserted made them complicit in the provision of contraception. *Zubik*, 136 S.Ct. at 1559–60; *see also Id.* at 1561 (Sotomayor, J., concurring) (citing the *per curium* opinion at 1559: “I . . . join the Court’s opinion because it allows the lower courts to consider only whether existing or modified regulations could provide seamless contraceptive coverage ‘to petitioners’ employees, through petitioners’ insurance companies, without any . . . notice from petitioners.’”).

261. *Zubik*, 136 S.Ct. at 1560–61.

262. U.S. DEP’T OF LAB., FAQs ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36 (Jan. 9, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> [<https://perma.cc/>



resolve the essential question of “complicity” set the stage for the new presidential administration to act. The breadth of its action was stunning.

5. The Trump Administration Issues Regulations Gutting the  
Contraceptive Mandate

President Trump acted early in his term to eviscerate the ACA contraceptive mandate. In May 2017, the President issued an executive order “Promoting Free Speech and Religious Liberty”<sup>263</sup> that directed relevant federal agencies to “consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under [the Women’s Health Amendment].”<sup>264</sup> The IFRs, developed in response to the executive order, were promulgated in October 2017. Notably, several of the attorneys who had represented the litigants in *Hobby Lobby* and *Zubik* had joined the Trump Administration, including Solicitor General Noel Francisco at the Department of Justice, and Matthew Bowman at HHS.<sup>265</sup> The Trump Administration settled with some of the *Zubik* litigants a week after the IFRs were promulgated.<sup>266</sup>

The IFRs were met with enormous public outcry. During the sixty days in which public comment was permitted *after* the IFRs

---

T39U-U9HB]; *See also* Linda Greenhouse, *On Contraception, It’s Church Over State*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/11/opinion/contraception-religious-exemption.html> [<https://perma.cc/D4FJ-2GE8>].

263. Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

264. *Id.* at § 3.

265. *See Meet the Solicitor General*, U.S. DEP’T OF JUS., <https://www.justice.gov/osg/staff-profile/meet-solicitor-general> [<https://perma.cc/8UB2-QVZN>] (last visited Dec. 11, 2019) (announcing Francisco’s appointment); *Zubik*, 136 S.Ct. at 1558 (2016) (listing General Francisco as counsel); Robert Pear, *Foes of Obama-Era Rule Work to Undo Birth Control Mandate*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/10/us/politics/birth-control-contraception-health-care-bill.html> [<https://perma.cc/BB7S-DWJV>].

266. Heidi Schlumpf, *Contraception Mandate: Women’s Health or Religious Liberty Issue?*, NAT’L CATHOLIC REP. (Oct. 18, 2017), <https://www.ncronline.org/print/news/people/contraception-mandate-womens-health-or-religious-liberty-issue> [<https://perma.cc/6ZF7-QPQ8>].

were issued, more than 262,000 individual comments were received.<sup>267</sup> Many parties sued to challenge the IFRs, including civil liberties and reproductive rights groups, labor unions, and individual employees. Several states also sued, asserting that the IFRs will encourage more employers to assert religious or moral objections to the contraceptive mandate and thus the states will face higher Medicaid and other costs to provide contraceptives and family planning services to women no longer able to receive such healthcare from their employers.<sup>268</sup> They also argued that they will face increased healthcare costs for pregnancy and childbirth for those women who become pregnant due to the lack of affordable contraceptive care.<sup>269</sup>

In January 2019, just before the Final Rules were to become effective, in *California v. Health and Human Services* and *Pennsylvania and New Jersey v. Trump*, two federal district courts in California and Pennsylvania, respectively, enjoined enforcement of the Final Rules.<sup>270</sup> Both courts concluded that the

- 
267. The IFR authorizing exemptions from the contraceptive mandate based on employers’ religious beliefs received 167,440 comments and the IFR authorizing exemption based on moral obligations is 94,792 comments. *Certain Preventative Services; Eligible Organizations CMS-9940-P*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=CMS-2014-0115> [<https://perma.cc/2HAN-QRF8>] (last visited Dec. 6, 2019). In publishing the Final Rules, the Administration stated that it had received more than 56,000 comments on the religious exemption. 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54). The Administration also stated that it received more than 54,000 comments on the moral exemption as well. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 47,596 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54).
268. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d 1267, 1282 (N.D. Cal. 2019); *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 827–28 (E.D. Pa. 2019); *Massachusetts v. Azar*, 923 F.3d 209, 228 (1st Cir. 2019) (finding that the Commonwealth of Massachusetts did have standing to challenge the Final Rules, thus vacating and remanding the district court’s decision at 301 F. Supp. 3d 248, 266 (D. Ma. 2018)).
269. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1283; *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d at 827–28.
270. *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d at 797–98; *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1301. These courts had previously issued preliminary injunctions against the

plaintiff states were likely to suffer irreparable harm without a stay because of the substantial financial costs they would incur if the Final Rules were allowed to go into effect, costs that they would not be able to recoup from the federal government.<sup>271</sup> Ruling on the plaintiffs’ likelihood of success on the merits, both courts found that the Trump Administration had not shown that its expansion of employers’ ability to opt out of the contraceptive mandate was within its statutory authority under the ACA.<sup>272</sup> The Pennsylvania district court also found that the APA had been violated by the lack of notice and comment rulemaking, and that this “procedural defect . . . fatally tainted the issuance of the final rules.”<sup>273</sup> Although the Courts of Appeal for the Third and Ninth Circuits affirmed these decisions, in January 2020, the Supreme Court granted certiorari in the Third Circuit case, *Trump v. Pennsylvania*.<sup>274</sup>

In *California v. Health and Human Services*, the court flatly rejected the Trump Administration’s argument that the contraceptive mandate was not required by the ACA, and ruled that the Administration lacked discretionary authority to carve out exemptions from the mandate.<sup>275</sup> Most importantly, the court

---

Interim Final Rules. *Pennsylvania v. Trump*, 281 F. Supp. 3d at 553; *California v. Azar*, 281 F. Supp. 3d 806, 814 (N.D. Cal. 2017). In *Pennsylvania v. Trump*, the District Court’s decision that one of the plaintiffs in the *Zubik* litigation, Little Sisters of the Poor, could not intervene in the suit was reversed on appeal. *Pennsylvania v. Trump*, 351 F. Supp. 3d at 560. In *California v. Azar*, the Ninth Circuit Court of Appeals affirmed the district court in part. The Court of Appeals rejected the Administration’s claim of a change in circumstances justifying a change in position on RFRA, as well as its argument that the IFRs would reduce uncertainty, along with other proffered justifications. However, the Court ruled that a nationwide injunction was too broad, and that injunctive relief should be limited to the plaintiff states. *California v. Azar*, 911 F.3d 558, 566 (9th Cir. 2018).

271. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1298; *Pennsylvania v. Trump*, 351 F. Supp. 3d at 827.

272. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1284–85; *Pennsylvania v. Trump*, 351 F. Supp. 3d at 819.

273. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1279; *Pennsylvania v. Trump*, 351 F. Supp. 3d at 816.

274. *Trump v. Pennsylvania*, 205 L. Ed. 2d 519 (Jan. 17, 2020).

275. *California v. Health and Human Services*, 281 F. Supp. 3d 806, 824 (N.D. Cal. 2017).

held that the Administration’s expanded religious and moral exemptions were not required by RFRA or case law, and that executive agencies had no authority to invoke RFRA as justification for administrative actions. Simply put, “the courts, not the agencies, are the arbiters of what the law and the Constitution require.”<sup>276</sup> Finally, the court scoffed at the Administration’s justification of the new rules on the grounds of “avoid[ing] litigation,” especially where that avoidance means depriving a large number of women of their statutory rights under the ACA.<sup>277</sup>

*Pennsylvania and New Jersey v. Trump* also roundly criticized the Trump Administration’s attempt to justify its actions as necessitated by RFRA, highlighting its concern with separation of powers. First, the court emphasized that RFRA established a private cause of action for plaintiffs who claimed a burden on their free exercise of religion, not a blank check for the executive to carve out exceptions from any statute that it did not like. The court reasoned further that interpreting RFRA and applying it to a particular set of facts was the province of the judicial, not the executive, branch.<sup>278</sup> Second, the court held that there was no authority under the ACA for the executive branch to create exceptions in addition to those authorized by Congress and, therefore, that the agencies’ actions contravened §706 of the APA, because they were “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>279</sup> Finally, the court ruled that the only way to preserve the status quo and protect the states’ financial interest was to issue a nationwide injunction, because “there is no more geographically limited injunction that prevents the States from potential harm.”<sup>280</sup>

6. RFRA Neither Supports nor Necessitates the Rules’  
Expansion of the Ability to Opt-Out of the Contraceptive Mandate

The Trump Administration claims that the Final Rules are compelled by RFRA and necessary to protect employers whose

---

276. *California v. Health & Hum. Servs.*, 351 F. Supp. at 1293.

277. *Id.*

278. *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 806 (E.D. Pa 2019).

279. *Id.* at 821.

280. *Id.* at 834.

religious beliefs or moral convictions about contraceptives will be burdened by the mere act of notifying the government that it is *opting out* of providing a health plan that includes contraceptive services, asserting that such notification makes them “complicit” in the provision of contraceptives.<sup>281</sup> It argues further that even if RFRA does not require these Final Rules, the government still has the discretion to extend the exemption to more employers. The Trump Administration has offered a veritable smorgasbord of justifications, including the following: (1) significant government resources have been already been spent litigating the contraceptive mandate, so broadening the exemption will provide certainty to employers and health plan administrators about whether they need to comply; (2) Congress did not explicitly mandate contraceptive access, but only women’s preventative services in general, leaving the details to be filled in by regulations, which the Trump Administration is free to change;<sup>282</sup> (3) the government does *not* have a compelling interest in ensuring women’s access to contraceptives (arguing variously that: (a) because some women still receive health coverage under grandfathered plans, which need not comply with the contraceptive mandate, providing contraceptive access must not be a truly compelling interest; (b) women can readily obtain contraceptives without cost outside of their health plans; (c) contraceptives may not work anyway; and (d) they may cause untoward side effects); and, finally, (4) the existing regulations treat different religious not-for profit organizations differently, depending on the type of entity and their health plans’ structure, and should be made uniform.<sup>283</sup> Opponents of the Final Rules have a strong basis for challenging each of these proffered justifications. Further, the lack of any opportunity for the public

---

281. See 83 Fed. Reg. 57,536, 57,542–46 (Nov. 15, 2018); *HHS Fact Sheet*, *supra* note 21.

282. *HHS Fact Sheet*, *supra* note 21 (misstating the law, declaring that “[t]he Affordable Care Act (ACA) did not require contraceptive coverage in health insurance.”). This interpretation of the ACA was explicitly rejected by the court in *California v. Health & Hum. Servs.* 351 F. Supp. 3d at 1285. The court in *Pennsylvania and New Jersey v. Trump* rejected it implicitly. 351 F. Supp. 3d at 817.

283. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 47,800–06 (Oct. 13, 2017) (to be codified at 26 C.F.R. Pt. 54).

to make those challenges *before* the IFRs became effective is both anti-democratic and deeply troubling, because of the irreversible nature of the harm that women denied access to contraception may suffer, due to the risks of Zika and other health problems created by an unintended pregnancy.

RFRA does not mandate the IFRs’ vast expansion of employers’ ability to be exempt from, or opt out of, the contraceptive mandate based on religious beliefs or moral convictions. When the Obama Administration initially issued regulations *exempting* houses of worship, their integrated auxiliaries, and conventions or associations of churches<sup>284</sup> from compliance with the mandate, it did so out of deference to traditional free exercise concerns and the role of congregational worship in Americans’ religious life.<sup>285</sup> Under this exemption, women covered by objecting health plans within this category must go outside their plan to obtain contraceptives.<sup>286</sup> In response to lobbying by other religious not-for-profits, which also asserted religious objections to the mandate, the Obama Administration developed the option of “*accommodation*.”<sup>287</sup> To obtain an accommodation, these other not-for-profits need only inform the government or their health plan administrator that they were opting out of the mandate. This would permit their employees to receive coverage in accordance with the ACA through the action of the health plan administrator.<sup>288</sup> Whether this requirement of

---

284. See Department of the Treasury, Group Health Plans and Health Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (August 3, 2011) (to be codified at 26 C.F.R. pt. 54). The category of exempt organizations was shaped by the Internal Revenue Service’s criteria for being treated as a religious employer. *California v. Health & Hum. Servs.*, 351 F. Supp. 3d at 1286.

285. See Griffin, *supra* note 178, at 671.

286. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,623 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

287. *Id.*

288. In implementing the ACA contraceptive mandate, the Obama Administration issued several sets of regulations, beginning in 2011 and continuing through 2017. Endeavoring to be sensitive to the concerns of religious not-for-profit entities, these regulations gradually expanded the class of organizations (both not-for-profit and for-profit) that would not need to meet the contraceptive

self-certification was *itself* a burden on the organization’s free exercise rights in violation of RFRA was litigated in *Zubik*, but the Supreme Court explicitly declined to decide the issue.<sup>289</sup> The Court declared:

[T]he Court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest. Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by petitioners’ health plans “obtain, without cost, the full range of FDA approved contraceptives.”<sup>290</sup>

Thus, there is *no* Supreme Court interpretation of RFRA that commands the Trump Administration to exempt additional health plan sponsors from the contraceptive mandate. Further, as explained in the recent decisions in *California v. Health and Human Services* and *New Jersey and Pennsylvania v. Trump*, the Trump Administration’s determination that RFRA required a much broader set of exemptions from the ACA’s preventative health mandate was both a violation of separation of powers doctrine and a decision in excess of its statutory authorization under the ACA, thereby violating § 706 of the APA.<sup>291</sup>

---

mandate. However, the regulations still required all organizations except houses of worship, integrated auxiliaries, and conventions or associations of churches to certify that they were seeking an accommodation on the basis of their religious beliefs. *See* Group Health Plans and Health Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,621–23; 45 C.F.R. § 147.131 (2013); 45 C.F.R. § 147.131 (2014); 45 C.F.R. § 147.131 (2015). Professor Leslie Griffin has argued that the Obama Administration’s decision to try to accommodate religious not-for-profits was “foolhardy” because its concession paved the way for Hobby Lobby to seek a similar accommodation. Griffin, *supra* note 178, at 675–76.

289. *Zubik v. Burwell*, 194 L.Ed.2d 599 (U.S. 2016) (requesting additional briefing), and per curium opinion, 136 S.Ct. 1557 (2016).

290. *Zubik*, 136 S.Ct. at 1560–61 (citations omitted).

291. *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 817 (E.D. Pa. 2019); *California v. Health & Hum. Servs.*, 351 F. Supp. 3d 1267, 1284 (N.D. Cal. 2019).

a. *The Rules Should Not Have Extended Hobby Lobby to Publicly Traded Corporations*

The Trump Administration’s decision to expand the exemption based on religious belief to publicly traded corporations is deeply troubling. Without conceding the correctness of *Hobby Lobby’s* ruling—that closely-held corporations can exercise the religious beliefs of their individual owners—it is a very large stretch indeed to apply its reasoning to publicly traded corporations. As Edward Thurlow, Lord High Chancellor of Great Britain, eloquently observed more than two centuries ago, corporations have “no soul to be damned, and no body to kick.”<sup>292</sup> Although courts have long accepted the legal fiction that corporations are persons for the purposes of imposing tort liability and criminal responsibility,<sup>293</sup> it is absurd to assert that such a large business entity, owned by thousands, if not millions, of shareholders, could have religious beliefs, much less exercise those beliefs in a unitary fashion.<sup>294</sup> As Justice Alito observed in *Hobby Lobby*, “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>295</sup> Yet despite such improbability, that is precisely what the Final Rules would permit. Authorizing publicly traded corporations to be exempt from providing essential health care services to their employees on the grounds of “religious belief” incentivizes large shareholders

---

292. John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow).

293. See, e.g., Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. J. 1559, 1562–63 (1990); See also N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492–95 (1909).

294. Indeed, after RFRA was enacted—but declared inapplicable to the states by the Supreme Court’s decision in *City of Boerne v. Flores*—Congress debated the enactment of RLUIPA. During that debate, legislators in both political parties agreed that large corporations like General Motors or Exxon do not (and could not) have religious beliefs. MARCI A. HAMILTON, *GOD V. THE GAVEL* 351–52 (Rev. 2d ed. 2014).

295. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014).



and corporate boards to manufacture such beliefs as a way to save money.

*b. RFRA Does Not Protect “Moral Convictions”*

Furthermore, RFRA provides no justification whatsoever for allowing employers or other health plan sponsors to opt out of their obligation under the ACA contraceptive mandate based on “sincerely held moral convictions.”<sup>296</sup> In *California v. Health and Human Services*, the California court declared that there was no justification for the Final Rules exempting employers from compliance with the ACA mandate based on their “moral convictions,” observing that “the Moral Exemption implicates neither RFRA nor the Religious Clauses of the Constitution.”<sup>297</sup> Further, for the purposes of granting injunctive relief, the court ruled that the exemption for moral convictions was “inconsistent with the language and purpose of the statute [the agencies] . . . purport to interpret.”<sup>298</sup> Under the Trump Administration’s “Moral Convictions” Rule, any health plan sponsor or plan issuer, whether non-profit or for-profit (except for publicly traded corporations), may exempt itself from the contraceptive mandate simply by declaring a “moral” objections to one or more contraceptives.<sup>299</sup> But RFRA is limited in scope to claims or defenses based on a person’s religious beliefs, not more general moral or philosophical views. Enacted in response to what its sponsors saw as *Smith’s* inadequate protection of the exercise of *religious* belief, RFRA explicitly declared its purpose to “restore” the compelling interest test approved in *Sherbert v. Verner* and *Yoder v. Wisconsin*.<sup>300</sup> Both were cases in which the claimant’s asserted *religious* beliefs were in conflict with state law.<sup>301</sup>

---

296. See *California v. Health and Hum. Servs.*, 351 F. Supp. 3d at 1297.

297. *Id.* at 1296.

298. *Id.* at 1297.

299. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,850 (Oct. 6, 2017); 83 Fed. Reg. 57,592, 57,592 (Nov. 15, 2018).

300. 42 U.S.C. § 2000bb(b) (2018).

301. *Id.*

The dangers of expanding RFRA further—to authorize exemption from a federal statute based on “moral convictions”—are apparent. There is simply no principled way to limit objections based on moral convictions. Any person might object on “moral” grounds to a multitude of statutory mandates (paying taxes, complying with the Clean Air Act, acting in accordance with the rules requiring gender equality in education, employment, etc.). In the health care arena, this could include those with moral objections to childhood vaccination, to providing liver transplants to people whose liver has been destroyed by their alcohol abuse, or to government funding of gender reassignment surgery.<sup>302</sup> For the average health care plan, the increased costs of providing contraceptives without cost sharing will be offset by the costs avoided by preventing pregnancies; however, some employers, especially those with self-insured plans, may incur somewhat higher costs if they are required to provide access to all contraceptive methods without cost sharing.<sup>303</sup> Given this potential economic incentive, the Final

---

302. Fifteen states permit parents to opt out of vaccination for their children based on their “personal, moral, or other beliefs,” so-called “philosophical exemptions.” NAT’L CONF. OF ST. LEGIS., *supra* note 22; *see, e.g., Allen v. Mansour*, 681 F.Supp. 1232, 1233 (E.D. Mich. 1986) (liver transplant); Quentin Fottrell, *Obamacare, States and Insurers Make Gender Reassignment Surgery More Accessible*, MARKET WATCH (June 3, 2015, 9:29 AM), <https://www.marketwatch.com/story/obamacare-states-and-insurers-make-gender-reassignment-surgery-more-accessible-2015-06-02> [<https://perma.cc/97XB-76W6>]; *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Ct. Md. 2017); Ann E. Marimow, *Federal Judge Says Trump Administration Can’t Stop Funding Sex-Reassignment Surgeries for Military Members*, WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/local/public-safety/a-second-judge-blocks-trump-administrations-proposed-transgender-military-ban/2017/11/21/d91f65e4-cee1-11e7-81bc-c55a220c8cbe\\_story.html?utm\\_term=.fe007a34ac47](https://www.washingtonpost.com/local/public-safety/a-second-judge-blocks-trump-administrations-proposed-transgender-military-ban/2017/11/21/d91f65e4-cee1-11e7-81bc-c55a220c8cbe_story.html?utm_term=.fe007a34ac47) [<https://perma.cc/42D5-ZAKE>]; Kathy L. Cerminara, *Whose Freedom? Teaching the Contraceptive Coverage Cases as a Bridge from Policy to Bioethics*, 61 ST. LOUIS L. J. 529, 538 (2018).

303. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraceptive Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. CIVIL RIGHTS—CIVIL LIBS. L. REV. 343, 352 (2014); *See also* Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act’s Contraception Coverage Mandate*, AM. CONST. SOC’Y FOR L. & POL’Y at n. 47 (Oct. 2012); Department of the Treasury, Group Health Plans and Health Issuers Relating to Coverage of

Rules create temptation for employers to seek exemption by citing a vague “moral conviction” that some or all types of contraception are morally wrong. Since the Final Rules permit exemptions on this ground to be claimed by all employers and health plan sponsors except publicly traded corporations, there is a substantial danger that many more employers will seek to opt out, leaving their female insureds without contraception. Just as with the Final Rules’ exemption for religious beliefs, it is also striking that the “moral convictions” exemption applies only to contraceptive services.

The Trump Administration’s effort to wrap itself in the mantle of the Church Amendment and other “conscience” exemptions is not persuasive. Although Congress has previously acted to exempt healthcare providers from being required, as a condition of employment, staff privileges, or Medicare/Medicaid reimbursement, to perform abortions or sterilizations,<sup>304</sup> and has recognized conscientious objection to military service,<sup>305</sup> these were specific statutes directed at a particular issue, which were enacted by a majority of both houses of Congress. In contrast, the Final Rules are an open-ended exemption, promulgated as a regulation by executive agencies with the specific aim of undercutting an act of Congress. It is notable that the Blunt Amendment, a bill that would have exempted employers from furnishing contraceptives based on their religious beliefs or moral convictions, was defeated in 2012.<sup>306</sup>

---

Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,727-28 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54).

304. This statute (42 U.S.C. §§ 300a-7(b), (c)(1), and (d) (2018)) known as the Church Amendment, after its primary sponsor, Senator Frank Church, was enacted as part of the Health Programs Extension Act of 1973 (Pub. L. No. 93-45, 87 Stat. 91 §§ 401 (A)–(B)) (1973).
305. *See, e.g.*, Universal Military Training and Service Act, 50 U.S.C. § 456 (j) (2018), as construed in *Clay v. United States*, 403 U.S. 698, 2068, 2069–2078, 2075 (1971).
306. *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 821 (E.D. Pa. 2019); *see also* Nejaime & Siegel, *supra* note 191, at 2551.

*B. The Final Rules Violate the Establishment Clause of the First Amendment, By Promoting the Sectarian Religious Views of Certain Religious Denominations as Government Policy*

The First Amendment has two provisions designed to protect religious liberty.<sup>307</sup> The Free Exercise clause is “aimed at protecting [the people’s right as individuals] . . . to be free from religious coercion” from the government.<sup>308</sup> In contrast, the “Establishment Clause is about the limited character of the government created by those people,”<sup>309</sup> “a structural bar on government action” that would impinge on people’s freedom to choose what to believe and how, if at all, to exercise their faith.<sup>310</sup> There is also an inherent tension between the two clauses.<sup>311</sup> Long before RFRA, it was clear that undue deference to claims that a neutral law was impinging on the free exercise of religious belief<sup>312</sup> can result in privileging one set of religious beliefs above others,

---

307. The First Amendment declares that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. AMEND. I.

308. IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 31 (2014).

309. *Id.*

310. *Cf.* Gedicks & Van Tassel, *supra* note 303, at 347.

311. *Locke v. Davey*, 540 U.S. 714, 718 (2004).

312. In addition, courts have long drawn a distinction between religious beliefs, which are wholly protected by the First Amendment, and actions based on those beliefs, which are not. In *Stormans, Inc. v. Selecky*, the court explained that:

Underlying the Supreme Court’s jurisprudence is the principle that the Free Exercise Clause ‘embraces two concepts [ ]—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.’ *Cantwell [v. Connecticut]*, 310 U.S. [296], at 303–04. . . . This principle traces its roots to the idea that allowing individual exceptions based on religious beliefs from laws governing general practices ‘would . . . make the professed doctrines of religious belief superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself.’

571 F.3d 960, 978 (9th Cir. 2009) (citing *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). *Stormans* involved a free exercise challenge to a Washington State regulation that required all pharmacists to dispense all lawfully prescribed prescriptions,

which would undercut the goal of separation of church and state and burden those who do not share those beliefs.<sup>313</sup> The Supreme Court has consistently refused to allow accommodations of religious belief that burden others, particularly in the employment or other secular contexts.<sup>314</sup> As Justice Stevens observed in his concurrence in *Boerne v. City of Flores*, “governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”<sup>315</sup> Justice Stevens concluded that “RFRA is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution.”<sup>316</sup>

In endeavoring to change by statute the standard that courts must use to evaluate claims of free-exercise violations, RFRA raises significant constitutional concerns. These include not only the fundamental principle that courts, especially the Supreme Court, are the sole arbiters of a law’s constitutionality,<sup>317</sup> but also other separation of powers issues.<sup>318</sup> Professors Christopher Eisgruber and Lawrence Sager assert bluntly that “RFRA is a congressional attempt to subvert rather than to supplement the constitutional judgment of the Supreme Court,”<sup>319</sup> an effort that places the federal courts, and especially the Supreme Court, in an untenable position.

Although RFRA declares that it shall not affect the Establishment Clause,<sup>320</sup> in fact, its statutory expansion of

---

without an exception for pharmacists who had religious or moral objections to certain prescriptions. After extensive litigation, the Ninth Circuit upheld the regulations. *See id.*

313. Gedicks & Van Tassel, *supra* note 303, at 357.

314. *Id.*

315. *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring).

316. *Id.*

317. *Marbury v. Madison*, 1 Cranch 137, 173 (1803).

318. Eisgruber & Sager, *supra* note 157, at 441.

319. *Id.* at 443.

320. The RFRA states:

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this

protections for the exercise of religious belief leads inevitably to the possibility that the government will not only favor religion over irreligion, but also favor one set of beliefs over others.<sup>321</sup> In a democracy, this is an untenable result. “In a nation with many groups, many values, and many views of the commitments by which a good life is shaped, the shared understanding among *some* groups that they are each bound by the commandments of a (different) god they believe deserves/demands obeisance is unacceptably sectarian as a basis for the constitutional privileging of religion.”<sup>322</sup> Indeed, many scholars contend that the increasing claims of “conscience” or “complicity” are an effort to undermine recent changes in legal rules and social norms, and a strategic effort to use the rhetoric of religious freedom to undo legislative and judicial decisions to which they object, especially those involving sexual relations and same-sex marriage.<sup>323</sup>

This unacceptably sectarian tilt has come to fruition with the Trump Administration’s Rules dramatically expanding exemptions to the contraceptive mandate. By elevating certain sectarian beliefs about when life begins to a privileged position, the Rules effectively enshrine them as government policy. Yet, as the Court ruled in *Larson v. Valente*, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>324</sup> Similarly, in

---

chapter. As used in this section, the term “granting,” used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne*, 521 U.S. 507.

321. Eisgruber and Sager refer to this as the goal of “unimpaired flourishing,” a view of some adherents of religious liberty concerning about what is necessary to protect the free exercise of religion that “privileges religious commitments over other deep commitments that persons have.” Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1255 (1994).

322. *Id.* at 1262 (emphasis added).

323. Nejaime & Siegel, *supra* note 191, at 2520, 2555–56; Mary Anne Case, *Why “Live-And-Let-Live” Is Not a Viable Solution to The Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 468–69, 486–92 (2015) [hereinafter *Case, Live-And-Let-Live*].

324. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, the Court declared, “[w]hatever else the Establishment Clause may mean, . . . [it] means at the very least that government may not demonstrate a preference for one particular sect or creed . . . .”<sup>325</sup>

By allowing both not-for-profit and for-profit corporations of all stripes to claim religious beliefs in opposition to some or all contraceptive methods—and to assert those beliefs as grounds for not complying with a national health care law—the Trump Administration has effectively written a new statute, grounded in the religious beliefs of a small minority, that will deny many American women access to the medical care that the ACA guarantees. Professor Mary Ann Case has aptly analogized the *Hobby Lobby* case to the 1555 Peace of Augsburg, the treaty that granted medieval European kings the authority to determine the religious faith of those who inhabit their kingdom.<sup>326</sup> The Trump Administration’s Final Rules have the same effect. Or, as Professor Case has stated more bluntly, in her critique of *Hobby Lobby*, “many religiously motivated opponents [of the rights to sexual liberty and equality] seem to want to have their cake, eat it too, and shove it down my throat . . . .”<sup>327</sup>

The concern that employers claiming a “moral” objection to contraceptives will undo the ACA is even greater, since an employer need not invoke a particular religious tenet as justification for its objection. Further, unlike the Church Amendment, which exempted certain health care professionals from sanction if they objected to performing (or chose to perform) an abortion or sterilization,<sup>328</sup> the Trump Administration’s exemption for “moral convictions” sweeps much more broadly; it authorizes employers to opt out of a statutory obligation based on a greatly attenuated connection between their provision of health insurance and the personal choice that an individual employee makes about medical care. The Rule exempts employers and other health plan sponsors from compliance with the contraceptive mandate despite the fact that they themselves are

---

325. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 605 (1989).

326. *Case, A Patchwork Array*, *supra* note 192, at 238–39.

327. *Case, Live-And-Let-Live*, *supra* note 323, at 471.

328. *See* Pub. L. No. 93-45, 87 Stat 91, §§ 401 (A)–(B) (1973).

not dispensing or providing the medical services to which they object.

*C. The Government Has a Compelling Interest in Making Contraceptive Care Available to All Women; A Wholesale Exemption of For-Profit and Not-for-Profit Corporations Defeats that Interest*

In *Hobby Lobby*, the plurality opinion grudgingly assumed that the government possessed a compelling interest in making contraception available to all women who received coverage under the ACA.<sup>329</sup> The Court ruled, however, that the government had not demonstrated that its interest was accomplished by the least restrictive means possible, pointing to what it saw as a less restrictive alternative: notifying the government or its own health plan administrator that it was opting out of the contraceptive mandate.<sup>330</sup> That way, Hobby Lobby would receive the same accommodation the Obama Administration had offered non-profits. But in *Zubik v Burwell*, the plaintiffs contended that this accommodation was *itself* a burden on religious exercise, making the not-for-profits “complicit” in the provision of contraceptives.<sup>331</sup> As noted above, such complicity claims have burgeoned in recent years. These invocations of religious liberty threaten to undermine completely the goals of neutral application of the laws and religious pluralism, as well as the rights of third parties.<sup>332</sup> It is notable that in its remand in *Zubik*, the Supreme Court explicitly did *not* resolve the issue of complicity—either because it was split 4-4, or because it anticipated that the parties would reach a compromise.<sup>333</sup> Nonetheless, the Court declared, “[n]othing in this opinion . . . is to affect the ability of the Government to ensure that women covered by petitioners’ health plans ‘obtain, without cost, the full range of FDA approved contraceptives,’”<sup>334</sup> implicitly acknowledging that this *was* a compelling Government interest.

---

329. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2779–80 (2014).

330. *Id.* at 2766, 2785; *see also* 45 C.F.R. § 147.131(a)–(c) (2018).

331. *Zubik v. Burwell*, 136 S.Ct. 1557, 1559 (2016).

332. *See* Nejaime & Siegel, *supra* note 191, at 2542, 2589–90.

333. *Zubik*, 136 S.Ct. at 1560–61.

334. *Id.*



The Trump Administration’s Final Rules are a total abdication of the government’s responsibility under the ACA and a deliberate decision to avoid its statutory obligations. Having unsuccessfully attempted to repeal the law,<sup>335</sup> it is now incumbent on the Trump Administration to fully implement its terms, including the requirement that health plans make contraceptives available to all female employees and insureds. The Women’s Health Amendment, part of the ACA, articulated the compelling need for women to have access to all FDA approved contraceptives at no cost.<sup>336</sup> Without such access, many women will be unable to exercise their right to procreative liberty<sup>337</sup> and control the number of children they will bear and the timing of their births, which is particularly important in light of the Zika epidemic and potential exposure to other pathogens that can cause birth defects.<sup>338</sup> More than ninety percent of American women who have ever been sexually active have used contraception at some point in their lives<sup>339</sup> and more than 62 million American women have availed themselves of no-cost contraception since the contraceptive mandate became effective in 2012.<sup>340</sup>

As Professor Jessie Hill explains, “[u]nderlying the [ACA’s] . . . contraceptive mandate is a judgment that maintaining control of one’s reproductive life is a basic medical need and that prescription contraceptives are a morally and socially appropriate

---

335. Abby Goodnough, *Obamacare Premiums to Fall and Number of Insurers to Rise Next Year*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/us/politics/obamacare-trump.html> [<https://perma.cc/4AA7-MH2P>].

336. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 131, § 2713 (2010).

337. The right to procreative liberty has long been recognized. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Eisenstadt v Baird*, 405 U.S. 438, 443 (1972).

338. *Cf. Burwell v. Hobby Lobby Stores Inc.*, 134 S.Ct. 2751, 2788 (2014) (Ginsburg, J., dissenting).

339. Margot Sanger-Katz, *Set It and Forget It: How Better Contraception Could Be a Key to Reducing Poverty*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/upshot/set-it-and-forget-it-how-better-contraception-could-be-a-secret-to-reducing-poverty.html> [<https://perma.cc/X5QM-ZDJT>].

340. Schwartz, *supra* note 126.

means of meeting that need.”<sup>341</sup> This is neither an abstract government interest in public health or gender equality, nor a general interest in law enforcement.<sup>342</sup> Rather, Congress articulated a specific and concrete government interest in promoting the health of millions of American women, who are the third parties whom the ACA’s guarantee of preventative health care services is designed to protect.

Avoiding harm to these third parties—women covered under an ACA plan and their yet-to-be-born children, including those who face severe harm from Zika exposure *in utero*—is a compelling government interest that must prevail over a RFRA claim.<sup>343</sup> The Trump Administration’s Final Rules authorize health plans to deny female insureds contraceptive coverage on the basis of the health plan sponsor’s religious or moral beliefs. These rules directly harm thousands of American women by

---

341. Jessie Hill, *The Contraceptives Coverage Controversy—What’s Old Is New Again*, SCOTUSBLOG (Feb. 21, 2014), <http://www.scotusblog.com/2014/02/symposium-the-contraceptives-coverage-controversy-whats-old-is-new-again/> [<https://perma.cc/X7LC-CYVA>]; Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J. L. & GENDER 193, 224 (2015)).

342. *Cf. Hobby Lobby*, 134 S.Ct. at 2779 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)).

343. Both the Third Circuit and Ninth Circuit Courts of Appeal held that *even if* RFRA authorized administrative agencies to protect the religious freedom of employers by promulgating these new regulations—which would expand the categories of exempt employers and eliminate the requirement that these employers notify the government, their insurers, third party administrations, or employees that they were not providing contraceptive access—the Rules did not satisfy the core RFRA criteria. The courts held the employers were not substantially burdened in the exercise of their religious beliefs and that, in prioritizing the employers’ interests over the affected third parties, women would be denied access to contraception—and, thus, risk a pregnancy that they did not desire. *Pennsylvania v. Trump*, 930 F.3d 543, 573-74 (3rd Cir. 2019). In *California v. Dep’t of Health and Hum. Servs.*, the Ninth Circuit declined to undertake a full RFRA analysis, ruling that the federal agencies had not shown that merely requiring an employer to notify the government or third parties of its religious objection imposed a substantial burden on the employer’s exercise of its religious beliefs. *California v. Dep’t of Health and Hum. Servs.*, 941 F.3d 410, 428–29 (9th Cir. 2019).

denying them access to the contraception of their choice,<sup>344</sup> exposing them to the potential or realized harm of an unintended pregnancy, and causing them to suffer dignitary injuries by being labelled “immoral” or a sinner by the plan sponsor.<sup>345</sup> In addition, the Trump Administration’s Final Rules also harm children who are born as a result of an unintended pregnancy and suffer the adverse effects of Zika infection, or are stillborn, born preterm or at low birthweight due to an inability to appropriately space a pregnancy. In the era of Zika and other health risks (such as *in utero* exposure to legal and illegal drugs), women must have the ability to choose whether and when to become pregnant. Access to contraception without cost-sharing is essential to achieving this goal. To allow an employer to opt out of a national insurance and taxation system and thus deny employees important benefits because of the employer’s religious beliefs “operates to impose the employer’s religious faith on the employees,” a practice that the Supreme Court expressly condemned in *United States v. Lee*.<sup>346</sup>

Ultimately, the Obama Administration’s regulations, which require that every health plan sponsor (*except* houses of worship, religious auxiliaries, or associations of churches) either comply with the contraceptive mandate or request an accommodation from the government on the basis of its religious beliefs,<sup>347</sup> are the least restrictive means available to implement the government’s interests. They are the only way to protect the interests of the affected third parties by guaranteeing them access to contraceptives in a “seamless manner”—without having to find and enroll in a separate health plan covering only contraception and to find a physician that accepts this health plan.<sup>348</sup> As the female justices of the Supreme Court pointed out during oral

---

344. The Trump Administration’s own Regulatory Impact Analysis concedes that its Rules will deny up to 120,000 American women access to contraceptive care. See discussion, *supra* notes 25–26.

345. Nejaime & Siegel, *supra* note 191, at 2566 (discussing dignitary harms).

346. *United States v. Lee*, 455 U.S. 252, 261 (1982).

347. See 45 C.F.R. § 147.131 (2018).

348. See Zoe Carpenter, *Can Religious Groups Ignore All Laws They Don’t Like?*, THE NATION (Mar. 24, 2016), <https://www.thenation.com/article/can-religious-groups-ignore-laws-they-dont-like/> [<https://perma.cc/78WZ-W4SM>].

argument of *Zubik v. Burwell*, such plans simply do not exist.<sup>349</sup> But even if they did, requiring those women who receive health care through a health plan whose sponsor objects to contraception to discover such a contraception-only plan, enroll in it, and find a doctor willing to accept such insurance would impose additional obstacles to attaining contraceptive access, providing a disincentive to use contraception. Even minor obstacles to accessing contraceptive services can prevent women from obtaining them.<sup>350</sup>

The Trump Administration has responded to the issue of access—the concern that women whose employers are exempt or who have otherwise opted out will not be able to obtain contraceptives without cost-sharing—with a solution both absurd and inadequate. In June 2018, the Trump Administration proposed new family-planning regulations under Title X, which support family-planning organizations.<sup>351</sup> These regulations proposed a new definition of “low-income” women, who are eligible to receive contraceptives without charge at Title X family planning clinics.<sup>352</sup> While the previous definition of low-income encompassed women whose income was less than the federal poverty level, the new definition also includes women whose employers objected to providing contraceptive coverage on religious or moral grounds.<sup>353</sup> While, at first glance, this might seem like a reasonable way to ensure that all women can obtain contraception without cost-sharing, in fact this is precisely the kind of patchwork solution that the ACA contraceptive mandate was designed to avoid. By requiring women to seek contraceptive care, but not their regular health care, at a special clinic, these regulations make it more difficult for them to be able to obtain contraception, particularly emergency contraception, in a timely

---

349. Transcript of Oral Argument, *Zubik v. Burwell* at 41–44 (2016), available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2015/14-1418\\_j4ek.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-1418_j4ek.pdf) [<https://perma.cc/UWM8-S78H>].

350. See Sanger-Katz, *supra* note 339.

351. Sobel et al., *supra* note 16.

352. *Id.*

353. *Id.*; See also 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) (proposing Title X regulations, which have not yet been adopted); 83 Fed. Reg. 57,536, 57,551 (Nov. 15, 2018) (regulating the Final Religious Exemptions).

and convenient manner. Access to health care is already difficult for many women, who face financial challenges and transportation obstacles, as well as the time constraints created by work, school, and family obligations. The Trump Administration’s proposal makes access to necessary contraceptive care even harder. It is the antithesis of the seamless coverage of reproductive health care, which was the goal of the ACA preventative health mandate and the Women’s Health Amendment.<sup>354</sup>

*D. The IFRs and Final Rules Deny Women the Equal Protection of the Laws*

The Trump Administration’s Final Rules exempt employers from their obligation to provide health care coverage under the ACA *solely* in regard to the preventative healthcare services mandated for women. There is no comparable exemption for employers who object to the provision of health care services for men, such as vasectomies or male contraception.<sup>355</sup> This gender-based discrimination is a blatant denial of women’s right to equal protection of the laws, protected against the federal government by the Fifth Amendment to the Constitution. Ever since the Supreme Court held in *Bolling v. Sharpe*<sup>356</sup> (the federal companion case to *Brown v. Board of Education*<sup>357</sup>) that the Fifth Amendment’s Due Process Clause implicitly encompasses the doctrine of equal protection<sup>358</sup> under a “reverse incorporation”

---

354. *See* *Zubik v. Burwell*, 136 S.Ct. 1557, 1561 (Sotomayor, J., concurring).

355. The ACA does not mandate these services as preventative health care. *Cf.* Notice of Transition Relief Regarding the Application of Section 223 to Certain Health Plans Providing Benefits for Male Sterilization or Male Contraceptives, IRS Notice 2018-12 at 4 (Mar. 2018), available at <https://www.irs.gov/pub/irs-drop/n-18-12.pdf> [<https://perma.cc/VZK2-HFAN>].

356. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

357. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

358. The Court held that “liberty,” protected under the Fifth Amendment’s due process clause, “is not confined to mere freedom from bodily restraint, . . . [but rather] extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”

theory,<sup>359</sup> the Court has invalidated numerous federal statutes that treated men and women differently in their entitlement to benefits.<sup>360</sup> These include laws that govern social security,<sup>361</sup> welfare benefits,<sup>362</sup> and military salaries.<sup>363</sup> In the leading case, *Frontiero v Richardson*, the Court ruled that a statute that required female, but not male, members of the military to prove their spouse’s economic dependency in order to receive certain financial benefits discriminated against female service members and violated the Due Process Clause of the Fifth Amendment.<sup>364</sup> So too here, by promulgating Final Rules that exempt employers from their obligation to provide health care services to women (approximately half of their plan enrollees), while requiring employers to provide all mandated health care services to men, the Trump Administration has violated women’s right to equal protection of the laws.

The fact that the challenged Rules purport to defer to the employers’ religious beliefs does not obviate the denial of equal protection. For example, in *Brown v. Stone*, the Mississippi Supreme Court struck down the state’s mandatory vaccination law, which exempted parents from the duty to vaccinate their children if the parents belonged to a recognized religious denomination that “require[d] reliance on prayer or spiritual means of healing.”<sup>365</sup> The court held that this religious exemption violated the Fourteenth Amendment’s Equal Protection Clause because it treated different groups of children differently and

---

*Bolling*, 347 U.S. at 499–500, *supplemented sub nom. Brown*, 347 U.S. at 495.

359. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 976 (2004).

360. The one area of federal law in which the Supreme Court has permitted distinctions to be drawn between men and women involves immigration, in which the Court has applied a rational basis test to find that the gender-based distinctions have a legitimate governmental purpose. *See* Martha F. Davis, *Sex-Based Citizenship Classifications and the “New Rationality”*, 80 ALBANY L. REV. 851, 866 (2017).

361. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

362. *Califano v. Westcott*, 443 U.S. 76, 89 (1979).

363. *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973).

364. *Id.*

365. *Brown v. Stone*, 378 So.2d 218, 219, 223 (Miss. 1979).

risked the health of children whose parents did not hold such religious beliefs, by allowing non-vaccinated, potentially infectious, children to attend public schools.<sup>366</sup> Similarly, the Trump Administration’s Final Rules treat different groups of women—those whose employers claim religious or moral objections to contraception and those whose employers do not assert such claims—differently, thus denying the first group of women the equal protection of the laws. At the same time, the Rules put potentially pregnant women (and their yet to be born children) at risk of harms, including Zika infection, that they could have prevented had they been able to avoid pregnancy.

*E. The IFRs and Final Rules Violate Title VII of the Civil Rights Act of 1964*

By authorizing employers whose opposition to contraception is based on religious and moral beliefs to deprive women—and only women—of access to health services mandated by the ACA, the Trump Administration’s Final Rules also sanction impermissible gender discrimination under Title VII of the Civil Rights Act of 1964. In the landmark case *Erickson v. Bartell Drug Co.*, the court held that an employer health plan that excluded prescription contraception for women from a generally comprehensive prescription-drug plan, while covering virtually all drugs used by men, violated Title VII because it discriminated in the “compensation, terms, conditions, or privileges of employment” on the basis of sex.<sup>367</sup> *Erickson’s* reasoning presaged the concerns of the sponsors of the Women’s Health Amendment.<sup>368</sup> The court noted that “the exclusion of prescription contraceptives [when almost all men’s prescription drugs are covered] creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate

---

366. *Id.* at 223.

367. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268, 1276–77 (W.D. Wash. 2001). The court relied on the Supreme Court’s decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682–83 (1983), which held that an employer violated Title VII when it covered pregnancy-related health care costs for its female employees but not for the spouses of its male employees. *Id.* at 1271.

368. See the discussion of the Women’s Health Amendment in Part I. C., *supra*, beginning at note 113.

healthcare need uncovered.”<sup>369</sup> *Erickson* was followed by many, although not all, courts around the country.<sup>370</sup> Many state legislatures have accepted its basic premise, enacting laws that require all employers to provide contraceptive benefits.<sup>371</sup>

An employer’s religious beliefs do not provide *carte blanche* to override the protections of Title VII of the Civil Rights Act of 1964. While Title VII permits religious non-profits to discriminate on the basis of religion in the *hiring* of certain employees, effectively authorizing an affirmative defense that the discrimination is necessary to permit the non-profit to carry out its religious mission,<sup>372</sup> and the Supreme Court has recognized a narrow “ministerial exception” to the application of the Americans with Disabilities Act,<sup>373</sup> neither decision authorizes

---

369. *Erickson*, 141 F. Supp. 2d at 1277.

370. Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 838 (2016).

371. Laurie Sobel et al., *State and Federal Contraceptive Coverage Requirements: Implications for Women and Employers*, KFF (Mar. 29, 2018), <https://www.kff.org/womens-health-policy/issue-brief/state-and-federal-contraceptive-coverage-requirements-implications-for-women-and-employers/> [https://perma.cc/2JF2-9C6R]. For reasons that are beyond the scope of this paper, state laws do not govern all employers’ health plans, many of which are exempt from state law requirements under the command of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 (1974). Today, 61% of Americans are covered by self-insured plans, which are not subject to state health-insurance mandates. Emily Bazar, *For Millions of Insured Americans, State Health Laws Don’t Apply*, KAISER HEALTH NEWS (Nov. 16, 2017), <https://khn.org/news/for-millions-of-insured-americans-state-health-laws-dont-apply/> [https://perma.cc/SWD3-BKXW].

372. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 330, 334–39 (1987) (holding, in a case involving a religious not-for profit employer that operated a gym open to the public, that Title VII’s limited exclusion of religious corporations from the prohibition against discrimination on the basis of religion did not violate the Establishment Clause of the First Amendment).

373. In *Hosanna-Tabor Evangelical Lutheran Church & Schl v. EEOC*, 565 U.S. 171, 182–83 (2012), the Court relied on the “ministerial exception” to find that a religious employer had an affirmative defense to the Americans with Disabilities Act, in a dispute between a religious employer and its employee, a teacher and “called minister” who was hired to instruct students in the tenets of the religion as well as secular subjects. The Court reached this



employers to brandish their religious beliefs as a sword to deny employees health benefits mandated by law. There is simply no ground for an employer, particularly a for-profit corporation, to invoke religious or moral beliefs as a license to discriminate against women.

*F. The Rules Violate Women’s Constitutional Right to Due Process, Personal Privacy, and Procreative Liberty*

The Supreme Court has recognized the right to procreative liberty for more than seventy years. In *Skinner v. Oklahoma*, the Court held that a state law that required the sterilization of “habitual criminals” who were blue collar thieves, but not white collar embezzlers, violated the Equal Protection Clause of the Fourteenth Amendment and the substantive due process right of procreative liberty.<sup>374</sup> In *Griswold v. Connecticut*, the Court recognized a fundamental right of privacy within the marital union, which encompassed the right of a married couple to choose whether or not to use contraception.<sup>375</sup> This right was extended to single people in *Eisenstaedt v. Baird*.<sup>376</sup> The Trump Administration’s Final Rules are a direct attack on women’s right to exercise their procreative liberty, to decide whether or not they will use contraception after consultation with their physician. Because the Final Rules put employers, rather than employees, in the decisionmaker’s seat, they deny women their fundamental right to decide whether or not they will become pregnant, which, in turn, affects the timing, and potential health, of children who might be conceived without access to contraception.<sup>377</sup> *Harris v.*

---

conclusion in light of a long series of cases which held that “on matters of religious doctrine, church governance, and control of leadership, the state is forbidden from substituting its judgment for that of duly constituted religious authority.” Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1274 (2017). Or, as Chief Justice Roberts wrote for the majority, “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” 565 U.S. at 181.

374. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

375. *Griswold v. Connecticut*, 85 S.Ct. 1678, 1682 (1965).

376. *Eisenstadt v. Baird*, 405 U.S. 438, 440–46 (1972).

377. *See, e.g., Carey v. Population Services*, 431 U.S. 678, 684–85, 697 (1977) (invalidating on constitutional grounds a New York statute

*McRae*, a case upholding the Hyde Amendment, which prohibited federal funding of abortion for Medicaid recipients, is distinguishable. In *Harris*, the Court emphasized that the Constitution protected negative rights: for example, the right to be free from government interference with fundamental rights.<sup>378</sup> The Court declared that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation.”<sup>379</sup> It ruled that that the Hyde Amendment did not deny women their substantive due process right to choose whether or not to have an abortion, because it was the women’s indigency, not Congressional action, that made it harder for them to access abortions.<sup>380</sup> The Court further declared, “[w]hether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.”<sup>381</sup> But in the case of the Trump Administration’s Final Rules, Congress has spoken clearly: employers subject to the ACA must provide all FDA-approved methods of contraception and sterilization as preventative healthcare services. The Trump Administration’s efforts to undermine the will of Congress constitute direct executive branch interference with women’s constitutionally protected liberty, and therefore violate their substantive due process rights.

*G. Rolling Back the Contraceptive Mandate Via IFR Violates the Administrative Procedure Act Because the Government Did Not Demonstrate Good Cause for Dispensing with Notice and Comment Rulemaking*

The Trump Administration’s endeavor to avoid the requirements of the APA through promulgating the IFRs—without the opportunity for public comment on either the significant expansion of the categories of exempt employers or the easing of the exemption process itself—violates the APA and renders the IFRs unenforceable. The fact that the Rules have now

---

that limited the distribution of non-prescription contraceptives); *Griswold v Connecticut*, 381 U.S. 479, 481 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972).

378. *Harris v. McRae*, 488 U.S. 297, 322–23 (1980).

379. *Id.* at 317.

380. *Id.* at 316–18.

381. *Id.* at 316.

been published in final form does not change this violation, particularly since the Final Rules, issued in November 2018, are, by the Trump Administration’s own admission, in essence the same as the IFRs that it published in October 2017.<sup>382</sup> In *Pennsylvania and New Jersey v. Trump*, the Pennsylvania federal district court held that the failure to comply with the APA’s notice and comment rule-making requirements “fatally tainted” the Final Rules.<sup>383</sup>

In a democracy, it is axiomatic that administrative agencies, who are charged with interpreting statutes to accord with Congress’ intent, must seek and consider comments from the public, including those affected by proposed regulatory action.<sup>384</sup> The APA implements this obligation by requiring agencies to provide public notice of any proposed rulemaking, as well as the substance of the proposed rule, and to offer the public the opportunity to comment for a minimum of thirty days.<sup>385</sup> The notice must be published in the Federal Register, unless “the agency *for good cause* finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>386</sup>

Courts strictly enforce the good cause requirement;<sup>387</sup> to do otherwise would permit an exception to notice and comment

---

382. *See, e.g.*, 83 Fed. Reg. 57,536, 57,542 (Nov. 15, 2018) (“[t]he Departments are finalizing the provisions of the . . . [Interim Final Rules] without contracting the scope of the exemptions and accommodation set forth in the . . . [Interim Final Rules.]”); 83 Fed. Reg. 57,592, 57,594 (Nov. 15, 2018) (“The moral exemptions to the contraceptive coverage requirement are finalized with technical changes.”).

383. *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 816 (E.D. Pa. 2017).

384. *See* *Buschmann v. Schweiker*, 676 F.2d 353, 357 (9th Cir. 1982) (“The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people. . . .”).

385. 5 U.S.C. § 553(d) (2018).

386. 5 U.S.C. § 553(b)(3)(B) (2018) (emphasis added).

387. *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (“ . . . [T]he good cause exception ‘is to be narrowly construed and only reluctantly countenanced’.”) (citations omitted).

rulemaking to swallow the rule.<sup>388</sup> There was no good cause for the Trump Administration to use the IFRs to undertake its radical restructuring of the ACA contraceptive mandate. There was no emergency, or a situation in which “delay could . . . result in serious harm.”<sup>389</sup> The Trump Administration had already signaled its intent to publish new rules in May 2017 when President Trump issued an executive order directing federal agencies to consider developing new regulations to address “conscience-based objections” to the ACA contraceptive mandate.<sup>390</sup> As the Courts of Appeal for the Fifth and Sixth Circuits have said, “[a] desire to provide immediate guidance, without more, does not suffice for good cause.”<sup>391</sup>

The IFRs announced a major policy shift in a statute that governs healthcare access for most Americans, exactly the situation that requires notice and comment rulemaking, so that the public can have input into agency decisionmaking.<sup>392</sup> Not only did the IFRs expand the categories of potentially exempt employers to include for-profit, publicly traded corporations with religious beliefs opposed to contraception, but they also announced an entirely new ground for exemption—that one holds a “moral conviction” that women should not use some or all types of contraception. In essence, the moral conviction exemptions permit any health plan sponsor who believes that the use of contraception is sinful or immoral to deny those women enrolled

---

388. *See* *Zhang v. Slattery*, 55 F.3d 732, 746 (3d Cir. 1995); 8 U.S.C. § 1101(a)(42) (2018) (superseding *Zhang v. Slattery* on other grounds); *City of New York v. Permanent Mission of India to U.N.*, 618 F.3d 172, 201 (2d Cir. 2010).

389. *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

390. Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

391. *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) (citing, among other cases, *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009)).

392. *See* *So. Cal. Aerial Advertisers’ Ass’n v. F.A.A.*, 881 F.2d 672, 677 (9th Cir. 1989) (citations omitted) (distinguishing between “substantive rules [which] effect a change in existing law and policy” and require notice and comment rulemaking, and “interpretative rules [which] merely clarify or explain existing laws or regulations” and do not require such rulemaking).

in its health plan access to that medical service.<sup>393</sup> The IFRs also greatly eased the employers’ exemption process, eliminating any requirement that they notify the government *or* their health plan administrator that they were seeking exemption or accommodation, thus leaving their female employees unaware of this loss of coverage.

The new rules affect a significant portion of the public. Women constitute more than half of the adult population of America; the average woman spends the better part of three decades either trying to become pregnant or to avoid pregnancy.<sup>394</sup> At least 62 million women have benefited from the ACA’s contraceptive mandate, entitling them to have no-cost access to contraception if they so choose.<sup>395</sup> The ACA has significantly lowered the cost of contraception, particularly for younger American women, for whom out of pocket expenditures for contraceptives constitute a significant fraction of their overall healthcare costs.<sup>396</sup> In the six years since the contraceptive mandate became effective, many more women have been choosing LARC because they no longer need to be concerned about the upfront cost of these contraceptive methods.<sup>397</sup> For women who

---

393. Cf. Nejaime & Siegel, *supra* note 191, at 2576–77 (explaining that those who raise “conscience” claims believe that anyone who uses contraception has acted immorally or sinfully).

394. *Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019), <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf> [<https://perma.cc/X85F-39LC>]; see, e.g., *Age and Sex Composition in the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2014/demo/age-and-sex/2014-age-sex-composition.html> [<https://perma.cc/TW3S-TM6F>] (last visited Feb. 27, 2020) (noting that females are just under 51% of the United States population). By their early 40s, 86% of American women have used three or more different contraceptive methods. Sonfield, *supra* note 18, at 103.

395. Konrad, *supra* note 122.

396. Nora Becker and Daniel Polsky, *Women Saw Large Decrease in Out-Of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFF. 1204, 1208 (2015) (estimating that out-of-pocket spending on contraceptives constituted 30 to 44% of their total out-of-pocket health care spending).

397. See Sobel et al., *supra* note 16, at 5; Sifferlin & Rebala, *supra* note 123.

do not choose such reliable contraception, the Final Rules have meant that many low income women will lack access to emergency contraception because they cannot afford to purchase the medication over the counter.<sup>398</sup> In the era of Zika, emergency contraception is particularly important because it is the only remedy available to prevent pregnancy for a woman who learns—at the last minute—that she or her partner may have been exposed to the Zika virus.

In any case, the Trump Administration’s avowed desire to eliminate uncertainty is insufficient, in itself, to constitute good cause.<sup>399</sup> Further, this assertion is undermined by the very fact of announcing this major regulatory change through Interim Final Rules and soliciting comments *after* their publication.<sup>400</sup> By acknowledging the importance of public comment, even if received after the fact, the agencies implied that those comments *would* be considered and possibly change the ultimate Rules issued. Thus, the process the Trump Administration chose has created more, not less, uncertainty.<sup>401</sup>

For all of the reasons discussed above, the Trump Administration’s Final Rules expanding the criteria and process for exemption from the ACA contraceptive mandate are unconstitutional and unlawful. They are also extremely short-sighted health policy.

#### IV. RECOMMENDATIONS FOR PUBLIC HEALTH POLICY THAT IS LAWFUL, CONSTITUTIONAL, AND EFFECTIVE

Effective public health policy must make government and individuals partners in the endeavor to protect public health. Whether that involves mandatory vaccination laws that support

---

398. Konrad, *supra* note 122; *cf.* Becker & Polsky, *supra* note 396, at 1209. Costs for over-the-counter or prescription emergency contraception range from \$15 to \$67 or more, depending on whether a woman needs to consult with a physician to receive a prescription. *See, e.g., Which Kind of Emergency Contraception Should I Use?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/morning-after-pill-emergency-contraception/which-kind-emergency-contraception-should-i-use> [https://perma.cc/6ZJA-KFTG] (last visited Oct. 23, 2018).

399. *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013).

400. *See, e.g., California v. Azar*, 911 F.3d 558, 576–78 (9th Cir. 2018).

401. *Reynolds*, 710 F.3d at 510–11.

herd immunity for contagious diseases like measles or pertussis, or limited isolation and quarantine for potentially fatal diseases like Ebola and COVID-19, the job of government is to inform members of the public about potential risks and then to assist them in obtaining the resources necessary to minimize the risks of infection and other harms. For example, in combatting the spread of HIV/AIDS, the government played a central role in (1) educating the public about how HIV is transmitted; (2) reducing HIV transmission via distribution of condoms and clean needles to prevent the spread of HIV through sexual activity and intravenous drug use; and (3) making treatment, including prophylactic treatment, available to HIV-positive individuals and those at high risk for HIV infection.<sup>402</sup> This, in turn, enabled them to make informed decisions about how to minimize their risk of contracting HIV.<sup>403</sup> During three decades of experience with the HIV/AIDS epidemic, government health officials *and* the public at large learned not to focus on the “immoral” activities of those who could transmit the virus, but instead pursued the goal of enabling everyone to protect herself from the risks of HIV, including the risk of HIV transmission from a pregnant woman to her developing fetus.

In 1964 and 1965, a worldwide epidemic of rubella (also known as “German measles”) afflicted more than 12 million Americans.<sup>404</sup> Young children were the primary transmitters of infection, spreading it to older children and pregnant women.<sup>405</sup> While rubella usually causes a mild illness in adults and children, the infection can be devastating in pregnant women, frequently leading to the birth of children with serious, even fatal, birth

- 
402. See, e.g., *Injection Drug Use and HIV Risk*, CDC, <https://www.cdc.gov/hiv/risk/idu.html> [<https://perma.cc/X6A9-QHYT>] (last visited Mar. 16, 2020); *HIV and Pregnant Women, Infants, and Children*, CDC (Mar. 2019), <https://www.cdc.gov/hiv/pdf/group/gender/pregnantwomen/cdc-hiv-pregnant-women.pdf> [<https://perma.cc/3XHX-EHYU>].
403. Cf. Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation*, 3 TEX. J. WOMEN & L. 7, 30 n. 101 (1994).
404. *Rubella in the U.S.*, CDC, <https://www.cdc.gov/rubella/about/in-the-us.html> [<https://perma.cc/RMW7-HPH8>] (last visited Sept. 15, 2017) [hereinafter *Rubella in the U.S.*].
405. LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 56–7 (2010).

defects.<sup>406</sup> During this epidemic, 20,000 babies in the United States were born with a constellation of birth defects called congenital rubella syndrome.<sup>407</sup> Of these 20,000, 2,000 died shortly after birth, 12,000 were deaf, 3,500 were blind and nearly 2,000 had permanent mental disabilities.<sup>408</sup> During this epidemic, the federal government provided updated information about the risks of contracting rubella while pregnant, which the mainstream media disseminated to the public.<sup>409</sup> Many women who knew they had been infected with rubella during their first trimester, the most dangerous period of exposure, sought a therapeutic abortion, and some, though certainly not all, were able to attain one, mostly through an arduous hospital committee process.<sup>410</sup> In general, the national attitude toward pregnant women infected with rubella was highly sympathetic, as most Americans could empathize with the decision not to bear a child who might have significant disabilities, particularly at a time when medical and social support services for disabled children and their families were virtually non-existent.<sup>411</sup>

In the case of the Zika epidemic, the federal government must also play a role of education and support. Since Zika’s outbreak in Brazil in 2015, the CDC have taken the lead in educating and advising the public about how best to avoid infection with the Zika virus: eliminating mosquito breeding grounds, wearing protective clothing to reduce the chance of being bitten by a Zika-carrying mosquito, or avoiding sexual transmission of the Zika virus from a woman’s partner. The CDC and other public health agencies have joined with leading physicians’ organizations, such as the American College of Obstetrics and Gynecology and the American Academy of Pediatrics, to determine the best practices

---

406. Scott A. Baron, *Rubella (German Measles)*, KIDS HEALTH, <https://kidshealth.org/en/parents/german-measles.html> [<https://perma.cc/6G8H-V6B8>] (last visited Feb. 27, 2020).

407. *Rubella in the U.S.*, *supra* note 404.

408. LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN’S HEALTH* 250 (2017).

409. REAGAN, *supra* note 405, at 55.

410. *Id.* at 76–77, 99.

411. *Id.* at 57, 77, 101. Nonetheless, some Catholic physicians who were opposed to abortion brought public and professional pressure to bear on colleagues who were providing abortion to pregnant women who had recently been infected with rubella. *Id.* at 118, 137.



for reducing the risk of Zika transmission from a pregnant woman to her fetus.<sup>412</sup> In September 2016, the CDC announced that “helping women who want to delay or avoid pregnancy during the Zika virus outbreak is a primary strategy to reduce Zika-related adverse pregnancy and birth outcomes.”<sup>413</sup> It further noted that LARC is the most effective means of preventing pregnancy, because it “remains highly effective at preventing pregnancy for many years” and “is safe for most women to use, including female adolescents.”<sup>414</sup> As noted, LARC is effective precisely because it does not require a woman or her partner to do (or remember to do) anything once the decision to use contraception is made. Hormonal implants or IUDs have pregnancy rates of less than one percent.<sup>415</sup> In contrast, hormonal devices such as the patch, the pill, and “injectables” have pregnancy rates of six to nine percent per year.<sup>416</sup> The CDC have reiterated this guidance over the last two years, stressing that “[d]ecisions about pregnancy are personal” and “couples and health care providers [should] work together to make decisions about timeframes to wait before trying to conceive after possible Zika virus exposure.”<sup>417</sup> The American Academy of Pediatrics emphasizes that prevention of Zika transmission is critical.<sup>418</sup> Yet, if women who are at risk for Zika

---

412. *Increasing Access to Contraception in the Context of Zika Preparedness*, CDC, [https://www.cdc.gov/pregnancy/zika/testing-follow-up/documents/ZIKA\\_Increasing\\_Access\\_LARC.pdf](https://www.cdc.gov/pregnancy/zika/testing-follow-up/documents/ZIKA_Increasing_Access_LARC.pdf) [<https://perma.cc/7AM7-JJ7L>] (last visited Dec. 7, 2018).

413. *Id.*

414. *Id.*

415. *Comparing Typical Effectiveness of Contraceptive Methods*, CONTRACEPTIVE TECH., <http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/Contraception-Effectiveness.pdf> [<https://perma.cc/37KA-WJFT>] (last visited Jan. 10, 2020).

416. *Effectiveness of Family Planning Methods*, *supra* note 118.

417. *Zika and Pregnancy, Reproductive Planning*, CDC, <https://www.cdc.gov/pregnancy/zika/testing-follow-up/reproductive-planning.html> [<https://perma.cc/F6FE-HAN5>] (last visited Dec. 10, 2018); Kara D. Polen et al., *Update: Interim Guidance for Preconception Counseling and Prevention of Sexual Transmission of Zika Virus for Men with Possible Zika Virus Exposure—United States*, 67 MORBIDITY & MORTALITY WKLY REP. 868, 869 (2018).

418. American Academy of Pediatrics, *Zika Virus: What Parents Need to Know*, HEALTHY CHILD., <https://www.healthychildren.org/>

exposure are denied access to affordable contraception, they may choose abortion instead.<sup>419</sup>

Thus, it is essential that all women of child-bearing age, who are by definition potentially pregnant, have access to the most effective contraceptive methods available, without cost-sharing, as part of their routine healthcare. By enabling employers and other health plan sponsors to deny women access to these health care services and to interfere with the physician-patient relationship and the personal decision-making which the CDC recommend as the best public health strategy, the Trump Administration’s Final Rules put women’s and children’s health at risk. Without cost-free, readily available contraceptive access, a significant number of children will be born with Zika-related disabilities. Since the women most at risk for Zika infection live in some of the poorest parts of our nation (Texas, Florida, Puerto Rico, and the Virgin Islands), the Trump Administration’s rollback of the contraceptive mandate is a clear threat to public health. If the rules are allowed to go forward they will cause irreparable injury to many women and their children. Simply put, the Trump Administration’s Final Rules sacrifice the health of America’s children on the altar of religious freedom.

---

English/ages-stages/prenatal/Pages/Zika-Virus.aspx [https://perma.cc/K7XA-TZUK] (last updated Feb. 22, 2018).

419. *Cf. Position Statement: Counseling Patients with Zika Infection*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, available at <https://www.acog.org/Clinical-Guidance-and-Publications/Position-Statements/Counseling-Patients-with-Zika-Infection> [https://perma.cc/FS9P-XBHH] (last visited Feb. 27, 2020) (asserting that “Zika-infected pregnant women should have access to the most complete range of reproductive options, including termination,” and should be counselled accordingly).

