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# The Contraception Mandate Accomodated: Why the RFRA Claim in *Zubik v. Burwell* Fails

Caroline Mala Corbin

*University of Miami School of Law*, [ccorbin@law.miami.edu](mailto:ccorbin@law.miami.edu)

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## The Contraception Mandate Accommodated: Why the RFRA Claim in *Zubik v. Burwell* Fails

By Caroline Mala Corbin

### Introduction

Does filing paperwork in order to obtain a religious exemption from a law constitute a substantial burden on religious liberty? That is the main question posed by *Zubik v. Burwell*, which the Supreme Court is slated to hear on March 23, 2016. In *Zubik*, which consolidates several different cases,<sup>1</sup> religiously affiliated nonprofit employers argue that the Affordable Care Act's contraception mandate<sup>2</sup> violates the Religious Freedom Restoration Act (RFRA) by substantially burdening their religious conscience.<sup>3</sup> Under RFRA, religious objectors need not comply with any federal law that imposes a substantial religious burden unless the government can demonstrate that the law passes strict scrutiny.<sup>4</sup> Notably, the contraception mandate actually exempts the nonprofits from its requirements. Nonetheless, these employers complain that even informing the government that they seek an exemption makes them complicit in the sin of contraception and therefore amounts to a substantial religious burden.<sup>5</sup> Their claim should fail. Filing paperwork to obtain a religious

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<sup>1</sup> *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Geneva College v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *E. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015).

<sup>2</sup> While the ACA guarantee of cost-free contraception might be better described as "the birth control benefit" or "the contraception coverage guarantee," this issue brief follows the courts and uses the term "the contraception mandate."

<sup>3</sup> The challenge is a statutory rather than constitutional challenge. RFRA offers more expansive protection than the Free Exercise Clause. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that if a law is neutral and generally applicable—that is, if a law does not target religion for adverse treatment and applies broadly—then it does not violate the Free Exercise Clause. Given that the goal of the contraception mandate is to improve health care and not to penalize religious organizations, most courts to address the free exercise question have found the mandate to be neutral and generally applicable. See, e.g., *Priests for Life*, 772 F.3d at 267-69; *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1196-99.

<sup>4</sup> Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

<sup>5</sup> The D.C. Circuit Court of Appeals described this claim as "extraordinary and potentially far reaching." *Priests for Life*, 772 F.3d at 245.

exemption does not constitute a substantial burden on religion. If it did, then almost anything would amount to a substantial religious burden.

Because there is no RFRA violation without a substantial religious burden, the analysis could end there. However, if the simple procedure for receiving a religious exemption were treated as a substantial burden, then the next question in *Zubik* would be whether the contraception mandate passes strict scrutiny. Under RFRA, laws that satisfy strict scrutiny must be obeyed, regardless of the religious burdens imposed. To pass strict scrutiny, the government's goal must be of the highest order, and there cannot be another way to accomplish that goal. Given the importance of women's equal access to essential health care, and the exemption granted to the nonprofits, the mandate does in fact meet the requirements of strict scrutiny, thereby providing a second reason why the nonprofits' RFRA claim should fail.

## I. The Case: *Zubik v. Burwell*

### A. The Contraception Mandate

The contraception mandate is part of the Affordable Care Act (ACA). The ACA requires that employer-sponsored health insurance plans cover basic preventive care without any cost-sharing—no deductibles or co-pays. To help determine what preventive services to include, the Department of Health and Human Services commissioned a study from the independent Institute of Medicine.<sup>6</sup> Finding contraception to be vital to women's health, the Institute of Medicine recommended that preventive care include FDA-approved contraception.<sup>7</sup>

*Zubik v. Burwell* is not the first RFRA challenge to the contraception mandate. In 2014, the Supreme Court ruled in *Hobby Lobby Stores, Inc. v. Burwell* that under RFRA, closely-held for-profit corporations with religious objections to contraception are entitled to an exemption from the mandate. *Hobby Lobby* focused on for-profit companies because nonprofit organizations had already been accommodated. First, the mandate does not apply to houses of worship or other “religious employers” as defined by the IRS. Thus, religious institutions that predominately serve and employ people of their own faith—such as churches, synagogues, and mosques—are completely exempt. Second, religiously affiliated non-profit institutions that employ people of many different faiths and often accept significant funding from the federal and state governments—such as schools, hospitals, nursing homes, and social service providers<sup>8</sup>—do not have to pay for contraception or even include

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<sup>6</sup> The Institute of Medicine is an arm of the National Academy of Sciences tasked with “help[ing] those in government and the private sector make informed health decisions by providing evidence upon which they can rely.” See *About the IOM*, NAT'L ACADEMY OF SCIENCES, <http://iom.nationalacademies.org/About-IOM.aspx#sthash.pZMs5sBa.dpuf> (last visited Mar. 2, 2016).

<sup>7</sup> INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011), <https://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx> [hereinafter CLINICAL PREVENTIVE SERVICES FOR WOMEN].

<sup>8</sup> Among complaining nonprofits are social services providers such as Catholic Charities of South East Texas, Catholic Charities of Fort Worth, Catholic Charities of Erie, and Little Sisters of the Poor Home for the Aged, and several schools including East Texas Baptist University, Houston Baptist University, University of Dallas, Southern Nazarene University, Oklahoma Baptist University, Mid-America Christian University, Thomas Aquinas College, Catholic University, Geneva College, and Erie Catholic Cathedral Preparatory School.

it in their health care plans. Instead, once a religiously affiliated nonprofit declares its religious opposition to contraception, the responsibility for contraception coverage passes to its insurance carrier: the nonprofit's health care insurer or, if the nonprofit is self-insured, a third-party administrator must provide and pay for a separate policy. Indeed, the Supreme Court in *Hobby Lobby* pointed to this accommodation as a reason why the contraception mandate's application to religious for-profits like Hobby Lobby was not narrowly tailored.<sup>9</sup> If this accommodation worked for religious nonprofits, the Court suggested, then why not for religious for-profits?

A nonprofit may obtain its exemption in two ways. It can either sign a short self-certification declaring that it is a religious nonprofit that “opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered” and mail the form to its health insurance company (or its third-party administrator for self-insured plans),<sup>10</sup> or the nonprofit may provide a similar notice, along with the name and contact information of its insurer (or third-party administrator), directly to the Department of Health and Human Services.

## B. The Claim

Despite the ability to opt out of contraception coverage, multiple religiously affiliated nonprofit employers complain that the religious accommodation itself imposes a substantial religious burden in violation of RFRA. According to these employers, signing a two-page form or sending a letter triggers the provision of contraception to their employees, thus making the employer complicit in sin. For example, Little Sisters of the Poor Home for the Aged argues that to facilitate contraception use “would violate their public witness to the sanctity of human life and human dignity.”<sup>11</sup> Other nonprofits argue that “taking the actions required of them under the regulations would make them complicit in wrongdoing and create ‘scandal’ in violation of Catholic moral teaching.”<sup>12</sup> The sincerity of their objections is not in question.

All but one of the courts of appeals to consider the claim (including the Second, Third, Fifth, Sixth, Seventh, Tenth, and the D.C. Circuits) has held that filing the exemption paperwork does not impose a substantial religious burden. Most decisions stop there, since RFRA only protects against substantial burdens on religion. The D.C. Circuit Court of Appeals added that, despite the nonprofits' claim that the contraception mandate neither advances a compelling state interest nor is narrowly tailored, the mandate does in fact pass strict scrutiny.<sup>13</sup>

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<sup>9</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014) (“[T]he HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.”).

<sup>10</sup> This two-sided, single sheet of paper is known as EBSA Form 700. *See, e.g., Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1207 (reprinting form).

<sup>11</sup> *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1167.

<sup>12</sup> Brief for Petitioners in Nos. 14-1418, 14-1453, & 14-1505 at 2, *Zubik v. Burwell*, No. 14-1418 (U.S. Jan. 4, 2016) [hereinafter Brief for Petitioners 1].

<sup>13</sup> *See, e.g., Priests for Life*, 772 F.3d at 256-67.

## II. Substantial Burden Analysis

### A. Substantial Burden Is A Legal Question for Courts to Decide

Who decides what counts as a substantial religious burden for purposes of RFRA is central to the substantial burden analysis in *Zubik*.<sup>14</sup> The nonprofits claiming a RFRA violation insist that substantial burden is a subjective religious question for the religious objector to decide. They assert that once a religious objector claims that a particular statutory requirement amounts to a substantial burden *as a matter of religious belief*, then, as long as they are sincere,<sup>15</sup> it amounts to a substantial burden under RFRA *as a matter of law*. According to them, “courts have neither the authority nor the competence to second-guess the reasonableness of those sincere beliefs.”<sup>16</sup> Failure to defer to the objectors’ assessment of substantial burden is akin to passing judgment on their religious faith, which is barred by the Establishment Clause.<sup>17</sup>

Most circuit courts have rightly rejected this claim. Automatic deference to religious objectors seeking religious exemptions (1) misreads the language of RFRA and (2) overlooks the courts’ authority to rule on factual and legal matters that are well within their institutional authority and competence. Ultimately, “[w]hether a law imposes a substantial burden on a party is something that a court must decide, not something that a party may simply allege.”<sup>18</sup>

#### I. RFRA’s Language

As RFRA’s language makes explicit, strict scrutiny is triggered only by substantial burdens on religion, not all burdens on religion. To simply assume a substantial burden whenever a sincere religious objector claims one exists essentially reads the substantial burden requirement out of RFRA. “If plaintiffs could assert and establish that a burden is ‘substantial’ without any possibility of judicial scrutiny, the word ‘substantial’ would become wholly devoid of independent meaning.”<sup>19</sup> Indeed, one would be hard-pressed to find exemption-seekers likely to argue that a challenged law burdens their practice of religion, but not substantially.

Without some objective evaluation of burden, all burdens imposed by federal laws would become eligible for accommodation. For example, D.C. parishioners could argue that issuing traffic tickets or adding a bicycle lane in front of their church imposes a substantial religious burden on them by

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<sup>14</sup> *E. Texas Baptist Univ.*, 793 F.3d at 456 (“A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector’s view on whether there is a substantial burden.”).

<sup>15</sup> RFRA only protects sincere religious beliefs; the sincerity of the nonprofits’ beliefs is not at issue in *Zubik*.

<sup>16</sup> Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 at 2, *Zubik v. Burwell*, No. 14-1418 (U.S. Jan. 4, 2016).

<sup>17</sup> *Cf. Emp’t Div.*, 494 U.S. at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

<sup>18</sup> *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015).

<sup>19</sup> *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1176; *see also Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015) (“[T]he fact that a RFRA plaintiff *considers* a regulatory burden substantial does not make it a substantial burden. Were it otherwise, no burden would be insubstantial.”).

making it much more difficult to park for Sunday services.<sup>20</sup> In short, every sincere religious protestor would be entitled to a religious exemption from any federal law that did not pass strict scrutiny.<sup>21</sup>

## 2. Courts' Authority

Although courts cannot and should not rule on theological questions, claims of substantial religious burden often depend on purely secular factual and legal assumptions courts can and should resolve. For example, imagine a vegetarian opposed to a compulsory vaccination law because her religion condemns killing animals and she thinks (erroneously) that the mandated vaccine contains animals. She argues she is entitled to a religious exemption because facilitating any animal death imposes a substantial burden on her religious conscience. Although she believes that animals were killed in the manufacture of the vaccine, she is wrong. She has made a factual mistake: vaccine production does not involve animals at all. While it would be inappropriate for a court to question whether her religion truly bans all animal slaughter, it is well within a court's competence to find that the vaccine is animal-free and therefore simply does not implicate the vegetarian's sincere religious opposition to animal slaughter. In short, while courts may not draw conclusions about the objector's religion, they should draw conclusions about the underlying legal or, as in this hypothetical, factual, bases for the religious claims.

In fact, courts possess not only the ability but also the responsibility to evaluate whether burdens are substantial enough to merit accommodation under RFRA, including the burdens caused by the contraception mandate's regulatory scheme. After all, it is not just the rights of religiously affiliated nonprofit employers that are at stake, but the rights of those who may be affected by a religious accommodation, such as the nonprofits' employees and students. In any event, subjecting to strict scrutiny laws that impose only negligible burdens on those seeking to circumvent them is not the balance RFRA, with its substantial burden requirement, envisions. And as the next part explains, the religious burden in this case is indeed slight, notwithstanding the sincere beliefs of the religious objectors.

### B. The Mandate's Accommodation Does Not Impose A Substantial Burden

In evaluating whether the contraception mandate regulatory scheme imposes a substantial burden on the objecting nonprofit employers, it is important to remember that the objection is not to mandatory contraception coverage but to the mechanism allowing them to opt-out of contraception coverage. This accommodation makes *Zubik v. Burwell* fundamentally different from *Hobby Lobby Stores, Inc v. Burwell*, where the for-profit company was not excused from providing contraception coverage. Here, in contrast, no religiously affiliated nonprofit is required to include any

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<sup>20</sup> Cf. Perry Stein, *D.C. Church Says a Bike Lane Would Infringe upon its Constitutional 'Rights of Religious Freedom'*, WASH. POST, Oct. 14, 2015.

<sup>21</sup> *Catholic Health Care Sys.*, 796 F.3d at 218 (“If RFRA plaintiffs needed only to assert that their religious beliefs were substantially burdened, federal courts would be reduced to rubber stamps, and the government would have to defend innumerable actions under demanding strict scrutiny analysis.”).



objectionable contraception in its health care plan.<sup>22</sup> Instead, all such entities must do is provide notice of their objections and the name and address of their insurance company or third-party administrator if they notify the Department of Health and Human Services instead of their insurance carriers.<sup>23</sup>

The opt-out procedure relieves the religiously affiliated nonprofit employers of all responsibility for contraception coverage.<sup>24</sup> Once a nonprofit expresses its objection, the law shifts responsibility to the insurance companies, who are required to step in and provide, pay for, and inform employees and students of the separate contraception coverage they are offering. The insurance company's contraception policy is unconnected to the nonprofit's health care plan. Moreover, the regulations forbid the insurance company from charging the nonprofits in any way for the costs of the contraception. Finally, the insurance company's notice to employees and students must be separate from any materials distributed on behalf of the nonprofit, and it must clarify that the nonprofit plays no part in the contraception coverage. "In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage."<sup>25</sup>

At the most basic level, the objecting nonprofits misunderstand how the contraception mandate works. Their belief that they are complicit in the sin of contraception use rests on the assumption that their written refusal triggers the provision of contraception. For example, one college argues "that as the trigger-puller or facilitator the college shares responsibility for the extension of [contraception] coverage to its students, faculty, and staff."<sup>26</sup> As a matter of law, they are wrong.<sup>27</sup> Their paperwork does not cause contraception coverage. The Affordable Care Act does. It is federal law, not the completion of any form, that creates the insurance companies' obligation to cover contraception. All the paperwork does is extricate the nonprofit organizations from the coverage.<sup>28</sup>

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<sup>22</sup> Cf. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1171 ("Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law.").

<sup>23</sup> See, e.g., *Priests for Life*, 772 F.3d at 237 (noting that "[t]hat bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state.>").

<sup>24</sup> See, e.g., *Priests for Life*, 772 F.3d at 236 ("Delivery of the requisite notice extinguishes the religious organization's obligation to contract, arrange, pay, or refer for any coverage that includes contraception.>").

<sup>25</sup> *Priests for Life*, 772 F.3d at 250.

<sup>26</sup> *Wheaton Coll. v. Burwell*, 791 F.3d 792, 796 (7th Cir. 2015); see also *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) ("The appellees' essential challenge is that providing the self-certification form to the insurance issuer or third-party administrator 'triggers' the provision of the contraceptive coverage to their employees and students.>").

<sup>27</sup> The circuit courts did not mince their words in rejecting this assumption. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1180 ("They do not."); *E. Texas Baptist Univ.*, 793 F.3d at 459 ("Not so."); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613 (7th Cir. 2015) ("That's not correct."); see also *Geneva Coll.*, 778 F.3d at 438 ("However, this purported causal connection is nonexistent."); *Mich. Catholic Conference & Catholic Family Servs.*, 807 F.3d at 750 ("Plaintiffs are fundamentally wrong in their understanding of how the law actually works.>").

<sup>28</sup> *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1173-74 ("Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them

“By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services.”<sup>29</sup>

Equally erroneous is the nonprofits’ claim that the accommodation forces them to facilitate contraception use because the government essentially commandeers their health care plans. In fact, as explained, the government exempts their plans. Instead, it requires the insurance companies—private insurance carriers like Aetna and Blue Cross/Blue Shield—to issue separate plans. “So when [a nonprofit] tells us that it is being ‘forced’ to allow ‘use’ of its health plans to cover emergency contraceptives, it is wrong. It’s being ‘forced’ only to notify its insurers (including third-party administrators), whether directly or by notifying the government ... that it will not use its health plans.”<sup>30</sup>

Thus, the courts’ rejection of the complicity claim does not turn on any evaluation of the religious doctrine of complicity.<sup>31</sup> Rather, it stems entirely from the courts’ rejection of the erroneous legal conclusions on which the complicity claim is based. As Judge Posner observed, “[t]his is an issue not of moral philosophy but of federal law. Federal courts are not required to treat [the nonprofit’s] erroneous legal interpretation as beyond their reach.”<sup>32</sup> Whatever deference might be owed to a nonprofit’s interpretation of its own religious beliefs, courts should not defer to the nonprofit’s interpretation of federal law.<sup>33</sup> After all, if there is one area over which federal courts have authority, it is the interpretation of federal law. The nonprofits’ opposition is based on legal error.<sup>34</sup> Courts

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from complicity.”); *Geneva Coll.*, 778 F.3d at 441 (“Far from ‘triggering’ the provision of contraceptive coverage to the appellees’ employees and students, EBSA Form 700 totally removes the appellees from providing those services.”).

<sup>29</sup> *Geneva Coll.*, 778 F.3d at 438.

<sup>30</sup> *Wheaton Coll.*, 791 F.3d at 795.

<sup>31</sup> *Cf. Geneva Coll.*, 778 F.3d at 435 (“Without testing the appellees’ religious beliefs, we must nonetheless objectively assess whether the appellees’ compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage.”).

<sup>32</sup> *Univ. of Notre Dame*, 786 F.3d at 623; *see also id.* (“[T]he courts cannot substitute even the most sincere religious beliefs for legal analysis.”).

<sup>33</sup> *Cf. Id.* at 612 (“Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs”); *Geneva Coll.*, 778 F.3d at 436 (“[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees’] characterization of the regulatory scheme on its face.” (quoting *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014))).

<sup>34</sup> Mistakes of law are not the only errors underlying the nonprofits’ complicity claims. Some of the objecting nonprofits such as East Texas Baptist University and Oklahoma Baptist University are not religiously opposed to contraception but are opposed to abortion. Their objections to the mandate flow from the erroneous belief that four of the FDA-approved contraceptives act as abortifacients and kill fertilized eggs. However, neither of the two morning after pills, Plan B and Ella, work in the way the nonprofits think the medicine works. Although the FDA approved them before fully understanding whether they prevented fertilization or implantation, every reputable scientific study to examine the pills’ mechanism has concluded that these pills prevent ovulation—and therefore fertilization—from occurring in the first place. *See, e.g., Mechanism of Action: How Do Levonorgestrel-Only Emergency Contraception Pills (LNG ECPs) Prevent Pregnancy*, INT’L FED’N OF GYNECOLOGY AND OBSTETRICS (FIGO) & INT’L CONSORTIUM FOR EMERGENCY CONTRACEPTION (2011), [http://www.figo.org/sites/default/files/uploads/MOA\\_FINAL\\_2011\\_ENG.pdf](http://www.figo.org/sites/default/files/uploads/MOA_FINAL_2011_ENG.pdf) (summarizing studies); James Trussell et al., *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy*, PRINCETON UNIV. (Jan. 2016), <http://ec.princeton.edu/questions/ec-review.pdf> (same); *see also Wheaton Coll.*, 791 F.3d at 795 (“There is no evidence to suggest that either of the FDA-approved emergency contraceptive options ... works after an egg is fertilized.”). In sum,



should not be, and for the most part have not been, deferential when they encounter obvious legal error.<sup>35</sup>

### III. Strict Scrutiny Analysis

Even if the contraception mandate substantially burdened the nonprofits' religious beliefs, RFRA specifically provides that such burdens must be tolerated if the law in question passes strict scrutiny. This one does. The contraception mandate advances compelling government interests, and the accommodation provided to objecting nonprofits is the least restrictive means of accomplishing those interests.

#### A. Compelling State Interest

Although the *Hobby Lobby* majority assumed without deciding that the contraception mandate advances compelling state goals, five Justices (the four dissenters plus Justice Kennedy) have stated that the contraception mandate passes the first prong of the strict scrutiny test. Granted, Justice Kennedy's controlling concurrence was somewhat tepid, but he did acknowledge that the mandate furthers "a compelling interest in the health of female employees."<sup>36</sup> Justice Ginsburg, writing for the dissenters, emphasized that "the Government has shown that the [mandate] furthers compelling interests in public health and women's well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence."<sup>37</sup>

Contraception is crucial to women's health—over 99 percent of women who have ever had sex have relied on contraception. By preventing unintended pregnancies, birth control allows women to better space their children. Contraception also improves prenatal care, which can help prevent complications, because women with unintended pregnancies receive later and less adequate prenatal care.<sup>38</sup> Pregnancy carries with it a host of risks, and is contraindicated for women with certain health issues.<sup>39</sup> Furthermore, contraception is not only used to prevent pregnancy. For example, millions of American women use hormonal birth control mainly to manage a host of medical issues.<sup>40</sup> The

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the scientific consensus is that morning-after pills prevent fertilization, not implantation. As with legal error, courts should not be deferential when they encounter obvious scientific error.

<sup>35</sup> *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1191 ("RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.").

<sup>36</sup> *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *see also id.* at 2785-86 ("As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee.").

<sup>37</sup> *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

<sup>38</sup> *See* INST. OF MEDICINE, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 66 (National Academies Press ed., 1995).

<sup>39</sup> CLINICAL PREVENTIVE SERVICES FOR WOMEN, *supra* note 7, at 103-04 (pregnancy contraindicated for women with pulmonary hypertension and cyanotic heart disease).

<sup>40</sup> Rachel K. Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills*, GUTTMACHER INST., (Nov. 2011), available at <https://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf> (oral contraception helps relieve Polycystic Ovary Syndrome, endometriosis, acne, hirsutism, bleeding due to uterine fibroids, amenorrhea, excessive menstrual bleeding (menorrhagia), and severe menstrual pain (dysmenorrhea)).

Institute of Medicine recommended that contraception be fully covered precisely because it is so essential to women's well-being.

Contraception is also essential to women's autonomy and equality. Women cannot be autonomous agents without the power to decide what happens to their own bodies, and women cannot be equal participants in the social, economic, and political life of this country without the ability to control when or whether to have children.<sup>41</sup> There is also a strong argument—and one endorsed by the EEOC—that a health insurance plan that covers basic preventive care without covering contraception, which only women and almost all women rely on, amounts to sex discrimination in violation of Title VII.<sup>42</sup> If nothing else, as Justice Kennedy noted in his *Hobby Lobby* concurrence, women have long been paying more for their health care than men.<sup>43</sup> Studies reveal that “in general, women of childbearing age spend 68% more in out-of-pocket health care costs than men.”<sup>44</sup>

The nonprofits argue that even though women's health and equality may be compelling interests, the contraception mandate cannot be said to advance those interests given all the exceptions to it. They point out that grandfathered plans, employers with fewer than fifty employees, and houses of worship are all exempt from the mandate. They maintain that all these exemptions undermine the government's claim that providing no-cost contraception to students and employees is truly a compelling interest.

To start, the nonprofits overstate the reach of the mandate's exemptions. First, the rule regarding the grandfathered plans is less an exemption than a measure “designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation.”<sup>45</sup> In addition to the fact that grandfathered plans have been steadily losing their grandfathered status,<sup>46</sup> most grandfathered plans include contraception. Twenty-eight states had their own contraception mandate before the ACA,<sup>47</sup> and one study found that more than 89% of insurance plans already covered contraception.<sup>48</sup> Second, the exemption for small employers is not an exemption from the contraception mandate but from the ACA's health care requirement. Any

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<sup>41</sup> *Cf.* *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the social and economic life of the Nation has been facilitated by their ability to control their reproductive lives.”).

<sup>42</sup> If an employer provides health insurance, it cannot discriminate against employees based on their sex, race, or other protected characteristic in its provision. Thus, an employer cannot offer health insurance against all cancers except testicular cancer, or all diseases except those that mainly affect Jews, or all preventive care except care that predominately affects women.

<sup>43</sup> *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (noting that prior to the Affordable Care Act, insurance for a female employee was “significantly more costly than for a male employee”).

<sup>44</sup> 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); *see* 78 Fed. Reg. at 39,887 (July 2, 2013).

<sup>45</sup> 75 Fed. Reg. at 34541 (July 17, 2010).

<sup>46</sup> The percentage of employees in grandfathered plans has already dropped from 56% in 2011 to 25% in 2015. HENRY J. KAISER FAMILY FOUND., 2015 EMPLOYER HEALTH BENEFITS SURVEY (Sept. 2015), <http://buff.ly/1SogmzO>.

<sup>47</sup> *Grote v. Sebelius*, 708 F.3d 850, 865-66 n.8 (7th Cir. 2013) (Rovner, J., dissenting) (citing NAT'L WOMEN'S LAW CENTER, GUARANTEEING COVERAGE OF CONTRACEPTIVES: PAST & PRESENT (Aug. 1, 2012)).

<sup>48</sup> 78 Fed. Reg. at 39873 (July 2, 2013) (citing A. Sonfield, et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 36(2) PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 72-79 (2002)). The mandate makes sure this contraception coverage does not require cost-sharing.

small employer that does offer health care to its employees must comply with the mandate. Finally, for religiously affiliated nonprofits to point to the government’s attempt to accommodate churches and other houses of worship as evidence that the government lacks a compelling interest seems more chutzpah<sup>49</sup> than anything else.<sup>50</sup>

In any event, the existence of exemptions is far from dispositive in assessing the strength of a government interest. Admittedly, the number of exemptions might matter in the face of uncertainty about the importance of the state’s interest. For example, when asking for the first time whether the uniform appearance of police officers is truly a compelling state interest, countless exceptions to the dress code may undercut claims that it is. But when the state’s interests have long been recognized as compelling—such as promoting the health and equality of women—the existence of exceptions should not change that recognition.

The number of exemptions might also matter if they are so numerous that they raise questions about whether the government’s asserted goal is really just a pretext for some illegitimate purpose. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,<sup>51</sup> for example, the city’s claim that its ban on animal slaughter was designed to promote animal welfare was belied by exemptions for every kind of animal slaughter except religious sacrifice—the sacramental practice of the Santeria church planning to move into the city. No such religious targeting is at issue here.

Moreover, plenty of laws have been held to advance compelling interests despite their various exemptions. Indeed, most major laws contain exceptions. Title VII does not apply to small employers and its ban on religious discrimination does not apply to nonprofit religious organizations, yet no one would dispute that it advances the government’s compelling interest in ending discrimination on the basis of sex, race, color, national origin, or religion. Along those lines, the Supreme Court has held that maintaining the uniformity of the tax code is a compelling government interest,<sup>52</sup> despite the tax code being fairly riddled with exceptions compared to the contraception mandate. In short, the lack of universal contraception coverage does not undermine the government’s compelling interests behind the contraception mandate.<sup>53</sup>

## B. Narrow Tailoring

As for narrow tailoring, it is difficult to picture a less intrusive alternative for religiously affiliated nonprofit employers than excusing them from all responsibility for contraception coverage after

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<sup>49</sup> “[C]hutzpah is when a man kills both his parents and begs the court for mercy because he’s an orphan.” Alex Kozinski & Eugene Volokh, *Lawsuit, Shmansuit*, 103 YALE L.J. 463, 467 (1993).

<sup>50</sup> Furthermore, although one might quibble with it, churches and other houses of worship have long been accorded special treatment in religion jurisprudence. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012) (recognizing ministerial exception from anti-discrimination law for church employers).

<sup>51</sup> *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

<sup>52</sup> *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. at 699-700 (“[A] substantial [religious] burden would be justified by the ‘broad public interest in maintaining a sound tax system . . .’”) (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

<sup>53</sup> Moreover, as the government points out, to hold otherwise would mean that none of the required preventive services could be considered compelling, including cancer screenings and child immunizations. Brief for the Respondents at 63, *Zubik v. Burwell*, No.14-1418 (U.S. Feb 10, 2016) [hereinafter Brief for Respondents].

they certify that they are a religious nonprofit whose faith requires them to exclude contraception from their health care plan. As previously noted, in finding that the mandate as applied to for-profit companies failed strict scrutiny, the *Hobby Lobby* majority pointed to the nonprofit accommodation as a less restrictive means for the government to achieve the mandate's goals. While the Supreme Court was careful to reserve its final judgment for a later day,<sup>54</sup> it nonetheless observed, “[a]t a minimum, however, [the nonprofit accommodation] does not impinge on the plaintiffs’ religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS’s stated interests equally well.”<sup>55</sup> Justice Kennedy wrote that the nonprofit accommodation “equally furthers the Government’s interest but does not impinge on the plaintiffs’ religious beliefs.”<sup>56</sup> Given that the accommodation itself constitutes a less restrictive alternative, it is hard to imagine that there is a less restrictive alternative to the accommodation.

Nevertheless, the religiously affiliated nonprofits proffer a list of possible alternatives. Among the proposed alternatives is that the federal government supply the contraception itself—never mind that Congress intended the ACA to build upon the existing system of employment-based insurance<sup>57</sup> or that the odds of Congress creating and funding a new program of no-cost contraception is close to nil in the current political climate.<sup>58</sup> Moreover, even assuming a hypothetical Federal Contraception Bureau,<sup>59</sup> the suggestion that a less restrictive alternative to any law requiring a private actor to provide a benefit or service is for the government to provide it instead is highly radical. Imagine a medical practice that refuses to see black patients, or an employer whose health insurance covers cancer screenings for white employees but not Asian ones. Now imagine that the medical practice or employer argues that a law banning race discrimination in public accommodations or employment benefits is not narrowly tailored because the government could directly provide the services/benefits instead. Similar claims about lack of narrow tailoring could be leveled against just about any civil rights or employment or benefits law.<sup>60</sup> Just as they should be rejected in those contexts, the nonprofits’ claim should be rejected here.

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<sup>54</sup> *Hobby Lobby*, 134 S. Ct. at 2782 (“We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.”). Although a few days later the Court granted an emergency injunction against the original accommodation, it suggested that the letter-to-HHS alternative was acceptable. The Court also cautioned that “this order should not be construed as an expression of the Court’s views on the merits.” *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

<sup>55</sup> *Hobby Lobby*, 134 S. Ct. at 2782.

<sup>56</sup> *Id.* at 2786 (Kennedy, J., concurring).

<sup>57</sup> *Cf. Univ. of Notre Dame*, 786 F.3d at 625 (“The heart of the Affordable Care Act was a decision to approach universal health insurance by expanding the employer-based system of private health insurance that had evolved in our country, rather than to substitute a new ‘single payer’ government program.”).

<sup>58</sup> In its brief, the government explains that none of the proposed alternatives “is currently available, and all would require new legislation.” Brief for Respondents, *supra* note 53, at 76; *see also id.* at 28 (“[T]he legal authority to implement those alternatives does not now exist.”).

<sup>59</sup> *Cf. Wheaton Coll.*, 791 F.3d at 798 (imagining a hypothetical “Emergency Contraception Bureau in the Department of Health & Human Services”).

<sup>60</sup> *Cf. Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (“[W]here is the stopping point to the ‘let the government pay’ alternative?”).

Moreover, a proposed alternative is not a less restrictive alternative if it fails to accomplish the government’s goals. The *Hobby Lobby* Court approved of the nonprofit accommodation because the Justices believed that it would not disrupt students’ or employees’ health care. Mindful of the Supreme Court’s longstanding disapproval of granting religious exemptions that impose burdens on others,<sup>61</sup> the majority emphasized that “[u]nder the accommodation, the plaintiffs’ female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers’ insurers would be responsible for providing information and coverage.”<sup>62</sup> Indeed, the Supreme Court in *Hobby Lobby* repeated more than once that “HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives.”<sup>63</sup>

Unlike the challenged accommodation, which according to the Supreme Court would have “precisely zero” effect on women,<sup>64</sup> the same could not be said for the nonprofits’ proposals, which range from women buying a special contraception-only plan on the exchanges,<sup>65</sup> to women obtaining contraception from an expanded Title X program, to offering tax credits or reimbursements to women who purchase it themselves. On the contrary, these proposed alternatives “would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical,

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<sup>61</sup> In praising the balance struck by the nonprofit accommodation in *Hobby Lobby*, Justice Kennedy observed: “Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. *Yet neither may that same exercise unduly restrict other persons*, such as employees, in protecting their own interests, interests the law deems compelling.” *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring) (emphasis added). The dissent was more direct in highlighting that religious accommodations, whether under the Free Exercise Clause or RFRA, may not substantially burden others: “Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.” *Id.* at 2790 (Ginsburg, J., dissenting). In other words, “[y]our right to swing your arms ends just where the other man’s nose begins.” *Id.* at 2791 (Ginsburg, J., dissenting). In support, the dissent cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which granted a religious exemption from mandatory school attendance laws for Amish teens after noting that “[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred,” *id.* at 230, and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which rejected a mandatory accommodation for Sabbath observers because it burdened the employer and other employees. In fact, the Supreme Court held the accommodation violated the Establishment Clause in part because of the burdens imposed on others, *id.* at 710-11. *See also id.* at 710 (“The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”).

<sup>62</sup> *Hobby Lobby*, 134 S. Ct. at 2782.

<sup>63</sup> *Id.* at 2759.

<sup>64</sup> *Id.* at 2760 (“The effect of the HHS-created accommodation on the women employed by *Hobby Lobby* and the other companies involved in these cases would be precisely zero.”); *see also Priests for Life*, 772 F.3d at 245 (“In holding that *Hobby Lobby* must be accommodated, the Supreme Court repeatedly underscored that the effect on women’s contraceptive coverage of extending the accommodation to the complaining businesses ‘would be precisely zero.’”).

<sup>65</sup> “Perhaps the most obvious solution would be for the Government to offer women . . . the opportunity to sign up for separate, contraceptive-only health plans on the ACA exchange.” Brief for Petitioners 1, *supra* note 12, at 75.



informational, and administrative burdens.”<sup>66</sup> Such disruption is especially problematic for contraception services because, as the D.C. Circuit Court of Appeals emphasized, “[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles.”<sup>67</sup> Thus, the contraception mandate, with its accommodation for religiously affiliated nonprofit employers, is the least restrictive way to accomplish the government’s compelling interests, and should be deemed to pass strict scrutiny.

#### IV. Conclusion

The religiously affiliated nonprofit organizations argue that their religion bars them from providing contraception. The existing contraception mandate regime ensures that they do not have to. Instead, an accommodation allows the nonprofits to opt-out. Once they give notice, the sole responsibility shifts to third parties to fulfill the contraception mandate. The nonprofits argue that this religious accommodation still forces them to facilitate sin because their notice triggers contraception coverage by their health insurance infrastructure. As a matter of federal law, they are simply wrong. Although courts must defer to religious objectors’ interpretation of their religious beliefs, they need not and should not defer to their interpretation of federal law. Because the accommodation does not impose a substantial religious burden, the nonprofits RFRA claim must fail. RFRA, after all, was not meant to shield religious observers from any and all burdens on their religion, no matter how slight.

Moreover, the contraception mandate regime easily passes strict scrutiny. In fact, as the Supreme Court has implicitly recognized, the existing accommodation, which “seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives,”<sup>68</sup> strikes a balance between the nonprofits’ sincere beliefs and the government’s compelling interests. To find otherwise would essentially grant the nonprofits veto power over the government’s own internal actions, and as the Second Circuit noted, “The rights conferred by . . . RFRA do not include a right to have the government or third parties behave in a manner that comports with an individual’s religious beliefs.”<sup>69</sup> This is especially true when the additional accommodation sought would impose on the rights of students and employees who may not share the objectors’ religious beliefs. In sum, “although a religious nonprofit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.”<sup>70</sup>

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<sup>66</sup> *Priests for Life*, 772 F.3d at 265; see also *id.* at 245 (“The relief Plaintiffs seek here, in contrast, would hinder women’s access to contraception. It would either deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless.”); *Univ. of Notre Dame*, 786 F.3d at 618 (“All of Notre Dame’s suggested alternatives would impose significant financial, administrative, and logistical obstacles . . .”).

<sup>67</sup> *Priests for Life*, 772 F.3d at 265; see also *id.* (“Imposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage.”).

<sup>68</sup> *Hobby Lobby*, 134 S. Ct. at 2759.

<sup>69</sup> *Catholic Health Care Sys.*, 796 F.3d at 226.

<sup>70</sup> *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1183.



## About the Author

Professor of Law, University of Miami School of Law. Parts of this issue brief draw from *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013), Debate (with Steven D. Smith): *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. Online 261 (2013), and *Paperwork as a Substantial Religious Burden*, JURIST (May 22, 2015). I would like to thank Michael Cheah, Sergio Campos, Mary Anne Franks, Lili Levi, Maya Mayan, Helen Louise Norton, Leigh Osofsky, and Steven Schnably for their helpful comments and Sabrina Niewialkouski and Ravika Rameshwar for their excellent research assistance.

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