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The Federal Contraceptive Coverage Requirement: Past and Pending Legal Challenges

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SUMMARY

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The Federal Contraceptive Coverage Requirement: Past and Pending Legal Challenges

When Congress enacted the Patient Protection and Affordable Care Act (ACA) in 2010, it required employment-based health plans and health insurance issuers to cover certain preventive health services without cost sharing. Those services, because of agency guidelines and rules, would soon include contraception for women. The "contraceptive coverage requirement," or "contraceptive mandate" as it came to be known, was heavily litigated in the years to follow, and exemptions from the requirement are currently the subject of a pending Supreme Court case.

The various legal challenges to the contraceptive coverage requirement primarily concerned (1) what types of employers and institutions should be exempt from the requirement based on their religious or moral objections to contraception; (2) what procedures the government can require for an entity to invoke a religious-based accommodation; and (3) how much authority federal agencies have to create exceptions to the coverage requirement. As originally formulated, only houses of worship and similar entities were exempt from the requirement, but the government later added an accommodation process for certain religious nonprofit organizations. On June 30, 2014, the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.* that the contraceptive coverage requirement violated federal law insofar as it did not also accommodate the religious objections of closely held, for-profit corporations. The law at issue in that case—the Religious Freedom Restoration Act of 1993 (RFRA)—prohibits the federal government from "substantially burden[ing] a person's exercise of religion" except under narrow circumstances.

Since *Hobby Lobby*, the agencies tasked with implementing the ACA have faced numerous hurdles in their attempts to accommodate the interests of sincere objectors while minimizing disruptions to the provision of cost-free contraceptive coverage to women. The lower courts split on whether the accommodation process—which required eligible objecting entities to notify their insurers or the government that they qualified for an exemption—substantially burdened the objectors' exercise of religion. Initially, most circuit courts rejected the view that such an accommodation triggered, facilitated, or otherwise made objectors complicit in the provision of coverage, denying their RFRA claims. After consolidating some of these cases for review, the Supreme Court ultimately vacated and remanded the decisions when the government and the objecting parties suggested that a solution might be reached so that the objectors' insurers could provide the required coverage without notice from the objecting parties.

Following a change in presidential administration, the implementing agencies reevaluated and reversed their position on the legality of the then-existing accommodation process, concluding that it violated RFRA when applied to certain entities. The agencies opted to automatically exempt most nongovernmental entities that objected to providing coverage for some or all forms of contraception on religious or moral grounds. These expanded exemptions sparked a new round of litigation based on claims that the agencies exceeded their authority under the ACA or violated federal requirements for promulgating new rules. Federal courts, including the U.S. Court of Appeals for the Third Circuit, preliminarily enjoined the government from implementing the expanded exemptions. The Supreme Court is slated to hear arguments on the Third Circuit's decision in May in *Little Sisters of the Poor v. Pennsylvania*. Meanwhile, the government is largely precluded from relying on the prior accommodation process as a result of a nationwide injunction issued by a federal district court.

Little Sisters of the Poor marks the fourth Supreme Court term in six years in which the Court has granted certiorari in a dispute about the federal contraceptive coverage requirement. During that time period, the Executive Departments promulgated six different rules concerning the requirement, a change in presidential administration marked a turning point in the Departments' RFRA calculus, and the Supreme Court underwent its own changes with the appointment of two new Justices. A Supreme Court decision in *Little Sisters of the Poor* could inform Congress's next steps with regard to the contraceptive coverage requirement. From a legal perspective, Congress has several options for clarifying the requirement's scope, including through amendments to the ACA and RFRA. An opinion in *Little Sisters* may also provide additional direction to lawmakers and federal agencies asked to accommodate the religious and moral beliefs of regulated entities when enacting or implementing laws of broader applicability.

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When Congress enacted the Patient Protection and Affordable Care Act (ACA) in 2010, it required employment-based health plans and health insurance issuers to cover certain preventive health services without cost sharing.[1] Those services, because of agency guidelines and rules, would soon include contraception for women.[2] The federal contraceptive coverage requirement—sometimes called the "contraceptive mandate"[3]—has generated significant public policy and legal debates. Proponents of the requirement have stressed a need to make contraception more widely accessible and affordable to promote women's health and equality.[4] Opponents have centrally raised religious freedom–based objections to paying for or otherwise having a role in the provision of coverage for some or all forms of contraception.[5] The Supreme Court first took up a challenge to the contraceptive coverage requirement in 2014 in *Burwell v. Hobby Lobby Stores, Inc.*[6] In *Hobby Lobby*, the Court held that the requirement did not properly accommodate the religious objections of closely held corporations.[7]

After *Hobby Lobby*, legal challenges to the contraceptive coverage requirement continued. The lower federal courts divided over the legality of an accommodation process instituted in 2013 that shifted the responsibility to provide coverage from an objecting employer to its insurer once the employer certified its religious objections.[8] In 2017, citing the uncertain legal footing of that accommodation, the Trump Administration decided to automatically exempt most nongovernmental entities from the coverage requirement based on their religious or moral

[1] *See* Pub. L. No. 111-148, tit. I, subtit. A, § 1001, subtit. G, § 1562(e)–(f), 124 Stat. 119, 131, 270 (Mar. 23, 2010). Cost sharing refers to out-of-pocket charges that the insured individual has to pay, such as a copayment, coinsurance, or deductible. *See* Ctrs. for Medicare & Medicaid Servs., *Cost Sharing*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/cost-sharing/ (last visited Apr. 27, 2020) (stating that cost sharing "generally includes deductibles, coinsurance, and copayments, or similar charges").

[2] *E.g.*, Health Res. & Servs. Admin., *Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines/index.html (last updated Dec. 2019); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (effective Aug. 1, 2011).

[3] *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014); Pennsylvania v. President United States, 930 F.3d 543, 556 (3d Cir. 2019), *cert. granted sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020).

[4] *See, e.g.*, INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 104–07, 109–10 (2011) (finding that contraception and contraceptive counseling are effective interventions to reduce unintended pregnancies and promote healthy spacing between pregnancies); Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of the Government at 1, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354, 13-356) (stating the organizations' belief that "increased access to the full range of FDA-approved prescription contraceptives is an essential component of effective health care for women and their families"); Brief for the National Women's Law Center and Sixty-Eight Other Organizations as Amici Curiae in Support of the Government at 3, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356) (arguing that "by addressing gender gaps in health insurance and remedying the sex disparities inherent in failing to provide health insurance coverage for contraception and related services, the contraception regulations advance the compelling governmental interest in ending gender discrimination and promoting gender equality").

[5] *See, e.g.*, Petition for a Writ of Certiorari at 1, Little Sisters of the Poor Home for the Aged v. Burwell (Zubik v. Burwell), 136 S. Ct. 1557 (2016) (No. 15-105) (stating that "the Little Sisters sincerely believe that all the available compliance methods would make them morally complicit in grave sin"); Brief for Respondents at 9–10, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356) (explaining that Hobby Lobby objected on religious grounds to covering four particular contraceptive methods).

[6] 573 U.S. 682.

[7] *Id.* at 736.

[8] *See* Massachusetts v. HHS, 923 F.3d 209, 215 (1st Cir. 2019) (noting that "[n]ine circuits considered the issue from late 2014 to early 2016," with eight holding that the accommodation process "did not substantially burden religious exercise" and one holding that it did).

objections.[9] However, more than 15 states filed or joined lawsuits challenging the expanded exemptions.[10] Federal courts, including the U.S. Court of Appeals for the Third Circuit,[11] have preliminarily enjoined the government from implementing the expanded exemptions while those challenges proceed.[12] The Supreme Court has agreed to review the Third Circuit's decision.[13] The case, *Little Sisters of the Poor v. Pennsylvania*, is scheduled for argument in May, paving the way for a decision in summer 2020.[14] Meanwhile, the government is largely precluded from relying on the prior accommodation process as a result of a federal district court's injunction.[15]

This report begins by explaining the statutory and regulatory framework for the federal contraceptive coverage requirement. It then recaps the Supreme Court's decision in *Hobby Lobby* before discussing the agency actions taken in response to that decision and subsequent Supreme Court rulings and executive action. Next, the report discusses significant pending legal challenges to the coverage exemptions and accommodations, including the Supreme Court case, *Little Sisters of the Poor*. The report concludes with some considerations for Congress, including the broader legal questions that could be answered in *Little Sisters of the Poor* and options that federal lawmakers have proposed related to the contraceptive coverage requirement.

The Contraceptive Coverage Requirement

The federal contraceptive coverage requirement stems from the Patient Protection and Affordable Care Act but was developed and modified by subsequent agency guidelines and rules.[16] Before the ACA, various federal and state requirements dictated whether a health plan needed to cover contraceptive services.[17] Although more than half of the states required plans covering

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[9] *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,799, 47,809, 47,835 (Oct. 13, 2017) (effective Oct. 6, 2017) [hereinafter Religious Exemption IFR]; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,862 (Oct. 13, 2017) (effective Oct. 6, 2017) [hereinafter Moral Exemption IFR].

[10] *See* Pennsylvania v. Trump, 351 F. Supp. 3d 791, 803 (E.D. Pa. 2019) (challenge by Pennsylvania and New Jersey), *aff'd sub nom.* Pennsylvania v. President United States, 930 F.3d 543 (3d Cir. 2019), *cert. granted sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020); California v. HHS, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019) (challenge by California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia), *aff'd*, 941 F.3d 410 (9th Cir. 2019), *cert. filed*, Nos. 19-1038, 19-1040, 19-1053 (Feb. 2020); Massachusetts v. HHS, 301 F. Supp. 3d 248, 250 (D. Mass. 2018) (challenge by Massachusetts), *vacated and remanded*, 923 F.3d 209 (1st Cir. 2019).

[11] Subsequent references to a particular circuit in this report refer to the U.S. Court of Appeals for that circuit.

[12] *See Pennsylvania*, 930 F.3d at 576 (upholding the district court's nationwide preliminary injunction); *California*, 941 F.3d at 431 (upholding the district court's preliminary injunction limited to the plaintiff-states).

[13] *See Little Sisters of the Poor*, 140 S. Ct. 918 (granting certiorari).

[14] *See Argument Calendar for the Session Beginning May 4, 2020*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMay2020.pdf; *The Court and Its Procedures*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/procedures.aspx (last visited Apr. 27, 2020) (noting that the Court typically "recesses at the end of June").

[15] *See* DeOtte v. Azar, 393 F. Supp. 3d 490, 512–15 (N.D. Tex. 2019), *appeal filed sub nom.* DeOtte v. Nevada, No. 19-10754 (2019).

[16] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697–98 (2014) (noting that "Congress itself . . . did not specify what types of preventive care must be covered" under the ACA but authorized "a component of HHS" to make that decision, which it did in consultation with "a nonprofit group of volunteer advisers," subject to exemptions set out in agency guidelines and rules).

[17] *See* INST. OF MED., *supra* note 4, at 47, 51–52 (providing background on federal and state laws about preventive

prescription drugs to include contraception,[18] access was typically subject to cost-sharing requirements.[19] The scope of religious exemptions from these state requirements varied.[20] Moreover, each state's law extended "only to insurance plans that [were] sold to employers and individuals in [that] state."[21] It did not apply to *self-insured* employer-sponsored health plans (also known as self-funded plans) in which nearly 60% of covered workers were enrolled.[22] Self-insured plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA),[23] a federal law that generally did not require coverage for specific preventive services before the ACA.[24] Nevertheless, whether as a matter of law or industry practice, "most private insurance and federally funded insurance programs" offered some form of insurance coverage for contraception before the federal contraceptive coverage requirement.[25]

With the enactment of the ACA, Congress required certain employment-based health plans and health insurance issuers (insurers)[26] to cover various preventive health services without cost

services coverage).

[18] *Id.* at 51, 108 (citing BLUE CROSS BLUE SHIELD ASS'N, STATE LEGISLATIVE HEALTHCARE AND INSURANCE ISSUES: 2010 SURVEY OF PLANS (2010) and GUTTMACHER INST., INSURANCE COVERAGE OF CONTRACEPTIVES (2011)).

[19] *See* Laurie Sobel et al., Issue Brief, *State and Federal Contraceptive Coverage Requirements: Implications for Women and Employers*, KFF (Mar. 29, 2018) ("While a number of states had contraceptive equity laws that required plans to cover some or all methods, cost-sharing typically applied.").

[20] *See* Nat'l Conf. of State Legislatures, *Insurance Coverage for Contraception Laws*, NCSL (Feb. 2012), http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (stating that 21 states "offer exemptions from contraceptive coverage, usually for religious reasons, for insurers or employers in their policies"); Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J. L. & PUB. POL'Y 741, 748 (2005) ("Most, but not all, of the state statutes that mandate prescription contraceptive coverage contain some exclusion for churches and other religious organizations. Those exclusions are framed in various ways."); Inimai M. Chettiar, Comment, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867, 1878 (2002) ("Some state laws have no religious exemptions. Additionally, some exemptions apply to employers, others to insurers, and some to both. Other exemptions only apply to a specific group of employers or insurers. Some exemptions apply to any religious employer or insurer that has religious beliefs against contraception and elects to invoke the exemption.").

[21] INST. OF MED., *supra* note 4, at 51.

[22] *Id.* at 48, 51; *see also* Massachusetts v. HHS, 923 F.3d 209, 218 (1st Cir. 2019) (stating that two Massachusetts laws adopting contraceptive coverage requirements for employer-sponsored health plans did "not apply to self-insured plans, because such plans come under [ERISA] (which preempts state regulation)"). With self-insured plans, "the employer itself collects premiums from enrollees and takes on the responsibility of paying employees' and dependents' medical claims" and may "contract for insurance services such as enrollment, claims processing, and provider networks with a third party administrator." Ctrs. for Medicare & Medicaid Servs., *Self-Insured Plan*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-plan/ (last visited Apr. 27, 2020).

[23] *See* FMC Corp. v. Holliday, 498 U.S. 52, 61, 64 (1990) (interpreting ERISA's preemption provisions to "exempt self-funded ERISA plans from state laws that 'regulate insurance,'" concluding that "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it" (quoting 29 U.S.C. § 1144)); *see generally Health Plans & Benefits: ERISA*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/topic/health-plans/erisa (last visited Apr. 27, 2020) ("In general, ERISA does not cover group health plans established or maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable workers compensation, unemployment, or disability laws.").

[24] INST. OF MED., *supra* note 4, at 48–49.

[25] *Id.* at 108; *see also* KAISER FAMILY FOUND. ET AL., EMPLOYER HEALTH BENEFITS: 2010 ANNUAL SURVEY 1, 186, 196 (2010) (stating that 63% of nonfederal private and public employers reported "that their plan with the largest enrollment cover[ed] prescription contraceptives, such as birth control pills, patches, implants, shots, IUDs, or diaphragms," and that 31% did not know whether their largest plan covered contraceptives).

[26] ACA's preventive health services requirement applies to a "group health plan and a health insurance issuer offering group or individual health insurance coverage." 42 U.S.C. § 300gg-13(a). Certain plans, such as "short-term limited

sharing.[27] One ACA provision specifically requires coverage "with respect to women" for "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]" within the U.S. Department of Health and Human Services (HHS).[28] To implement this requirement, HHS commissioned a study by the Institute of Medicine (IOM)[29] "to review what preventive services are necessary for women's health and well-being."[30] In its final report, the IOM recommended that HRSA consider including the "full range of Food and Drug Administration [(FDA)]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[31] Among other reasons, IOM concluded that "[s]ystematic evidence reviews and other peer-reviewed studies provide evidence that contraception and contraceptive counseling are effective at reducing unintended pregnancies," which HHS had identified as a specific national health goal.[32] HRSA adopted the IOM's recommendation, including in HRSA's 2011 *Women's Preventive Services Guidelines* (HRSA guidelines) "all" FDA-approved contraception[33] "as prescribed."[34]

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duration insurance" and grandfathered health plans, are not subject to the requirement. *See id.* § 300gg-91 (stating that "'individual health insurance coverage' . . . does not include short-term limited duration insurance"); *id.* § 18011 (stating, in a section pertaining to "grandfathered health plans," that certain amendments the ACA made that included the preventive health services coverage requirement do not apply to "a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment" (March 23, 2010) "regardless of whether the individual renews such coverage after such date"); Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,540 (Jun. 17, 2010) (noting that "grandfathered health plans are not required to comply with . . . [the ACA's] requirement that preventive health services be covered without any cost sharing").

[27] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, subtit. A, § 1001, 124 Stat. 119, 131 (Mar. 23, 2010) (codified at 42 U.S.C. § 300gg-13(a)) (requiring "at a minimum" coverage for, among other things, certain immunizations as well as "preventive care and screenings" for infants, children, and adolescents). The ACA incorporated the preventive health services coverage requirements into ERISA and the Internal Revenue Code. *See id.* at tit. I, subtit. G, § 1562(e), 124 Stat. 119, 270 (codified at 29 U.S.C. § 1185d); *id.* at tit. I, subtit. G, § 1562(e), 124 Stat. 119, 270 (codified at 26 U.S.C. § 9815). ERISA is a federal law implemented by the Department of Labor that provides minimum standards for group health plans offered by private-sector employers, as well as health insurance issuers offering coverage in the group market. *See Health Plans & Benefits: ERISA*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/topic/health-plans/erisa (last visited Apr. 27, 2020). The Department of the Treasury administers and enforces the Internal Revenue Code, and its provisions governing preventive services also apply to group health plans and health insurance issuers in the group market. *See* 26 C.F.R. § 54.9815-2713 (setting out the preventive health services coverage requirements with respect to group health plans and issuers offering group health insurance coverage).

[28] 42 U.S.C. § 300gg-13(a)(4).

[29] IOM, which is now called the National Academy of Medicine, is a nonprofit organization affiliated with the National Academies of Sciences and Engineering that advises on matters of health. *About the National Academy of Medicine*, NATIONAL ACADEMY OF MEDICINE, https://nam.edu/about-the-nam/ (last visited Apr. 27, 2020).

[30] *Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines/index.html (last updated Dec. 2019).

[31] INST. OF MED., *supra* note 4, at 109–10.

[32] *Id.* at 104, 109 (citing HHS, *Healthy People 2020: Topics & Objectives*, HEALTHYPEOPLE.GOV, http://www.healthypeople.gov/2020/topicsobjectives2020/default.aspx (accessed Apr. 19, 2011)); *see generally* HHS, *Healthy People 2020: Family Planning*, HEALTHYPEOPLE.GOV, https://www.healthypeople.gov/2020/topics-objectives/topic/family-planning (last accessed Sept. 12, 2019) (summarizing the family planning goal to "[i]mprove pregnancy planning and spacing, and prevent unintended pregnancy").

[33] For brevity, this report refers to the FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling" referenced in the HRSA guidelines as "contraception," "contraceptives," or "contraceptive services."

[34] *Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines/index.html (last updated Dec. 2019). Other covered services included gestational diabetes screening for pregnant women, lactation support and

The HRSA guidelines applied to plan years beginning on or after August 1, 2012.[35] However, they exempted certain "religious employers"—houses of worship and certain related entities that primarily employed and served persons who shared their religious tenets.[36] In 2012, HHS announced a temporary "safe harbor" from government enforcement of the coverage requirement for certain nonexempt, nonprofit organizations with religious objections to covering some or all forms of contraception.[37] Subsequent rules called such nonprofits "eligible organizations."[38]

On July 2, 2013, following a notice and comment period, HHS, the Department of Labor (DOL), and the Department of the Treasury (the Departments)[39] jointly issued a final rule (2013 Rule) to "simplify and clarify the religious employer exemption" and "establish accommodations" for eligible organizations.[40] The rule continued to authorize HRSA to provide an automatic exemption to the coverage requirement for houses of worship.[41] However, it no longer required those employers to have "the inculcation of religious values" as their purpose or to "primarily" employ and serve "persons who share [their] religious tenets" to qualify for the exemption.[42]

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counseling, annual HIV counseling and screening for sexually active women, and domestic violence screening and counseling. *Id.* HRSA amended its guidelines in 2016 based on a review by a panel of "clinician, academic, and consumer-focused health professional organizations." *Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines-2016/index.html (last updated Dec. 2019). The panel continued to recommend "the full range of female-controlled [FDA]-approved contraceptive methods" (listed in the updated HRSA guidelines) as well as "follow-up care" and "instruction in fertility awareness-based methods . . . for women desiring an alternative method." *Id.*; *see also Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines-2019 (last updated Dec. 2019) (same).

[35] *Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines/index.html (last updated Dec. 2019).

[36] *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (effective Aug. 1, 2011) (authorizing HRSA to exempt "religious employers," defined as entities with "the inculcation of religious values as [their] purpose," that "primarily" employ and serve "persons who share [their] religious tenets," and that qualify for certain nonprofit statuses under the Internal Revenue Code for "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order"); Religious Exemption IFR, *supra* note 9, at 47,795 (noting that HRSA exercised its discretion to adopt a religious employer exemption the same day that the Departments issued their 2011 rule authorizing such an exemption).

[37] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012) (finalizing the "religious employer" exemption from the 2011 interim rule without change and establishing a one-year safe harbor for other objecting nonprofits); *see also* CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING UNDER SECTION 2713 OF THE PUBLIC HEALTH SERVICE ACT, SECTION 715(A)(1) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND SECTION 9815(A)(1) OF THE INTERNAL REVENUE CODE (2013), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (extending the 2012 safe harbor to plan years beginning before Jan. 1, 2014).

[38] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) [hereinafter 2013 Rule].

[39] Unless otherwise noted, each of the regulations discussed in this report was promulgated by all three departments.

[40] 2013 Rule, *supra* note 38, at 39,870.

[41] *Id.* at 39,896; *see also* U.S. DEP'T OF LABOR, FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36, at 6 (2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf (referring to religious employers as "automatically exempt").

[42] 2013 Rule, *supra* note 38, at 39,873–74. Specifically, the 2013 Rule defined "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." *Id.* at 39,896. That section of the Tax Code, in turn, referred to "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively

The 2013 Rule also established an accommodation process for "eligible organizations"[43]—essentially, nonprofit, religious organizations with religious objections to some or all forms of contraception.[44] The accommodation also extended to student health plans arranged by eligible institutions of higher education.[45] Eligible organizations could comply with the contraceptive coverage requirement by completing a self-certification form provided by HHS and DOL and sending copies of this form to their insurers or third-party administrators (TPAs), as applicable.[46] For insured plans, the rule required the issuers, upon receipt of a certification, to "[e]xpressly exclude contraceptive coverage" (or the subset of objected-to methods) from the applicable plans but separately pay for any required, excluded contraceptive services for the enrolled individuals and their beneficiaries.[47] For self-insured plans, the rule stated that the TPA, upon receipt of a certification, would become the "plan administrator" for contraceptive benefits under ERISA and responsible for providing contraceptive coverage.[48] In addition, the certification provided to the TPA would become "an instrument under which the plan is operated."[49] The rule required the insurer or TPA, rather than the objecting organization, to notify plan participants that separate payments would be made for contraception and that the organization would not be administering or funding such coverage.[50]

RFRA and the *Hobby Lobby* Decision

Numerous organizations filed lawsuits challenging the contraceptive coverage requirement and the accommodation process.[51] Among other claims, these plaintiffs argued that the requirement violated the Religious Freedom Restoration Act of 1993 (RFRA).[52] RFRA is a federal statute enacted in response to *Employment Division v. Smith*,[53] a 1990 Supreme Court decision holding

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religious activities of any religious order." *Id.* at 39,871. The amended definition of "religious employer" took effect for plan years beginning on or after August 1, 2013. *Id.* at 39,870.

[43] To qualify as an eligible organization, an entity must (1) oppose providing coverage for some or all of the required contraceptive services "on account of religious objections"; (2) be a nonprofit entity that holds itself out as a religious organization; and (3) comply with the rule's self-certification requirements. 2013 Rule, *supra* note 38, at 39,896.

[44] The accommodation took effect for plan years beginning on or after January 1, 2014. 2013 Rule, *supra* note 38, at 39,870.

[45] 2013 Rule, *supra* note 38, at 39,881.

[46] *Id.* at 39,872, 39,894–96. Some employers with self-insured plans contract with TPAs to manage enrollment, process claims, or provide other insurance services. *See* Ctrs. for Medicare & Medicaid Servs., *Self-Insured Plan*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-plan/ (last visited Apr. 27, 2020).

[47] 2013 Rule, *supra* note 38, at 39,896.

[48] *Id.* at 39,880, 39,894. The TPA could make the required payments itself or arrange for an issuer or other entity to do so. *Id.* at 39,895.

[49] *Id.* at 39,894.

[50] *Id.* at 39,893.

[51] *See* Pennsylvania v. Trump, 351 F. Supp. 3d 791, 800 (E.D. Pa. 2019) (noting that during the promulgation of the 2013 rule, "a host of legal challenges to the Contraceptive Mandate progressed through the federal courts, several of which eventually reached the Supreme Court").

[52] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4). *E.g.*, Conestoga Wood Specialties Corp. v. Sec'y of HHS, 724 F.3d 377, 380 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014); E. Tex. Baptist Univ. v. Sebelius, 988 F. Supp. 2d 743, 747 (S.D. Tex. 2013), *rev'd sub nom.* E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 463 (5th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam); Roman Catholic Archdiocese of N.Y. v. Sebelius, 987 F. Supp. 2d 232, 236–37 (E.D.N.Y. 2013).

[53] *See* 42 U.S.C. § 2000bb (congressional findings and declaration of purpose).

that the Free Exercise Clause of the First Amendment does not require the government to exempt religious objectors from generally applicable laws.[54] Except under narrow circumstances, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[55] RFRA allows such a burden only if the government shows that applying the burden to the person (1) furthers "a compelling governmental interest"; and (2) "is the least restrictive means" of furthering that interest.[56] This "strict scrutiny" standard, particularly the "least restrictive means" requirement, is "exceptionally demanding."[57] Thus, in challenges by religious objectors to the application of generally applicable laws, RFRA extends "far beyond" what the "Court has held is constitutionally required."[58]

The initial challenges to the contraceptive coverage requirement centered on two emerging issues: (1) whether for-profit corporations were "persons" protected by RFRA;[59] and (2) whether requiring employers to cover contraception to which they objected on religious grounds violated RFRA.[60] The Supreme Court took up both issues as they related to closely held corporations in *Burwell v. Hobby Lobby Stores, Inc.*, issuing a decision on June 30, 2014.[61]

The challengers in *Hobby Lobby*, which included the owners of the "nationwide chain" of arts-and-crafts stores of the same name, objected to providing health insurance coverage for four of the 20 FDA-approved methods of contraception included in the coverage requirement.[62] In their view, "life begins at conception" and "facilitat[ing] access" to methods of contraception that "may operate after the fertilization of an egg" would violate their religious beliefs.[63] The

[54] 494 U.S. 872, 881 (1990). In *Smith*, the Court concluded that denying unemployment benefits to individuals who "ingested peyote for sacramental purposes at a ceremony of the Native American Church" did not violate the Free Exercise Clause because peyote use was a crime in the state. *Id.* at 874, 890. The Court rejected the argument that the government must exempt religious use from the general prohibition unless it could demonstrate a "compelling interest" in applying the law to such use. *Id.* at 882–86 (reasoning that to require an individual to comply with an "across-the-board criminal prohibition" only when it "coincide[s] with his religious beliefs, except where the State's interest is 'compelling'" would permit that individual "by virtue of his beliefs, 'to become a law unto himself'" and contravene "constitutional tradition" (internal citation omitted)).

[55] 42 U.S.C. § 2000bb-1(a).

[56] *Id.* § 2000bb-1(b).

[57] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006) (referring to RFRA's "strict scrutiny test").

[58] *Hobby Lobby*, 573 U.S. at 706.

[59] *See* Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403–04 (2012) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion. . . . [A]nd no court has issued a final decision granting permanent relief with respect to such claims.").

[60] *See E. Tex. Baptist Univ.*, 988 F. Supp. 2d at 746–47 ("One set of cases, filed by for-profit employers, is before the Supreme Court. A second set of cases, filed by nonprofit religious organizations, includes this case." (footnote omitted)).

[61] *Hobby Lobby*, 573 U.S. at 682. Although definitions of closely held corporations vary, a closely held corporation typically is characterized by a small number of stockholders, such as a family-owned company that is not publicly traded. *See* Frequently Asked Questions, Entities, IRS, https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-5 (last updated Sept. 20, 2019) (giving a general definition of closely held corporation).

[62] *Hobby Lobby*, 573 U.S. at 702–03.

[63] *Id.* at 701–03, 720 (noting that the four methods to which these parties objected included "two forms of emergency contraception commonly called 'morning after' pills and two types of intrauterine devices").

challengers argued that requiring them to provide insurance coverage for such contraception violated RFRA.[64]

The Supreme Court held that Hobby Lobby, though a corporation, was a "person" covered by RFRA.[65] Although RFRA itself did not define "person," the first section of the *U.S. Code*, commonly known as the Dictionary Act, defined the term to include "corporations" for the purpose of "determining the meaning of any Act of Congress, unless the context indicates otherwise."[66] The Court reasoned that "nothing in RFRA" suggested a meaning other than the Dictionary Act definition.[67] Specifically, the majority rejected HHS's argument that for-profit corporations could not "exercise" religion, reasoning that they could do so through "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine."[68]

The Court then proceeded to analyze whether the contraceptive coverage requirement "substantially burden[ed]" the challengers' exercise of religion.[69] The Court accepted their argument that providing coverage for certain forms of contraception would violate their sincerely held religious beliefs because it might enable or facilitate the "destruction of an embryo."[70] According to the majority, "federal courts have no business addressing" whether "the religious belief asserted in a RFRA case is reasonable."[71] The more limited judicial role, the Court said, is to determine whether the "line drawn" by the religious objectors "reflects 'an honest conviction.'"[72] Because no party disputed the sincerity of the employers' convictions, the Court focused its inquiry on whether the burden imposed by the coverage requirement was substantial.[73] The Court concluded that it was, because the requirement would force the challengers to either violate their religious beliefs or face "severe" economic consequences.[74]

The Court next considered whether the contraceptive coverage requirement nonetheless satisfied RFRA's strict scrutiny standard.[75] The Court assumed, for purposes of its analysis, that applying the coverage requirement to petitioners served a "compelling governmental interest" in "guaranteeing cost-free access to the four challenged contraceptive methods."[76] However, the

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[64] *Id.* at 701, 704.

[65] *Id.* at 708, 719.

[66] *Id.* at 707 (internal quotation marks omitted) (quoting 1 U.S.C. § 1); *see also id.* at 706 (reasoning that Congress "employ[ed] a familiar legal fiction" when it "included corporations within RFRA's definition of 'persons'").

[67] *Id.* at 708.

[68] *Id.* at 710. For five Members of the Court, HHS's concession that RFRA applied to nonprofit corporations "effectively dispatche[d] any argument" that the term "person" in RFRA did not apply to closely held corporations. *Id.* at 708. However, HHS and two of the four dissenting Justices argued that for-profit corporations could not "exercise" religion because religious exercise "is characteristic of natural persons, not artificial legal entities." *See id.* at 751–52 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.").

[69] *Id.* at 719 (majority opinion).

[70] *Id.* at 720, 724.

[71] *Id.* at 724.

[72] *Id.* at 725 (quoting Thomas v. Review Bd. of Ind. Employ. Sec. Div., 450 U.S. 707, 716 (1981)).

[73] *Id.* at 720–23, 726.

[74] *Id.* at 720, 726. Specifically, the Court observed that failure to provide the required coverage would trigger a statutory tax of $100 per affected individual per day while "dropping insurance coverage altogether" could result in penalties of $2,000 per employee per year. *Id.* at 720 (citing 26 U.S.C. §§ 4980D, 4980H).

[75] *Id.* at 726.

[76] *Id.* at 728. *But cf. id.* at 727 (suggesting that "one of the biggest exceptions, the exception for grandfathered plans," undercut the government's rationale because that exception "simply [served] the interest of employers in avoiding the

Court concluded that the least restrictive means standard was not satisfied because HHS had "at its disposal" the accommodation process it provided to nonprofit organizations with religious objections which, in the Court's view, did not "impinge on" the challengers' religious beliefs and "serve[d] HHS's stated interests equally well."[77] Accordingly, the Court held that applying the contraceptive coverage requirement to closely held corporations violated RFRA.[78]

On July 14, 2015, the Departments finalized a rule in response to the *Hobby Lobby* decision that extended the accommodation previously reserved for religious nonprofits to for-profit entities that are "not publicly traded, [are] majority-owned by a relatively small number of individuals, and object[] to providing contraceptive coverage based on [their] owners' religious beliefs."[79]

Legal Challenges to the Accommodation Process and Agency Responses

When the Court handed down its decision in *Hobby Lobby*, a separate line of legal challenges to the contraceptive coverage requirement involving the accommodation process remained unresolved by the High Court.[80] In one such case, a Christian college argued that the process, which required objecting entities to submit a certification form called EBSA Form 700 to their insurers or TPAs, itself burdened its exercise of religion in violation of RFRA and the First Amendment.[81] The college believed that submitting the required form would "make it morally complicit in the wrongful destruction of human life."[82]

As shown in **Figure 1**, EBSA Form 700 had two pages: the first required the organization to certify compliance with the criteria for obtaining the accommodation and the second contained a notice to TPAs.

inconvenience of amending an existing plan").

[77] *Id.* at 728, 730–31. Four dissenting Justices argued that the contraceptive coverage requirement did not place a "substantial" burden on the employers' religious exercise because it only required them to "direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans," which, by law, "must offer contraceptive coverage without cost sharing" among other preventive services. *Id.* at 760 (Ginsburg, J., dissenting). But any decision to use contraception, the dissent emphasized, was with the individual covered by the plan, not the employer or the government. *Id.* at 760–61. In the dissent's view, "[n]o tradition, and no prior decision under RFRA, allow[ed] a religion-based exemption when the accommodation would be harmful to others" pointing to "the very persons the contraceptive coverage requirement was designed to protect." *Id.* at 764.

[78] *Id.* at 736 (majority opinion). Given that holding, the Court concluded that it was unnecessary to reach the Free Exercise claim raised by some of the challengers. *Id.*

[79] Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,324 (July 14, 2015) (effective Sept. 14, 2015) (summarizing the eligibility criteria for closely held corporations); *see id.* at 41,346 (defining "closely held for-profit entity" for purposes of the revised definition of "eligible organization").

[80] *See, e.g.*, Wheaton Coll. v. Burwell, 573 U.S. 943 (2014) (temporarily enjoining the government from enforcing the contraceptive coverage requirement against the college pending additional briefing and "further order of the Court"); Eternal Word TV Network, Inc. v. Sec'y of HHS, 756 F.3d 1339, 1340 (11th Cir. 2014) (granting the network's motion for an injunction pending appeal); Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 562 (7th Cir. 2014) (affirming the district court's denial of Notre Dame's motion to preliminarily enjoin the 2013 rules), *vacated sub nom.* 135 S. Ct. 1528 (2015) (remanding the case "in light of *Burwell v. Hobby Lobby Stores, Inc.*").

[81] *See* Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939, 942–43 (N.D. Ill. 2014), *aff'd*, 791 F.3d 792 (7th Cir. 2015).

[82] *Id.* (internal quotation marks omitted).

Figure 1. Self-Certification Form/EBSA Form 700

EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

Source: Dep't of Labor, EBSA Form 700, http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf [https://web.archive.org/web/20140712052413/http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf].[83]

After a federal district court denied the college's motion to preliminarily enjoin the enforcement of the contraceptive coverage requirement,[84] the college sought emergency relief from the Supreme Court.[85] On July 3, 2014, three days after deciding *Hobby Lobby*, the Supreme Court ruled that while the college's case was on appeal to the Seventh Circuit, the college did not need to comply with the contraceptive coverage requirement or complete EBSA Form 700 so long as it "inform[ed] the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services."[86]

On August 27, 2014, "consistent with the *Wheaton* order," HHS issued an interim rule that provided eligible organizations an alternative to EBSA Form 700.[87] Pursuant to this rule,

[83] For additional versions of this form, see Dep't of Labor, Emp. Benefits Sec. Admin., *Coverage of Preventive Services*, DOL.GOV, https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-of-preventive-services (last visited Sept. 23, 2019) [https://web.archive.org/web/20190919114407/https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-of-preventive-services] (click on "EBSA Form 700—Revised August 2014" or "EBSA Form 700—Revised September 2017").

[84] *Wheaton Coll.*, 50 F. Supp. 3d at 952.

[85] *See* Wheaton Coll. v. Burwell, 573 U.S. 943 (2014) (temporarily enjoining enforcement of the contraceptive coverage requirement against the college pending further briefing and consideration by the Court).

[86] Wheaton Coll. v. Burwell, 573 U.S. 958, 958–59 (2014).

[87] Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014) (effective Aug. 27, 2014).

organizations could opt to notify HHS, rather than their insurers or TPAs, of their eligibility for the exemption and their objections to providing coverage for some or all forms of FDA-approved contraception.[88] This option (the "alternative notice process") required organizations to provide HHS with their insurers' or TPAs' names and contact information.[89] After receiving the notice, those Departments would send a "separate notification" to each issuer or TPA, which, for self-insured plans, would designate the TPA as the plan administrator and constitute "an instrument under which the plan is operated."[90] The model notice that HHS issued with the interim rule appears in **Figure 2**.[91]

Figure 2. Model Notice to Secretary of HHS

MODEL NOTICE

Date: _____

To the Secretary of Health and Human Services:

The following eligible organization has a religious objection to providing coverage of [ ] all or [ ] a subset of contraceptive services required to be covered under PHS Act section 2713, as added by the Affordable Care Act, and incorporated into ERISA section 715 and Code section 9815. *If the eligible organization objects to providing coverage of a subset of contraceptive services, insert a description of the services for which the eligible organization objects to providing coverage:*

_____.

(1) Name of eligible organization: _____
Contact information: _____
Eligible organization is a: [ ] Non-profit entity; OR [ ] Other eligible organization

(2) Service provider information:

(a) Plan name	(b) Service provider name	(c) Service provider contact information	(d) Service provider category	(e) Plan type (if applicable)
			[ ]Issuer or [ ]TPA	[ ]Church plan [ ]Student plan
			[ ]Issuer or [ ]TPA	[ ]Church plan [ ]Student plan
			[ ]Issuer or [ ]TPA	[ ]Church plan [ ]Student plan
			[ ]Issuer or [ ]TPA	[ ]Church plan [ ]Student plan

(3) Information being submitted is (check one):
[ ] Original information; OR [ ] Updated information.
If updated information is being provided, specify the date upon which the updated information was, or will be, effective and what has changed: _____.

_____
Signature of authorized representative of eligible organization Date

_____
Typed name of authorized representative of eligible organization

Source: *The Center for Consumer Information & Insurance Oversight*, CMS.GOV, https://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention (click on "August 22, 2014 Model Notice to Secretary of HHS" under "Prevention") (last visited Apr. 27, 2020).

[88] *Id.*

[89] *Id.* at 51,095.

[90] *Id.* at 51,098–51100.

[91] The Departments issued a final rule that included the alternative notice process on July 14, 2015. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,323 (July 14, 2015) (effective Sept. 14, 2015) ("These final regulations continue to allow eligible organizations to choose between using EBSA Form 700 or the alternative process consistent with the *Wheaton* interim order.").

After these changes in the law, the Seventh Circuit affirmed the district court's decision to deny the college a preliminary injunction.[92] The appellate court reasoned that the college did not have to provide certain forms of contraception in its student benefit plans so long as it notified *either* its TPA *or* the government of its objection to providing that coverage.[93] Although the government would designate the college's preexisting TPA to provide the required coverage, the court reasoned that the plan instrument became the "government's plan" rather than the college's plan.[94] The court also rejected the college's argument that complying with the accommodation process would render it "complicit" in providing the contraception to which it objected.[95] Writing for the court, Judge Richard Posner reasoned that "it is the *law*, not any action on the part of the college," that requires the TPA to provide coverage once the college has registered its objection.[96] Accordingly, the court concluded that the college was unlikely to prevail on its RFRA claim.[97]

The Seventh Circuit was not the only appellate court to uphold the accommodation process amid requests for injunctive relief. Appellate courts in eight circuits in total concluded (at least as a preliminary matter while litigation proceeded on the merits) that the process did not impose a substantial burden on the challengers' exercise of religion.[98] They rejected the view that providing notice to insurers or TPAs, or to HHS, "triggered" the provision of contraception, making the plaintiffs partially responsible for an act that violated their beliefs.[99] Like the Seventh Circuit, they reasoned that the ACA, not the transmission of EBSA Form 700 or the notice to HHS, was the reason the applicable plans provided coverage for contraception without cost sharing.[100] Some

[92] Wheaton Coll. v. Burwell, 791 F.3d 792, 801 (7th Cir. 2015).

[93] *Wheaton Coll.*, 791 F.3d at 795.

[94] *Id.* at 796–98, 800.

[95] *Id.* at 796.

[96] *Id.*

[97] *Id.* at 800.

[98] *See* Massachusetts v. HHS, 923 F.3d 209, 215 n.6 (1st Cir. 2019) (noting that "the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits held that the Accommodation did not substantially burden religious exercise" and citing the relevant decisions); *see, e.g.*, Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1195 (10th Cir. 2015) (deciding in a consolidated appeal that the "ministerial act to opt out is not a substantial burden on religious exercise, nor are the collateral requirements of the scheme"); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir. 2015) (stating that "[b]ecause RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise"); Geneva Coll. v. Sec'y of HHS, 778 F.3d 422, 442 (3d Cir. 2015) (concluding that because "the self-certification procedure does not cause or trigger the provision of contraceptive coverage, appellees are unable to show that their religious exercise is burdened"); *Geneva Coll.*, 778 F.3d at 428 n.3 (further concluding that "the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden"); Priests for Life v. HHS, 772 F.3d 229, 237 (D.C. Cir. 2014) (concluding in a consolidated appeal that "the challenged regulations do not impose a substantial burden . . . under RFRA" because "[a]ll Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form").

[99] *See, e.g.*, *Geneva Coll.*, 778 F.3d at 441 (reasoning that instead of "'triggering' the provision of contraceptive coverage to the appellees' employees and students, EBSA Form 700 totally removes the appellees from providing those services"); *E. Tex. Baptist Univ.*, 793 F.3d at 461 (reasoning that the "acts that violate [the plaintiffs'] faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree").

[100] *See, e.g.*, *E. Tex. Baptist Univ.*, 793 F.3d at 459 (reasoning that the "ACA already requires contraceptive coverage" and nothing in that law "suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation"). *But cf. Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1210 (Baldock, J., dissenting in part) (arguing that five circuits either failed to recognize or failed to appreciate "a critical distinction" in the accommodation scheme: "[I]n the *insured* health plan context, 'a health insurance issuer . . . would be obligated to provide contraceptive coverage under the ACA whether or not [the insured non-profit] delivered the Form or notification to HHS.' But in the *self-insured* context, a TPA would be '*authorized* and obligated to provide

appellate judges dissented from their panel's decision or a denial of rehearing by the full circuit court, including now–Supreme Court Justices Neil Gorsuch and Brett Kavanaugh.[101]

The Eighth Circuit was the first appellate court to hold that the accommodation process violated RFRA.[102] In that case, the district court had preliminarily enjoined the government from enforcing the contraceptive coverage requirement against two nonprofit employers that offered self-insured plans.[103] The Eighth Circuit read *Hobby Lobby* to require it to "accept [the plaintiffs'] assertion that self-certification under the accommodation process—using either [EBSA] Form 700 or HHS Notice—would violate their sincerely held religious beliefs."[104] And it reasoned that providing the notice resulted in the provision of contraceptive coverage even if the plaintiffs did not have to arrange for or subsidize that coverage.[105] The court then concluded that the process was not the least-restrictive means of serving the government's interest in providing women with access to cost-free contraception.[106] In particular, it observed that the government could require objecting organizations to notify HHS of their objections without providing "the detailed information and updates" required under the alternative notice process.[107] The court also found that the government failed to demonstrate why it could not reimburse employees for their purchase of contraceptives directly or pursue other ways to make contraception more widely available.[108]

After the Eighth Circuit rendered its decision but before the government sought the Supreme Court's review, the Supreme Court consolidated and granted certiorari in seven other cases involving RFRA challenges to the accommodation process under the caption *Zubik v. Burwell*.[109] However, on May 16, 2016, the Supreme Court vacated the *Zubik* decisions and remanded the cases to the circuit courts in light of the "significantly clarified view of the parties."[110] The Court explained that in response to its request for additional briefing after oral argument, the government confirmed that "contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies" without requiring the petitioners to notify their insurers

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the coverage . . . *only if* the religious non-profit . . . opts out.'" (internal citations omitted) (quoting from the majority opinion and adding emphasis)).

[101] *See* Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315, 1317 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc, joined by Kelly, Tymkovich, Gorsuch, & Holmes, JJ.) (reasoning that because the plaintiffs "sincerely believe that they will be violating God's law if they execute the documents required by the government" and because "the penalty for refusal to execute the documents may be in the millions of dollars," it could not "be any clearer that the law substantially burdens the plaintiffs' free exercise of religion"); Priests for Life v. HHS, 808 F.3d 1, 15 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (reasoning that "under *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties").

[102] *See* Sharpe Holdings, Inc. v. HHS, 801 F.3d 927, 946 (8th Cir. 2015), *vacated and remanded sub nom.* HHS v. CNS Int'l Ministries, 136 S. Ct. 2006 (2016) (granting certiorari, vacating and remanding in light of *Zubik v. Burwell*).

[103] *Id.* at 932.

[104] *Id.* at 941.

[105] *Id.* at 942–43.

[106] *Id.* at 944.

[107] *Id.*

[108] *Id.* at 945.

[109] Order of Nov. 6, 2015, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418 et al.) (granting petitions and consolidating cases); *see also* Petition for a Writ of Certiorari, HHS v. CNS Int'l Ministries, 136 S. Ct. 2006 (2016) (No. 15-775) (filed Dec. 15, 2015).

[110] Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam).

or HHS in the manner previously required.[111] The petitioners, in turn, confirmed that an insurer's independent provision of contraceptive coverage to the petitioners' employees would not burden the petitioners' religious exercise.[112] The Court instructed the appellate courts on remand to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[113] It also enjoined the government from taxing or penalizing the petitioners based on a failure to provide notice, reasoning that the petitioners apprised the government of their religious objections through the litigation itself.[114] The Court expressly declined to opine on whether the existing accommodation process substantially burdened the petitioners' religious exercise or nonetheless complied with RFRA's strict scrutiny standard.[115]

Executive Action After *Zubik*

Following the Supreme Court's remand, the executive branch took additional actions on the contraceptive coverage requirement. The Departments solicited and reviewed public comments on options to further revise the process.[116] However, as of January 9, 2017, the Departments had not identified a "feasible approach . . . [to] resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage."[117] At that time, the Departments maintained that the existing accommodation process was "consistent with RFRA."[118]

Following a change in presidential administrations, on May 4, 2017, President Donald J. Trump issued an executive order directing the Departments to "consider issuing amended regulations,

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[111] *Id.* at 1559–60. Although the government indicated that such an approach might be feasible for insured plans, it stated that such a process "would not work" for self-insured plans, because TPAs, unlike issuers, have no independent, preexisting legal obligation to provide coverage. Supplemental Brief for the Respondents at 14–16, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418 et al.). In order to properly designate a TPA as the plan administrator, the government reasoned, it needed the objecting party to either send EBSA Form 700 directly to the TPA, which makes this designation, or provide HHS with the TPA's name so that HHS could make the designation in a separate notice to the TPA (i.e., per the alternative notice process). *Id.* at 16–17.

[112] *Zubik*, 136 S. Ct. at 1560. The petitioners indicated that their RFRA objections "would be fully addressed" if the coverage offered by the issuer or another commercial insurer (in the case of a self-insured plan) was "*truly* independent of petitioners and their plans—i.e., provided through a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to individuals through a separate communication." Supplemental Brief for Petitioners at 1, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418 et al.).

[113] *Zubik*, 136 S. Ct. at 1560 (quoting Supplemental Brief for the Respondents at 1, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418 et al.)).

[114] *Id.* at 1561.

[115] *Id.* at 1560.

[116] U.S. DEP'T OF LABOR, FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36, at 4 (Jan. 9, 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf (noting the receipt of over 54,000 comments).

[117] *Id.* The Departments reasoned that an approach described by the *Zubik* Court—one in which objecting employers notified their insurers of their religious objections to providing coverage in the course of negotiating contracts for employee benefits—did not appear to be acceptable to certain parties to that litigation and objecting employers who submitted comments. *Id.* at 5. The Departments further reasoned that eliminating written notice altogether would raise significant "administrative and operational challenges" that could compromise coverage for women. *Id.* at 4–7. Moreover, according to the Departments, requiring "separate contraceptive-only coverage" might produce conflicts with state contract and insurance laws. *Id.* at 8.

[118] *Id.* at 4.

consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under [42 U.S.C. §] 300gg-13(a)(4)"—the ACA provision that refers specifically to preventive care for women and pursuant to which HRSA included contraceptive coverage.[119]

On October 6, 2017, the Departments reversed their position on the legality of the accommodation process and issued two interim final rules (IFRs)[120] that made that process "optional."[121] The first rule (the Religious Exemption IFR) expanded the automatic exemption formerly available only to houses of worship and related entities[122] to include any nongovernmental organization that objected to providing or arranging coverage for some or all contraceptives based on "sincerely held religious beliefs."[123] The second rule (the Moral Exemption IFR) extended the same exemption to certain nongovernmental organizations whose objections were based on "sincerely held moral convictions," rather than religious beliefs.[124] Pursuant to these rules, "an eligible organization [that] pursue[d] the optional accommodation process through the EBSA Form 700 or other specified notice to HHS" would "voluntarily shift[] an obligation to provide separate but seamless contraceptive coverage to its issuer or [TPA]."[125] However, if an employer or institution chose to rely on the automatic exemption rather than the accommodation process, neither the objecting entity *nor its insurer or TPA* would need to provide coverage for the objected-to contraceptive methods.[126] The Departments also added an "individual exemption" that allowed willing employers and issuers, both governmental and

[119] Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017).

[120] The Administrative Procedure Act (APA) generally requires agencies to seek comments from the public on proposed rules before finalizing a new regulation. *See* 5 U.S.C. § 553. However, if an agency determines that it has good cause to bypass the notice and comment requirements, it may choose to issue an interim final rule that takes effect immediately, sometimes soliciting comments through that rule and modifying the final rule based on those comments. OFF. OF FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 9 (2011).

[121] Religious Exemption IFR, *supra* note 9, at 47,799. *But cf. id.* at 47,808–09 (noting that employers that sponsor plans governed by ERISA would still have to notify participants and beneficiaries of the excluded coverage in their plan documents as a result of "existing [ERISA] disclosure requirements"). HHS explained that after reevaluating its position, the agency had concluded that "requiring certain objecting entities or individuals to choose between the [contraceptive coverage] Mandate, the accommodation, or penalties for noncompliance violates their rights under RFRA." *Id.* at 47,800, *see also id.* at 47,806 ("We recognize that this is a change of position on this issue . . . .").

[122] 45 C.F.R. § 147.131(a) (2017).

[123] Religious Exemption IFR, *supra* note 9, at 47,806–11 (explaining that the exemption would be available to houses of worship and other nonprofit organizations, to closely held and non-closely held for-profit companies, to institutions of higher education, and to insurance issuers and non-employer plan sponsors (e.g., unions) with their own religious objections).

[124] Moral Exemption IFR, *supra* note 9, at 47,862 (quoting language to be codified at 45 C.F.R. § 147.133(a)(2)); *see also id.* at 47844 (explaining the exemption). In contrast to the Religious Exemption IFR, the Moral Exemption IFR did not extend the exemption to *all* for-profit companies. Instead, it excluded companies with a publicly traded ownership interest. *Id.* at 47851. Before the Moral Exemption IFR, at least one federal court, in a case involving a "non-profit, non-religious pro-life organization," had held that the contraceptive coverage requirement violated equal protection principles under the Fifth Amendment because its regulations exempted religious employers, but not employers with similar moral or ethical objections to contraception. *See* March for Life v. Burwell, 128 F. Supp. 3d 116, 122, 125–28 (D.D.C. 2015).

[125] Religious Exemption IFR, *supra* note 9, at 47,813; Moral Exemption IFR, *supra* note 9, at 47,854 (noting that "the accommodation process works the same as it does for entities with objections based on sincerely held religious beliefs as described in the [Religious Exemption IFR]").

[126] Religious Exemption IFR, *supra* note 9, at 47,808–09; Moral Exemption IFR, *supra* note 9, at 47,850. In its final rule, the Departments clarified that a group health plan would still be responsible for providing coverage if the *issuer* holds the objection, unless the plan also has a religious or moral objection. 83 Fed. Reg. 57,536, 57,565 (Nov. 15, 2018).

nongovernmental, to provide alternative policies or contracts that did not offer contraceptive coverage to individual enrollees who objected to such coverage based on sincerely held religious beliefs or moral convictions.[127]

The Departments estimated that the Religious Exemption IFR "would affect the contraceptive costs of approximately 31,700 women" based on information derived from the litigating positions of various objecting entities and notices the agency received pursuant to the previous accommodation process.[128] They further estimated that the total costs potentially transferred to those affected women would amount to "approximately $18.5 million."[129] However, to "account for uncertainty" in its estimate, the agencies also examined the "possible upper bound economic impact" of the Religious Exemption IFR.[130] Applying a different methodology, the Departments arrived at a figure of approximately 120,000 women, with potential transfer costs totaling $63.8 million.[131] The Departments projected a smaller effect with respect to the Moral Exemption IFR, estimating that it could affect the contraceptive costs of 15 women, an aggregate effect of approximately $8,760.[132]

The Departments finalized the Religious and Moral Exemption IFRs on November 15, 2018, with effective dates of January 14, 2019 (collectively, the 2019 Final Rules).[133] The 2019 Final Rules amended the regulatory text "to clarify the intended scope of the language" but retained the substance of the IFRs.[134] The Departments increased their upper-bound estimate of the number of

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[127] Religious Exemption IFR, *supra* note 9, at 47,807, 47,812; Moral Exemption IFR, *supra* note 9, at 47,853. According to a January 2020 federal district court opinion, a week after publishing the IFRs, the Departments "executed a Settlement Agreement with Notre Dame and more than 70 other entities to resolve pending challenges to the ACA's contraceptive coverage requirement." Irish 4 Reprod. Health v. HHS, No. 3:18-CV-491, 2020 U.S. Dist. LEXIS 7537, at *13 (N.D. Ind. Jan. 16, 2020). The settlement agreement "exempts Notre Dame . . . from the contraceptive coverage requirement and 'any materially similar regulation or agency policy.'" *Id.* at 14. The court interpreted this language to "inoculate[] Notre Dame in perpetuity from any *future* regulation that might mandate the provision of contraception to its students or employees." *Id.*

[128] Religious Exemption IFR, *supra* note 9, at 47,821.

[129] *See id.* (estimating "the cost of contraception to women" based on the approximate per-person cost of providing contraceptive coverage for a subset of issuers in 2015).

[130] *Id.*

[131] *Id.* at 47,823–24. For their upper-bound estimate, the Departments considered the number of women of childbearing age who (1) used contraceptives covered by the HRSA guidelines; and (2) were employed by "private, non-publicly traded employers that did not cover contraception pre-Affordable Care Act" and that were not previously exempt. *Id.* at 47,823. The Departments estimated this number to be "362,100" such women. *Id.* However, given that only a subset of these employers would have a sincere religious exemption making them eligible for the expanded exemption, the Departments concluded that a "reasonable estimate" of the number of women "likely" to be affected by the Religious Exemption IFR was closer to 120,000. *Id.* In calculating transfer costs, the Departments accounted for the possibility of partial offsets due to adjustments to premiums. *Id.* at 47,824.

[132] Moral Exemption IFR, *supra* note 9, at 47,857–58 (attributing such projected costs to the potential for for-profit entities with moral objections to use the expanded exemption but concluding that the expanded exemption for nonprofit entities and institutions of higher education would not likely reduce coverage for employees who want it).

[133] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (effective Jan. 14, 2019) [hereinafter Religious Exemption]; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (effective Jan. 14, 2019) [hereinafter Moral Exemption].

[134] Religious Exemption, *supra* note 133, at 57,537; Moral Exemption, *supra* note 133, at 57,593; *see also* California v. HHS, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019) (describing the 2019 Final Rules as "nearly identical" in substance to the interim rules). For example, the Departments amended the Religious Exemption IFR to bring the "operative language" describing the scope of the exemption more in line with the Moral Exemption IFR. Religious Exemption, *supra* note 133, at 57,567. Accordingly, in the final Religious Exemption, the exemption applies if an entity has sincere religious objections to providing or arranging for *either* "[c]overage or payments for some or all contraceptive services"

women that the expanded Religious Exemption could affect from 120,000 women to 126,400 women, yielding potential transfer costs of $67.3 million.[135]

Little Sisters of the Poor and Other Pending Legal Challenges

The expanded exemptions generated a new set of legal challenges from states concerned with the fiscal burdens of the revised rules and the Departments' authority to promulgate them.[136] In addition, some private parties (including a nationwide class of employers) successfully obtained injunctions against enforcement of the prior accommodation process after the government stopped defending the process on RFRA grounds.[137] This section discusses some of the key pending legal challenges, beginning with a summary of the procedural history and arguments before the Supreme Court in *Little Sisters of the Poor v. Pennsylvania*.

Little Sisters of the Poor v. Pennsylvania

In late 2018, Pennsylvania and New Jersey asked a federal court to block the 2019 Final Rules, alleging, among other claims, that the rules (1) "failed to comply with the notice-and-comment procedures" required by the Administrative Procedure Act (APA) and (2) were "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' in violation of the [APA's] substantive provisions."[138] The U.S. District Court for the Eastern District of Pennsylvania ruled that the states were "likely to succeed" on both of their APA claims and preliminarily enjoined the rules on a nationwide basis.[139]

On appeal, the Third Circuit affirmed the district court's decision.[140] The appellate court ruled that the Departments committed a procedural APA violation in issuing the IFRs by "dispensing

or a "plan, issuer, or third party administrator that provides or arranges such coverage or payments." *Id.* at 57,590. The purpose of amending the language, the Departments said, was to clarify that "an entity would be exempt from the Mandate if it objected to complying with the Mandate, or if it objected to complying with the accommodation." *Id.* at 57,567. The Departments also clarified that if an insurance issuer objected to providing coverage on religious or moral grounds, the plan would still be responsible for providing that coverage unless it also qualified for an exemption. *Id.* at 57,565–66.

[135] Religious Exemption, *supra* note 133, at 57,551, 57,581. The Departments did not change their numerical estimates with respect to the Moral Exemption. *See* Moral Exemption, *supra* note 133, at 57,627–28.

[136] *E.g.*, Pennsylvania v. Trump, 351 F. Supp. 3d 791 (E.D. Pa. 2019), *aff'd sub nom.* Pennsylvania v. President United States, 930 F.3d 543 (3d Cir. 2019), *cert. granted sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020).

[137] *See, e.g.*, DeOtte v. Azar, 393 F. Supp. 3d 490, 499 (N.D. Tex. 2019); Order Granting Permanent Injunction & Declaratory Relief, Geneva Coll. v. Azar, No. 2:12-cv-00207 (W.D. Pa. July 5, 2018), ECF No. 153; Order Reopening Case and Granting Permanent Injunction, Little Sisters of the Poor Home for the Aged v. Azar, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82.

[138] *Pennsylvania*, 351 F. Supp. 3d at 803–04. The district court had previously granted Pennsylvania's motion for a preliminary injunction against enforcement of the *interim* rules, a decision that was on appeal when the Departments issued the 2019 Final Rules. *Id.* at 802–03.

[139] *Id.* at 813, 827, 835. As a threshold matter, the court ruled that the states had standing to challenge the 2019 Final Rules. *Id.* at 807–08 (reasoning, *inter alia*, that "the Final Rules inflict a direct injury upon the States by imposing substantial financial burdens on their coffers").

[140] *Pennsylvania*, 930 F.3d at 576.

with" the statute's notice and comment requirement without "good cause."[141] In the court's view, the Departments' solicitation of comments before issuing the Final Rules did not remedy this defect because the agency's action did not give the public a "meaningful opportunity" to comment on the rules during their formulation, or demonstrate that the agency showed "any real open-mindedness" to amending the IFRs.[142]

The court next considered whether the 2019 Final Rules were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"—grounds for a reviewing court to "set aside" the rules under the APA.[143] The Third Circuit concluded that the ACA did not authorize the Departments to "exempt actors" from the preventive services requirement.[144] Reciting the statutory language, the court observed that group health plans and insurers "shall" cover "such additional preventive care . . . as provided for in comprehensive guidelines supported by [HRSA]."[145] The appellate court reasoned that the "authority to issue 'comprehensive guidelines' concerns the *type* of services that are to be provided and does not provide authority to undermine Congress's directive"—expressed with the command *shall*—"concerning *who* must provide coverage for these services."[146]

The Third Circuit also disagreed with the Departments' argument that the expanded Religious Exemption in the 2019 Final Rules was necessary to bring the contraceptive coverage requirement into compliance with RFRA.[147] Recognizing that RFRA authorized *courts* to determine, through "individualized adjudication," whether a particular law burdens a person's religious exercise, the court concluded that it need not defer to the Departments' assessment of the necessity of a broader religious exemption.[148] Additionally, the court concluded that RFRA could not have required the expanded exemption because the prior accommodation process itself complied with RFRA.[149] And the Third Circuit reasoned that making compliance with the accommodation process optional for religious objectors "would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care."[150]

Finally, the circuit court upheld the district court's decision to issue a nationwide preliminary injunction.[151] The court reasoned that the injunction would ensure that the "likely" unlawful 2019 Final Rules would not take effect in some states only to be invalidated in full after further judicial proceedings.[152] The court also concluded that a nationwide remedy was "necessary to provide the States complete relief," because individuals may reside or attend college in Pennsylvania or New Jersey but obtain their health insurance from an employer-sponsored or a parent's plan in a state

[141] *Id.* at 567.

[142] *Id.* at 568–69 (internal quotation marks and citation omitted).

[143] *Id.* at 569, 575 (quoting 5 U.S.C. § 706(2)(A), (C)).

[144] *Id.* at 571.

[145] *Id.* at 570 (quoting 42 U.S.C. § 300gg-13(a)(4)).

[146] *Id.* at 570 (emphasis added).

[147] *Id.* at 572.

[148] *Id.* The court, however, stopped short of holding that RFRA did not authorize the Departments to adopt exemptions for religious objectors. *See id.* ("Even assuming that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens the Contraceptive Mandate may impose on certain individuals, RFRA does not require the enactment of the Religious Exemption to address this burden.").

[149] *Id.* at 573–74.

[150] *Id.* at 574.

[151] *Id.* at 575–76.

[152] *Id.*

that was not part of the lawsuit.[153] If those individuals lost contraceptive coverage on an out-of-state plan, they might turn to state-sponsored services in Pennsylvania or New Jersey, placing fiscal burdens on those states.[154]

Two parties filed petitions for certiorari with the Supreme Court seeking to appeal the Third Circuit's ruling: the federal government and the Little Sisters of the Poor Saints Peter and Paul Home (Little Sisters), a religious nonprofit organization that was permitted to intervene in the litigation in defense of the interim final rules,[155] but later denied standing to challenge the 2019 Final Rules on appeal.[156] On January 17, 2020, the Supreme Court granted both petitions and consolidated the appeals.[157] Over 50 amicus briefs have been filed by organizations, individuals, states, and localities.[158] Some Members of Congress have also filed briefs in opposition to or support of the Third Circuit's ruling.[159]

While the case raises a number of legal issues, the central question presented in *Little Sisters of the Poor* is whether the Departments "had statutory authority under the ACA and [RFRA] to expand the conscience exemption" to the contraceptive coverage requirement through the 2019 Final Rules.[160] The federal government advances three main arguments in defense of its substantive authority to issue the rules. First, the government argues that HRSA has "ample authority to develop guidelines" for women's preventive services "that account for sincere conscience-based objections" because, among other reasons, ACA's "plain text" requires coverage "'*as provided for* in comprehensive guidelines supported by [HRSA].'"[161] Second, the government contends that RFRA required it to extend automatic exemptions to "certain employers with conscientious objections" because the prior accommodation process, which may have sufficed for Hobby Lobby, did "not eliminate the substantial burden" that the coverage

[153] *Id.* at 576.

[154] *Id.*

[155] *See* Pennsylvania v. President United States, 888 F.3d 52, 62 (3d Cir. 2018) ("[W]e will reverse the District Court's order denying the Little Sisters' motion to intervene under Rule 24(a), and we will remand the case to permit intervention for the purpose of defending the portions of the religious exemption IFR that apply to religious nonprofit entities."); Order, Pennsylvania v. Trump, No. 17-4540 (May 9, 2018), ECF No. 77 (granting the Little Sisters' motion to intervene).

[156] *See* Pennsylvania v. President United States, 930 F.3d 543, 559 n.6 (3d Cir. 2019) (noting that after the Third Circuit allowed Little Sisters to intervene because "the litigation posed a threat to Little Sisters' interest in an exemption," a federal court in Colorado "enjoined enforcement of the Contraceptive Mandate for benefit plans in which Little Sisters participates," and concluding that "Little Sisters is no longer aggrieved by the District Court's ruling, its need for relief is moot, and thus they lack appellate standing").

[157] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020).

[158] *See* Docket, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, No. 19-431, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-431.html.

[159] See *infra* "Considerations for Congress."

[160] Petition for a Writ of Certiorari at (I), Trump v. Pennsylvania, No. 19-454 (Oct. 3, 2019); *see also* Petition for a Writ of Certiorari at ii, Little Sisters of the Poor v. Pennsylvania, No. 19-431 (Oct. 1, 2019) (framing the question as whether the Departments "lawfully exempted religious objectors" from the contraceptive coverage requirement). The case also presents several procedural issues, including whether the 2019 Final Rules were procedurally defective for lack of a notice-and-comment period before the IFRs were published; whether a nationwide injunction was appropriate; and whether Little Sisters has appellate standing to challenge the rules when the government is enjoined from enforcing the coverage requirement against the organization because of an injunction issued in another case. Petition for a Writ of Certiorari at (I), Trump v. Pennsylvania, No. 19-454; Petition for a Writ of Certiorari at i, *Little Sisters of the Poor*, No. 19-431.

[161] Brief for the Petitioners at 11, 19, Trump v. Pennsylvania, No. 19-454 (Mar. 2, 2020) (emphasis added) (quoting 42 U.S.C. § 300gg-13(a)(4)).

requirement placed on those employers.[162] Third, the government argues that RFRA authorizes, even if it does not require, the expanded Religious Exemption because it applies to "the implementation" of "all Federal law."[163] In support of its interests, Little Sisters argues that in light of the "substantial burden" mandatory contraceptive coverage places on religious exercise recognized in *Hobby Lobby*, the government was "duty-bound to change its rules and stop forcing religious objectors to comply via the accommodation."[164] Little Sisters described the certification process as "the stingiest of accommodations" that amounted to "merely another means of complying with the contraceptive mandate."[165] The state-respondents ask the Supreme Court to affirm the Third Circuit's ruling.[166] They frame the case as more than a dispute over "the appropriate balance between the health and autonomy of women and the religious and moral views of their employers," because it concerns "the power of federal agencies to resolve such questions by relying on power never explicitly granted by Congress nor recognized by the courts."[167] The states argue, *inter alia*, that Congress, through the ACA, "delegated HRSA authority to oversee guidelines defining *what* preventive services for women must be covered, not *who* must cover them."[168] In the states' view, "RFRA does not grant federal agencies broad rulemaking authority to create exemptions from mandatory laws absent a violation," which was not present under the prior regulatory framework because "the accommodation 'effectively exempt[s]' an employer."[169] And they remind the Court that "[n]o party claims that RFRA authorizes the *moral* rule" and its exemption.[170]

Challenges by Other States

Pennsylvania and New Jersey were not the only states to challenge the expanded exemptions. A lawsuit by the Commonwealth of Massachusetts to block the enforcement of the interim rules—and later the final rules—was initially barred on standing grounds.[171] But on May 2, 2019, the First Circuit reversed the district court's ruling,[172] holding that Massachusetts had shown an "imminent" fiscal harm "fairly traceable" to the expanded exemptions, sufficient to confer standing.[173] The appellate court remanded the case to the district court to consider the

[162] *Id.* at 22–23.

[163] *Id.* at 27 (quoting 42 U.S.C. § 2000bb-3(a)).

[164] Brief for Petitioner at 30–31, Little Sisters of the Poor v. Pennsylvania, No. 19-431 (Mar. 2, 2020).

[165] *Id.* at 33, 36 (emphasis removed).

[166] Brief of Respondents at 3, *Little Sisters of the Poor*, Nos. 19-431, 19-454 (Apr. 1, 2020).

[167] *Id.* at 2.

[168] *Id.* at 29.

[169] *Id.* at 36, 40 (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 698 (2014)).

[170] *Id.* at 36.

[171] Massachusetts v. HHS, 301 F. Supp. 3d 248 (D. Mass. 2018), *vacated and remanded*, 923 F.3d 209 (1st Cir. 2019). The district court rejected the Commonwealth's primary standing argument that the expanded exemptions threatened fiscal injury to the state. *Id.* at 258. In essence, the Commonwealth had alleged that as more employers availed themselves of the exemptions, Massachusetts would need to assume the costs of contraceptive coverage for qualifying residents as well as prenatal and postnatal care resulting from unintended pregnancies. *Id.* at 258–64. The district court found this argument too speculative. *Id.* at 259.

[172] *Massachusetts*, 923 F.3d at 213. When the First Circuit rendered its decision, the 2019 Final Rules already were enjoined nationwide as a result of the district court decisions in the *Pennsylvania* and *California* actions. *See id.* at 220.

[173] *Id.* at 222. The court determined that the Commonwealth had demonstrated through the Departments' own regulatory impact estimates and data that there was a "substantial risk" that "*some* women in Massachusetts" would lose coverage and that it was "highly likely" that three Massachusetts employers with health plans exempt from state regulation (one of which was Hobby Lobby) would utilize the expanded exemptions. *Id.* at 223–24. Even though the

Commonwealth's substantive arguments that the 2019 Final Rules violated the APA, the First Amendment's Establishment Clause, and the "equal protection guarantee" of the Fifth Amendment's Due Process Clause.[174] The parties' motions for summary judgment—asking the court for a ruling on the legal issues prior to (and ultimately instead of) a trial—were pending before the district court when the parties and the court agreed to stay the proceedings in light of a potential Supreme Court ruling in *Little Sisters of the Poor*.[175]

An action in the U.S. District Court for the Northern District of California proceeded alongside the Pennsylvania and Massachusetts cases. In 2018, 14 states moved to enjoin enforcement preliminarily of the 2019 Final Rules.[176] A subset of these states had already obtained a nationwide injunction against enforcement of the IFRs, which the Ninth Circuit then modified to apply only in the states that were plaintiffs in the action.[177] In renewing their challenge to the 2019 Final Rules, the states advanced APA, Establishment Clause, and Equal Protection Clause claims similar to the Massachusetts action.[178] As with its first ruling on the IFRs,[179] the district court decided the motion for injunctive relief on statutory grounds.[180] The court concluded that the final rules likely violated the APA because they were "not in accordance with" the ACA and were not required, and potentially not even authorized, by RFRA.[181] Rather than issue a nationwide injunction, this time the court issued a preliminary injunction against enforcement in the plaintiff states alone.[182]

On appeal, the Ninth Circuit ruled that "the district court did not err in concluding that the agencies likely lacked statutory authority under the ACA to issue the final rules," engaging in a textual analysis similar to the Third Circuit's in the Pennsylvania action.[183] The appellate court also shared the district court's reservations that RFRA did not permit, let alone require, the Religious Exemption, citing three reasons. First, RFRA does not explicitly "delegate[] to any government agency the authority to determine violations and to issue rules addressing alleged

Commonwealth's argument "proceed[ed] in steps," the "causal chain" from loss of coverage to use of state-funded services at the Commonwealth's expense was not too "attenuated" and relied on "probable market behavior." *Id.* at 223, 227 (internal quotation marks omitted and emphasis removed).

[174] *Massachusetts*, 301 F. Supp. 3d at 250; *see also Massachusetts*, 923 F.3d at 228.

[175] *See* Order, Massachusetts v. HHS, No. 17-cv-11930 (D. Mass. Feb. 7, 2020), ECF No. 132; Motion to Dismiss and for Summary Judgment, No. 17-cv-11930 (D. Mass. Aug. 30, 2019), ECF No. 121; Commonwealth of Massachusetts' Motion for Summary Judgment, No. 17-cv-11930 (D. Mass. July 31, 2019), ECF No. 115. During the summary judgment phase of litigation, the "court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law." *Summary Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the absence of a material factual dispute, the court may grant the moving party's motion if that party is "entitled to prevail as a matter of law." *Id.*

[176] California v. HHS, 351 F. Supp. 3d 1267, 1279–80 (N.D. Cal. 2019), *affirmed*, 941 F.3d 410 (9th Cir. 2019), *cert. filed*, Nos. 19-1038, 19-1040, 19-1053 (Feb. 2020).

[177] *Id.* at 1278–79; *see* California v. Azar, 911 F.3d 558, 566, 585 (9th Cir. 2018), *cert. denied sub nom.* Little Sisters of the Poor Jeanne Jugan Residence v. California, 139 S. Ct. 2716 (2019).

[178] *California*, 351 F. Supp. 3d at 1279.

[179] *See* California v. HHS, 281 F. Supp. 3d 806, 813, 824 (N.D. Cal. 2017) (concluding that "at a minimum," the IFRs likely violated the APA's procedural requirements).

[180] *California*, 351 F. Supp. at 1284.

[181] *Id.* at 1284, 1286–87, 1296–97.

[182] *Id.* at 1301. The court later extended the scope of the preliminary injunction to include an additional state, Oregon. *See* California v. HHS, 390 F. Supp. 3d 1061, 1067 (2019).

[183] California v. HHS, 941 F.3d 410, 424–26 (9th Cir. 2019).

violations."[184] Second, the Religious Exemption "contradicts congressional intent that all women have access to appropriate preventative care."[185] And third, a "blanket exemption for self-certifying religious objectors" was "at odds with the careful, individualized, and searching review mandate[d] by RFRA."[186] While the Ninth Circuit affirmed the district court's decision, it emphasized that its "disposition [was] only preliminary," preserving "the status quo until the district court renders judgment on the merits based on a fully developed record."[187]

DeOtte v. Azar

While the Pennsylvania and California actions resulted in preliminary injunctions against the 2019 Final Rules, the Departments are also enjoined from enforcing the prior accommodation process in key respects as a result of a nationwide injunction issued by the U.S. District Court for the Northern District of Texas.[188] In *DeOtte v. Azar*, the court certified two classes of objectors to the contraceptive coverage requirements.[189] The "Employer Class" consisted of the following:

> Every current and future employer in the United States that objects, based on its sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments.[190]

The "Individual Class" consisted of the following:

> All current and future individuals in the United States who: (1) object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs; and (2) would be willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services from a health insurance issuer, or from a plan sponsor of a group plan, who is willing to offer a separate benefit package option, or a separate policy, certificate, or contract of insurance that excludes coverage or payments for some or all contraceptive services.[191]

The court granted these classes summary judgment on their RFRA claims.[192] Similar to the Eighth Circuit's pre-*Zubik* reasoning,[193] the district court concluded with respect to the Employer Class that the court could not question the lead plaintiff's position "that the act of executing the accommodation forms is itself immoral."[194] As for the Individual Class, the court accepted the

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[184] *Id.* at 427.

[185] *Id.* (emphasis removed).

[186] *Id.* at 427–28.

[187] *Id.* at 431.

[188] *See* Katie Keith, *ACA Litigation Round-Up: Contraceptive Mandate, Section 1557, and More*, HEALTHAFFAIRS (Aug. 6, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190806.847241/full/ (noting that "[o]ther courts have enjoined the federal government from enforcing the contraceptive mandate against religious plaintiffs," but "the employer and individual class allowed by [the Northern District of Texas] are far broader").

[189] DeOtte v. Azar, 393 F. Supp. 3d 490, 499 (N.D. Tex. 2019).

[190] *Id.*

[191] *Id.*

[192] *Id.* at 508, 511.

[193] *See* Sharpe Holdings, Inc. v. HHS, 801 F.3d 927, 946 (8th Cir. 2015), *vacated and remanded sub nom.* HHS v. CNS Int'l Ministries, 136 S. Ct. 2006 (2016) (granting certiorari, vacating and remanding in light of *Zubik v. Burwell*). See *supra* "Legal Challenges to the Accommodation Process and Agency Responses."

[194] *DeOtte*, 393 F. Supp. 3d at 504–05. The district court acknowledged that the Fifth Circuit had held that the Departments' prior accommodation process (requiring objecting employers to notify HHS or their insurers of their objections to providing coverage) did not violate RFRA. *Id.* at 502 (reasoning that the appellate court's decision did not

plaintiffs' argument that purchasing plans that cover certain forms of contraception substantially burdens their religious exercise because it makes them "complicit" in the provision of contraception to which they object.[195] Having found that the requirement imposed a substantial burden on these groups, the court then concluded that the requirement was insufficiently tailored.[196] It reasoned that "[i]f the Government has a compelling interest in ensuring access to free contraception, it has ample options at its disposal that do not involve conscripting religious employers" or requiring the participation of objecting employees.[197]

The district court permanently enjoined the government from enforcing the contraceptive coverage requirement against any member of the Employer Class to the extent of its objection.[198] It further enjoined the government from preventing a "willing" employer or insurer from offering Individual Class members plans that do not include contraceptive coverage.[199] In its final order specifying the terms of its nationwide, permanent injunction, the court included a "safe harbor" allowing the Departments to (1) ask employers or individuals whether they are sincere religious objectors; (2) enforce the contraceptive coverage requirement with respect to employers or individuals who "admit" they are not sincere religious objectors; and (3) seek a declaration from the court that an employer or individual falls outside the certified classes if the government "reasonably and in good faith doubt[s] the sincerity of that employer or individual's asserted religious objections."[200] Before entering final judgment, the district court denied the State of Nevada's motion to intervene (supported by 22 additional states) in the litigation.[201] Nevada appealed that denial and the court's injunction to the Fifth Circuit, which has stayed the appeal pending a decision in *Little Sisters of the Poor*.[202]

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bind the district court because it had been vacated and remanded by the Supreme Court in the *Zubik* litigation). However, the court reasoned that two "material development[s]" warranted a different conclusion. *Id.* at 503. First, the court observed that the Departments subsequently clarified the effect of the accommodation process on a subset of employer-sponsored plans—"self-insured plans governed by ERISA." *Id.* at 502 (emphasis removed). For such plans, the court reasoned, notifying the TPA of the employer's objection would likely result in the provision of contraceptive coverage through the same employer-sponsored plan rather than a separate plan, supporting the argument that the accommodation made those employers' plans a "vehicle" for coverage to which they objected. *Id.* Second, the court observed that following the Supreme Court's remand in *Zubik*, the Departments concluded that they were, in the district court's words, "unable to adequately protect religious employers' civil rights through the accommodation process." *Id.* at 503.

[195] *Id.* at 508–510 (observing that, in the plaintiffs' view, their premiums subsidize other people's access to contraception). *But see* Real Alternatives, Inc. v. Sec'y of HHS, 867 F.3d 338, 362 (3d Cir. 2017) (denying employees' RFRA claim, reasoning that "[t]here is a material difference between employers arranging or providing an insurance plan that includes contraception coverage . . . and becoming eligible to apply for reimbursement for a service of one's choosing").

[196] *DeOtte*, 393 F. Supp. at 506–08, 511.

[197] *Id.* at 507, 511.

[198] *Id.* at 514 (permitting the government to require coverage of those contraceptives to which the sponsoring Employer Class member does not have religious objections).

[199] *Id.* at 514–15.

[200] *Id.* at 515; *see also* DeOtte v. Azar, No. 4:18-CV-00825-O, 2019 U.S. Dist. LEXIS 137519, at *39–40 (N.D. Tex. July 29, 2019) (entering final judgment and issuing permanent injunction).

[201] *See* Order, *DeOtte*, No. 4:18-cv-00825-O (N.D. Tex. July 29, 2019), ECF No. 97 (denying Nevada's motion to intervene); Brief of Amici Curiae Opposing Plaintiffs' Motion for Summary Judgment and Permanent Injunction and Supporting Nevada's Motion to Intervene, *DeOtte*, No. 4:18-cv-00825-O (N.D. Tex. July 9, 2019), ECF No. 93.

[202] Order, DeOtte v. Nevada, No. 19-10754 (5th Cir. Jan. 29, 2020); Amended Notice of Appeal, DeOtte v. Azar, No. 19-10754 (5th Cir. Aug. 30, 2019) (appealing, *inter alia*, the district court's judgment and its denial of Nevada's motion to intervene). Against this backdrop, the same district court ordered in a separate case that a central provision of the ACA, the "Individual Mandate," exceeded Congress's authority and could not be "severed" from the rest of that

Considerations for Congress

Although the contraceptive coverage requirement remains in effect,[203] the injunctions discussed above leave its implementation and enforcement in an uncertain posture. In combination, these rulings affect the regulatory frameworks that existed both before and after the promulgation of the expanded exemptions.[204] The injunctions entered in the Pennsylvania and California actions do not bar entities that qualified for an exemption or an accommodation before the Religious or Moral Exemption IFRs from availing themselves of those options.[205] Accordingly, it appears that (1) qualifying institutions (e.g., houses of worship) can still invoke the exemption for religious employers; and (2) "eligible organizations"—including closely held corporations as defined in the 2015 rule—can still use the accommodation process.[206] However, as a result of the injunctions entered in *DeOtte* and other cases concerning the accommodation,[207] the government is more limited in its ability to enforce the requirement against entities that choose *not* to notify their insurers or HHS of their objections. For example, regardless of an entity's compliance with the accommodation process, the government may not enforce the requirement against employers that object to providing or arranging for contraceptive coverage based on sincerely held religious beliefs, at least to the extent of those employers' objections.[208] And the government may not

law, invalidating the ACA in its entirety. Texas v. United States, 340 F. Supp. 3d 579, 586, 619 (N.D. Tex. 2018) (noting that "the ACA established a '[r]equirement to maintain minimum essential coverage'—commonly known as the 'Individual Mandate'" (quoting 26 U.S.C. § 5000A(a))). The Fifth Circuit reversed the court's severability ruling and remanded the case for additional analysis of the severability question. Texas v. United States, 945 F.3d 355, 402 (5th Cir. 2019). The Supreme Court granted certiorari on March 2, 2020, but is not expected to hear arguments in the case until later in the year. California v. Texas, No. 19-840, 206 L.Ed.2d 253 (U.S. 2020).

[203] HRSA has thus far maintained its guidelines requiring contraceptive coverage. However, HRSA could elect not to support including contraceptives among women's preventive services, in which case the ACA would not mandate such coverage unless amended by Congress. *See* 42 U.S.C. § 300gg-13(a)(4) (linking coverage for preventive services "with respect to women" to "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph").

[204] *See Women's Preventive Services Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines/index.html (last updated Dec. 2019) (providing a "General Notice" that as "a result of court decisions," the 2019 Final Rules "are not in effect" and that the *DeOtte* injunction enjoined enforcement of the contraceptive coverage requirement "with respect to individuals and entities with religious objections to contraceptive coverage").

[205] *See* Pennsylvania v. Trump, 351 F. Supp. 3d 791, 829–30 (E.D. Pa. 2019) (stating that under the court's nationwide injunction, "those eligible for exemptions or accommodations prior to October 6, 2017 will maintain their status"), *aff'd sub nom.* Pennsylvania v. President United States, 930 F.3d 543, 575 (3d Cir. 2019) (stating that "the public interest favors minimizing harm to third-parties by ensuring that women who may lose ACA guaranteed contraceptive coverage are able to maintain access to [that coverage] . . . while final adjudication of the Rules is pending" because, among other reasons, "the current Accommodation does not substantially burden employers' religious exercise"); California v. HHS, 351 F. Supp. 3d 1267, 1298–99 (N.D. Cal. 2019) (discussing reasons for preserving the "status quo" that "preceded the Final Rules and the 2017 IFRs—in which eligible entities still would be permitted to avail themselves of the exemption or the accommodation"), *aff'd*, 941 F.3d 410 (9th Cir. 2019).

[206] *See, e.g.*, 45 C.F.R. § 147.131 (2017).

[207] *See, e.g.*, Christian Emplrs. All. v. Azar, No. 3:16-cv-309, 2019 U.S. Dist. LEXIS 81919, at *17–18 (D.N.D. May 15, 2019) (permanently enjoining the Departments "from enforcing the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and any related regulations implementing that provision" against the Christian Employers Alliance and its present and future members that meet certain criteria, to the extent of their objections).

[208] *See* DeOtte v. Azar, No. 4:18-cv-00825-O, 2019 U.S. Dist. LEXIS 137519, at *37–38 (N.D. Tex. July 29, 2019); DeOtte v. Azar, 393 F. Supp. 3d 490, 499 (N.D. Tex. 2019) (describing the Employer Class as "consisting of employers who object to the Contraceptive Mandate's accommodation process for religious reasons"); *see also id.* at 513 (responding to the government's concerns about discerning class members for enforcement purposes by stating that "class members should be able to simply decline the offending coverage with the comfort that, like other exempt entities and individuals, they will not be subjected to a religious test").

prevent employers or insurers from offering plans without contraceptive coverage to individuals who oppose that coverage based on sincere religious beliefs.[209]

A Supreme Court decision in *Little Sisters of the Poor* could clarify the validity of the 2019 Final Rules and the scope of the exemptions going forward. A ruling affirming the nationwide injunction or remanding with instructions to issue a narrower preliminary injunction would likely result in invalidation of the 2019 Final Rules in at least some states, which could prompt the Department to issue new regulations or guidance.[210] In contrast, a ruling reversing the Third Circuit's decision and holding that the 2019 Final Rules do not violate the APA could pave the way for the expanded exemptions to take effect, leaving the question of further amendments to the federal contraceptive coverage requirement to the Departments and to Congress.

The litigation from *Hobby Lobby* to *Little Sisters of the Poor* reflects an ongoing public policy debate over the extent to which the government should accommodate entities with religious or moral objections to contraception, particularly when those accommodations may compromise their employees' or students' access to the full range of contraceptive services covered for other women. As a legal matter, a *Little Sisters of the Poor* decision could help to clarify whether RFRA allows or requires federal agencies to exempt entities from generally applicable laws that the agencies conclude will burden the religious exercise of those groups.[211] The decision could also clarify whether, in making this determination, agencies may or must account for the interests of third parties, such as the women who otherwise would receive contraceptive coverage under the ACA.[212] Other issues, such as the Departments' authority to exempt objecting universities or

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[209] *See DeOtte*, 2019 U.S. Dist. LEXIS 137519, at *38–39. The *DeOtte* injunction does not bar the government from (1) enforcing the contraceptive coverage requirement against employers "who admit that they are not sincere religious objectors"; (2) asking employers who fail to comply with the coverage requirement whether they are sincere religious objectors; or (3) challenging an employer's claim to have a sincere religious objection in federal court. *See id.* at *39–40. In addition, because the Third Circuit has preliminarily blocked enforcement of the Moral Exemption nationwide, and because the *DeOtte* injunction extends only to employers with *religious* objections, it appears that, as a general matter, the government is not barred from enforcing the requirement against entities with ethical or moral, but not religious, objections to contraception. *See id.* at *35–36 (defining the Employer Class); *see also Pennsylvania*, 930 F.3d at 575–76 (upholding the nationwide preliminary injunction against both final rules). However, injunctions entered in other cases may preclude enforcement against particular parties. *See, e.g.*, March for Life v. Burwell, 128 F. Supp. 3d 116, 134 (D.D.C. 2015) (permanently enjoining the government from enforcing the contraceptive coverage requirement against "March for Life, its health insurance issuer, and the insurance issuer(s) of [certain] employee plaintiffs").

[210] *See Pennsylvania*, 930 F.3d at 575 ("[O]ur APA case law suggests that, at the merits stage, courts invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action."); *accord* Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). Although a decision in *Little Sisters of the Poor* is unlikely to immediately affect the *DeOtte* injunction because that case is not before the Court, it could inform the Fifth Circuit's analysis in the *DeOtte* appeal, particularly if the Supreme Court opines on the validity of the prior accommodation in its RFRA analysis.

[211] *See* California v. HHS, 351 F. Supp. 3d 1267, 1291–92 (N.D. Cal. 2019) (positing that the question of "whether Congress has 'delegated authority to the agencies to create exemptions to protect religious exercise,' such that RFRA 'operates as a floor on religious accommodation, not a ceiling,'" "raises what appears to be a complex issue at the intersection of RFRA, Free Exercise, and Establishment Clause jurisprudence" (quoting Little Sisters Opp. at 17)).

[212] *See California*, 351 F. Supp. 3d at 1295 ("The arguments of the Federal Defendants, and especially the Little Sisters [of the Poor, Jeanne Jugan Residence], thus raise questions that the Supreme Court did not reach in *Hobby Lobby*, *Zubik*, or *Wheaton College*. There is substantial debate among commentators as to how to assess the legality of accommodations not mandated by RFRA when those accommodations impose harms on third parties, given the statute's directive that it does not preclude accommodations allowed by the Establishment Clause."). *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729 n.37 (2014) ("It is certainly true that in applying RFRA '*courts* must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries [of the accommodation].' . . . But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible

employers from—in the words of one court—"existing *and future*" contraceptive coverage requirements through private settlement agreements, allegedly without the involvement of students or employees, may be the next phase of litigation.[213]

Amicus briefs filed by some Members of Congress in *Little Sisters of the Poor* highlight differing views of what RFRA requires of federal agencies. In a brief filed by 161 Members of Congress, the amici argue that RFRA "is far more than a backward-facing statute enacted to address prior wrongs," setting "forth an *affirmative mandate* that, when carrying out official duties, each member of the federal government (including federal administrative agencies) '*shall not* substantially burden a person's exercise of religion,' absent a compelling interest and use of the least restrictive means."[214] In contrast, a group of 186 Members of Congress argue that "RFRA did not, and was not intended to, grant authority to federal agencies to craft exemptions to laws enacted by Congress—and thereby to negate Congress's own legislative intent."[215] That brief further maintains that RFRA was not "intended to allow some individuals' religious liberties (or agencies' own perceptions about those religious liberties) to be used as a sword to limit the rights of others."[216]

Because *Little Sisters of the Poor* involves a *statutory* rather than a *constitutional* challenge to the 2019 Final Rules,[217] the Court's ruling is unlikely to preclude Congress from amending the coverage requirement, its exemptions, or RFRA itself, if Congress disagrees with the Court's decision.[218] Individual Members of Congress have proposed a number of approaches over the years that would recalibrate the legal framework for contraceptive coverage, including those that would have the government take a more active role in facilitating access to contraception and others that would attempt to clarify the responsibilities of the government in accommodating those with genuine religious objections to a coverage requirement.[219] Some lawmakers have

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under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." (emphasis added) (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005))).

[213] *See* Irish 4 Reprod. Health v. HHS, No. 3:18-CV-491-PPS-JEM, 2020 U.S. Dist. LEXIS 7537, at *4–5 (N.D. Ind. Jan. 16, 2020) ("The second part of this case presents a wrinkle not present in the cases out of the Third and Ninth Circuits. Notre Dame has been named as a defendant because a week after issuing the [IFRs], the Federal Defendants executed a private settlement agreement with Notre Dame exempting the university from all existing *and future* requirements with respect to contraceptive coverage. Notre Dame did not seek input from its students or faculty before entering into the settlement agreement. The Plaintiffs in this case . . . claim this backroom deal is illegal and unconstitutional."); *id.* at 33–35, 46–47, 55–57 (allowing the plaintiffs to proceed with their claims that the settlement agreement violates the APA (as contrary to the ACA), the Establishment Clause, and "the Supreme Court's directives in *Zubik*," giving the government an opportunity to "'arrive at an approach going forward that accommodates [objectors'] religious exercise while at the same time ensuring that women covered by [objectors'] health plans receive full and equal health coverage, including contraceptive coverage.'" (quoting Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016))).

[214] Brief of *Amici Curiae* 161 Members of Congress in Support of Petitioners at 11, *Little Sisters of the Poor*, No. 19-431, 19-454 (Mar. 9, 2020) (quoting 42 U.S.C. § 2000bb-1(a)–(b) (emphasis added)).

[215] Brief of 186 Members of the United States Congress as *Amici Curiae* in Support of Respondents at 24, No. 19-431, 19-454 (Apr. 8, 2020).

[216] *Id.*

[217] While the dispute over the district court's authority to issue a *nationwide* injunction does involve constitutional arguments, questions regarding the rules' compliance with the ACA and RFRA are statutory in nature. *See, e.g.*, Brief for the Petitioners at 44, Trump v. Pennsylvania, No. 19-454 (Mar. 2, 2020) (arguing that "[n]ationwide injunctions are irreconcilable with [certain] constitutional and equitable limitations").

[218] *Cf.* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 604 (2010) ("To the extent Congress is persuaded that the policy concerns identified by the dissent require a recalibration of the [Fair Debt Collection Practices Act's] liability scheme, it is, of course, free to amend the statute accordingly.").

[219] *E.g.*, Brief of 123 Members of the United States Congress as Amici Curiae in Support of Respondents, Zubik v.

proposed amendments to the ACA's preventive services coverage requirements "with respect to women"[220] to explicitly require coverage of contraception. For example, a bill introduced in the last Congress would have amended the preventive services requirement in subsection (a)(4) to include "contraceptive care," including "the full range of [FDA-approved] female-controlled contraceptive methods" and "instruction in fertility awareness-based methods . . . for women desiring an alternative method."[221] Other proposals, including a bill introduced in the 116th Congress, would direct the Departments to include certain forms of contraception at the regulatory level.[222]

In general, legislation specifying that contraception is among the required preventive health services may help tip the scales on the government interest prong of the RFRA analysis toward a compelling interest in providing cost-free coverage for contraception through employer-sponsored health plans. In *Hobby Lobby*, the Supreme Court assumed that the government had a compelling interest in "guaranteeing cost-free access" to the objected-to contraceptive methods.[223] However, the majority noted that "there are features of ACA that support" the opposing view, in particular, the inapplicability of the requirement to grandfathered plans.[224] The Departments went a step further in the 2019 Final Rules, suggesting that the government did not have a compelling interest in contraceptive coverage because Congress left the decision of whether to include it to the agencies.[225] Codifying the requirement may respond to arguments of this nature. However, proposals to expand contraceptive coverage, standing alone, could still be susceptible to challenge by religious objectors who might still assert that laws mandating coverage—even if they include some exemptions—impose a substantial burden on their religious exercise and are not narrowly tailored under RFRA.[226]

Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418 et al.); Brief of Amici Curiae 207 Members of Congress in Support of Petitioners, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418 et al.); Brief of 91 Members of the United States House of Representatives as Amici Curiae in Support of the Government, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354, 13-356); Brief of Amici Curiae Members of Congress in Support of Respondents, *Hobby Lobby*, 573 U.S. 682 (No. 13-354).

[220] 42 U.S.C. § 300gg-13(a)(4).

[221] Save Women's Preventive Care Act, S. 1045, 115th Cong. § 4(a) (as introduced May 4, 2017), https://www.congress.gov/bill/115th-congress/senate-bill/1045; *see also* Women's Preventive Health Awareness Campaign, H.R. 2355, 114th Cong. § 4 (as introduced May 15, 2015), https://www.congress.gov/bill/114th-congress/house-bill/2355 (stating that in applying the ACA's preventive services coverage requirements "with respect to women," the "guidelines supported under subsection (a)(4) shall be treated as including the recommendation of one form of contraception in each of the methods identified by the [FDA] in its current Birth Control Guide as well as clinical services needed for provision of such contraceptive method, including patient education and counseling").

[222] *See* Affordability Is Access Act, H.R. 3296, 116th Cong. § 5 (as introduced June 14, 2019), https://www.congress.gov/bill/116th-congress/house-bill/3296/ (directing the Departments to "clarify that coverage of contraceptives pursuant to section 2713(a)(4) of the Public Health Service Act (42 U.S.C. 300gg–13(a)(4)) includes coverage of over-the-counter contraceptive methods approved by the [FDA], even if the enrollee does not have a prescription for the contraceptive"); S. 1847, 116th Cong. § 5 (as introduced June 13, 2019), https://www.congress.gov/bill/116th-congress/senate-bill/1847/ (same).

[223] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

[224] *Id.* at 727.

[225] In the 2019 Final Rules, the Departments indicated that they no longer believed that applying the contraceptive coverage requirement to objecting entities served a compelling governmental interest. They posited that "the structure of section 2713(a)(4) [(pertaining to preventive services for women)] and the ACA evince a desire by Congress to grant a great amount of discretion on the issue of whether, and to what extent, to require contraceptive coverage in health plans," which "inform[ed] the Departments' assessment of whether the interest in mandating the coverage constitutes a compelling [one]." Religious Exemption, *supra* note 133, at 57,546–47.

[226] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 434 (2006) ("The Government argues that the existence of a *congressional* exemption for peyote does not indicate that the Controlled Substances Act

RFRA applies by default to all federal statutes adopted after its enactment (November 16, 1993) "unless such law explicitly excludes such application by reference to this Act."[227] Some legislation concerning contraception includes language excepting those provisions from RFRA or excluding RFRA claims.[228] A pair of bills introduced in the wake of *Hobby Lobby* would have prohibited an "employer that establishes or maintains a group health plan for its employees" from "deny[ing] coverage of a specific health care item or service . . . where the coverage of such item or service is required under any provision of Federal law or the regulations promulgated thereunder," notwithstanding RFRA.[229] Lawmakers have also proposed amendments to RFRA itself. Similar bills introduced in both chambers this Congress would provide that RFRA's strict scrutiny standard does not apply to certain types of laws, including "any provision of law or its implementation that provides for or requires . . . access to, . . . referrals for, provision of, or coverage for, any health care item or service."[230]

Laws that make RFRA inapplicable to the contraceptive coverage requirement would not foreclose challenges based on the Free Exercise Clause.[231] However, as previously noted, Free Exercise claims are potentially subject to a less stringent standard of review than RFRA-based objections because of the Supreme Court's holding in *Employment Division v. Smith* that the Free Exercise Clause typically does not require the government to provide religious-based exemptions to generally applicable laws.[232]

Other approaches to contraceptive coverage have focused on accommodating the interests of religious objectors. Some courts and objecting employers have suggested that Congress could avoid or minimize burdens on religious objectors by funding separate contraceptive coverage or expanding access to programs that provide free contraception instead of requiring employers to

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is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that *courts* would recognize exceptions—that is how the law works.").

[227] 42 U.S.C. § 2000bb-3(b).

[228] *See, e.g.*, Access to Birth Control Act, H.R. 2182, 116th Cong. § 3 (as introduced Apr. 9, 2019), https://www.congress.gov/bill/116th-congress/house-bill/2182 ("The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.").

[229] Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Cong. § 4(a)–(b) (as introduced July 9, 2014), https://www.congress.gov/bill/113th-congress/senate-bill/2578; H.R. 5051, 113th Cong. § 4(a)–(b) (as introduced July 9, 2014), https://www.congress.gov/bill/113th-congress/house-bill/5051. The "Findings" section of the Senate version stated that the bill was "intended to be consistent with the Congressional intent in enacting [RFRA], and with the exemption for houses of worship, and an accommodation for religiously-affiliated nonprofit organizations with objections to contraceptive coverage." S. 2578, § 3(19). Both bills stated that the Departments' regulations concerning the religious employer exemption and the accommodation process for eligible organizations were to apply. S. 2578, § 4(c); H.R. 5051, § 4(c).

[230] Do No Harm Act, H.R. 1450, 116th Cong. § 3 (as introduced Feb. 28, 2019), https://www.congress.gov/bill/116th-congress/house-bill/1450; S. 593, 116th Cong. § 3 (as introduced Feb. 28, 2019), https://www.congress.gov/bill/116th-congress/senate-bill/593.

[231] *See generally* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (stating that Congress does not have the "power to determine what constitutes a constitutional violation").

[232] By way of illustration, prior to the federal contraceptive coverage requirement, the highest courts in California and New York rejected Free Exercise challenges to state law contraceptive coverage requirements in those jurisdictions based on the Supreme Court's decision in *Employment Division v. Smith*. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 94 (Cal. 2004) (reasoning, in a challenge brought by a nonprofit corporation affiliated with the Catholic Church, that the plaintiff's free exercise claim would fail under the *Smith* standard and concluding that the California law survived even strict scrutiny); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) (reasoning that *Smith* posed "an insuperable obstacle to plaintiffs' federal free exercise claim").

provide this coverage.[233] Along these lines, the Departments separately issued a rule authorizing the directors of federally funded family planning projects to extend contraceptive services to some women whose employers do not provide coverage for such services because of a religious or moral exemption.[234] While the efficacy of such proposals in maintaining or increasing access to contraception is beyond the scope of this report, alternatives that do not involve requiring private parties to provide contraceptive coverage or otherwise take an action that results in the provision of coverage by a third party could reduce the potential for both RFRA and Free Exercise challenges.[235]

Other proposals seek to codify exemptions to the contraceptive coverage requirement for entities with religious or moral objections. For example, the Religious Liberty Protection Act of 2014 would have prohibited HHS from "implement[ing] or enforc[ing]" any rule that "relates to requiring any individual or entity to provide coverage of sterilization or contraceptive services to which the individual or entity is opposed on the basis of religious belief."[236] That bill also would have included a "special rule" in the ACA stating that a "health plan shall not be considered to have failed to provide" the required preventive health services "on the basis that the plan does not provide (or pay for) coverage of sterilization or contraceptive services because—(A) providing (or paying for) such coverage is contrary to the religious or moral beliefs of the sponsor, issuer, or other entity offering the plan; or (B) such coverage, in the case of individual coverage, is contrary to the religious or moral beliefs of the purchaser or beneficiary of the coverage."[237] Enacting statutory exemptions to the contraceptive coverage requirement might avoid future litigation over the Departments' authority under the ACA to create categorical exemptions.[238] In addition,

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[233] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728–30 (2014) ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."); Sharpe Holdings, Inc. v. HHS, 801 F.3d 927, 945 (8th Cir. 2015) (reasoning that on the limited record before it, the government had not shown the infeasibility of the alternatives proposed by the plaintiffs: government "subsidies, reimbursements, tax credits, or tax deductions to employees" or funding "for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support"), *vacated and remanded sub nom.* HHS v. CNS Int'l Ministries, 136 S. Ct. 2006 (2016).

[234] Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714, 7,734, 7,787 (Mar. 4, 2019) (codified at 42 C.F.R. § 59.2); *see also* CRS In Focus IF11142, *Title X Family Planning Program: 2019 Final Rule*, by Angela Napili and Victoria L. Elliott. This rule was also challenged in court (on other grounds), with some courts upholding the rule and others enjoining its implementation in some jurisdictions. *Compare* California v. Azar, 950 F.3d 1067, 1105 (9th Cir. 2020) (en banc) (upholding the rule and vacating three lower court injunctions entered by federal courts in California, Oregon, and Washington), *with* Mayor of Balt. v. Azar, No. 19-cv-1103, 2020 U.S. Dist. LEXIS 38060, at *4 (D. Md. Mar. 4, 2020) (declining to apply the Ninth Circuit's reasoning and reaffirming its decision "setting aside and vacating the Final Rule in the State of Maryland," which is in the Fourth Circuit).

[235] *Cf. Sharpe Holdings, Inc.*, 801 F.3d at 941 ("Even if the ACA requires that insurance issuers and group health plans include contraceptive coverage regardless of whether [the plaintiffs] self-certify, it also compels [the plaintiffs] to act in a manner that they sincerely believe would make them complicit in a grave moral wrong as the price of avoiding a ruinous financial penalty. . . . [I]f one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear.").

[236] H.R. 4396, 113th Cong. § 3(a) (as introduced Apr. 3, 2014), https://www.congress.gov/bill/113th-congress/house-bill/4396.

[237] *Id.* § 3(b); *see also* Health Care Conscience Rights Act, H.R. 940, 113th Cong. (as introduced Mar. 4, 2013), https://www.congress.gov/bill/113th-congress/house-bill/940 (amending the ACA title that includes the preventive health services coverage requirements to state that "no provision of this title . . . shall . . . require an issuer of health insurance coverage or the sponsor of a group health plan to include, in any such coverage or plan, coverage of an abortion or other item or service to which such issuer or sponsor has a moral or religious objection" and stating that any regulation that violates that restriction must not be "given legal effect").

[238] *See* Pennsylvania v. President United States, 930 F.3d 543, 570 (3d Cir. 2019) ("Nothing from § 300gg-13(a) gives HRSA the discretion to wholly exempt actors of its choosing from providing the guidelines services.").

broader exemptions could reduce the potential for RFRA or Free Exercise challenges. At the same time, they could increase the prospect of Establishment Clause challenges like those brought in response to the expanded exemptions in the 2019 Final Rules.[239] While the Supreme Court has said that "there is room for play in the joints" between the Free Exercise Clause and the Establishment Clause,[240] it remains to be seen whether broad accommodations like the Religious Exemption and the Moral Exemption fit comfortably in that space.[241]

Little Sisters of the Poor marks the fourth Supreme Court term in six years in which the Court has granted certiorari in a dispute about the federal contraceptive coverage requirement.[242] During that time period, the Departments promulgated six different rules concerning the requirement, a change in presidential administration marked a turning point in the Departments' RFRA calculus, and the Supreme Court underwent its own changes with the appointment of two new Justices. While the Court has the next opportunity to weigh in on the coverage requirement in *Little Sisters of the Poor*, Congress and the executive branch continue to have a role in defining the interests at stake and the balance to be achieved in the years ahead.

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[239] *See, e.g.*, First Amended Complaint for Declaratory and Injunctive Relief ¶ 129, California v. HHS, 351 F. Supp. 3d 1267 (N.D. Cal. 2019) (No. 17-cv-05783) ("By promulgating the new IFRs, Defendants have violated the Establishment Clause because the IFRs do not have a secular legislative purpose, the primary effect advances religion, especially in that they place an undue burden on third parties—the women who seek birth control, and the IFRs foster excessive government entanglement with religion.").

[240] Locke v. Davey, 540 U.S. 712, 718–19 (2004) (internal quotation marks and citation omitted) ("In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

[241] *See* California v. HHS, 351 F. Supp. 3d 1267, 1291–92 (N.D. Cal. 2019) (observing that whether "RFRA operates as a floor on religious accommodation" or "a ceiling" in terms of what it authorizes or requires agencies to do raises "what appears to be a complex issue at the intersection of RFRA, Free Exercise, and Establishment Clause jurisprudence" (internal quotation marks and citation omitted)).

[242] *See also* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam); Univ. of Notre Dame v. Burwell, 575 U.S. 901 (2015) (remanding in light of *Hobby Lobby*); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).