



## Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule

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On August 1, 2012, the Obama administration's contraceptive coverage rule went into effect. That marked a year since the Department of Health and Human Services first announced that new insurance plans would include coverage for contraception with no copay, as part of a broader measure facilitating affordable access to preventive health services from well-woman visits to screenings for HIV.

Contraception coverage is a popular benefit of the Affordable Care Act (ACA).<sup>1</sup> That's not surprising, given that virtually all women use contraception at some point.<sup>2</sup> Indeed, the advent of birth control revolutionized women's lives. Without "the means to control and limit reproduction, the average woman would bear twelve to fifteen children in her lifetime."<sup>3</sup> With contraception, women have greater opportunities to finish school, pursue higher education, advance in the workplace, have healthier pregnancies and infants, and create and nurture families in sizes that work for them. But for too many women, high costs and discriminatory insurance coverage have been a real barrier to effective access and use. That's why the ACA's coverage provision is so important.

Almost immediately, however, the contraceptive coverage rule found vocal opposition from those who argue that it is a threat to religious liberty. These attacks have come on many fronts. Most prominently, the U.S. Conference of Catholic Bishops, which opposes contraception, has pressed the administration to reverse course and rescind the rule altogether. Anti-contraception members of Congress have held hearing after hearing and put forward multiple bills that would undermine the rule.<sup>4</sup> Opponents have also taken to the

courts, filing over thirty lawsuits challenging the rule. The plaintiffs range from religiously identified universities to for-profit manufacturing companies.

### How the Rule Works

- The contraceptive coverage rule **does not apply** to institutions like churches and other houses of worship.<sup>i</sup>
- Although no changes are necessary as a legal or policy matter, in February 2012, the president announced that an **accommodation** is in the works for a certain set of non-profits that have a religious objection to birth control. It is intended to ensure that employees who work at these institutions receive seamless coverage through their insurance plans, but allow the employers not to contribute to the cost of contraception coverage.<sup>ii</sup>
- In the meantime, non-profits with religious objections to contraception have a **safe harbor** until **August 1, 2013**. The rule will not be enforced against them while the administration works out the details of the accommodation.<sup>iii</sup>

Each of these attempts to undermine the rule centers on the same argument: requiring health plans to provide comprehensive coverage that includes contraception infringes on the religious liberty of those who oppose birth control. Some have gone so far as to call the rule the greatest threat to religious liberty that our nation has faced.<sup>5</sup> One member of Congress even likened it to September 11<sup>th</sup> and Pearl Harbor.<sup>6</sup> All this, despite the fact that the rule exempts institutions like churches and other houses of worship, and that the Obama administration is now taking steps to extend an accommodation to yet a broader set of non-profit organizations with objections to contraception that are religiously based. The accommodation is intended to allow these institutions to decline to contribute to the cost or provision of contraceptive coverage, while ensuring that employees at those institutions still receive seamless coverage through their insurance plans.<sup>7</sup>

Although the rhetoric has often been hyperbolic, the legal principles at play are actually unremarkable. The same sort of objections have been made – and rejected – with respect to a series of civil rights and labor laws. This paper breaks down those arguments, explains why the rule does not conflict with religious freedom protections, and shows how the theory these groups are pushing has far-reaching consequences. Indeed, it is opponents of the rule who would turn religious freedom on its head in their attempt to establish a paradigm in which religion becomes a license to discriminate – threatening the government’s ability to take actions promoting equality.

### What is religious freedom law about?

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Freedom of religion and belief has long been a treasured American value and a centerpiece of our constitutional system. As a result, religion has flourished and we are one of the most religiously diverse nations in the world. Religious freedom, however, has never meant the absolute right to conform institutions in the public sphere to religious doctrine. Other values – such as fairness, equality, health and safety, and the government’s ability to administer laws

and programs – also affect the way we order society. Our religious freedom protections safeguard the right to both believe and act on our beliefs; but they are not a license to take actions that discriminate against or harm others.

Two principal safeguards of religious liberty are the First Amendment to the U.S. Constitution, and the Religious Freedom Restoration Act (RFRA).

As interpreted by the U.S. Supreme Court for the past two decades, the First Amendment is not offended where a neutral law of general applicability has an incidental impact on religious exercise. The Free Exercise Clause is triggered only when a law intentionally targets religion. In the 1990 opinion establishing this framework, Justice Antonin Scalia explained that society cannot function where “each conscience is a law unto itself.”<sup>8</sup> In other words, the Supreme Court concluded that the Free Exercise Clause does not create a blanket right to exemptions from every law or regulation that conflicts with someone’s religious teachings or convictions.

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In 1993, Congress responded to this interpretation by passing RFRA to give greater – although not unlimited –

protection to claims of infringement on religious exercise. The statute is intended to restore the test that courts previously used when evaluating such assertions. Instead of asking whether a regulation intentionally targets religion, RFRA asks whether the law places a “substantial burden” on religious exercise, regardless of intent. If yes, the government regulation needs to be important, or in the words of the statute “further a compelling government interest” using the “least restrictive means.” Those interests found to be compelling have included, among others, combating discrimination, and ensuring the comprehensiveness or administrability of a government program.<sup>9</sup>

RFRA asks courts to be highly protective of religion, but Justice Scalia’s words ring true here as well – each conscience cannot be its own law. In a “cosmopolitan nation made up of people of almost every conceivable religious preference,”<sup>10</sup> the right to act on our beliefs has never been and cannot be without limit. That is borne out by the fact that minimal burdens do not trigger RFRA protection, and that even substantial burdens on religious exercise must be tolerated where the countervailing interest is important. Courts have been careful not to exempt an objector where “the requested exemption would detrimentally affect the rights of third parties.”<sup>11</sup> Indeed, the U.S. Supreme Court has explained that allowing an employer to opt out of a benefits law would “operate to impose the employer’s religious faith on the employees.”<sup>12</sup>

## How does that relate to the contraception rule?

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Some opponents of the rule argue that it violates their religious freedom. Because their religious teachings say the use of contraception is a sin, they maintain it burdens their religious exercise to contribute to insurance plans that include contraception coverage, thereby facilitating use by others. The argument fails on each front: the rule does not target religion; contributing to the provision of health insurance that includes services to which you object is not the kind of activity considered a substantial burden on religious exercise; and regardless, the rule furthers compelling interests in women's equality and health.

The contraception rule plainly does not target any faith or religious practice and broadly applies to new health insurance plans. That means that it is both "general" and "neutral," and clearly meets the prevailing test under the Free Exercise Clause.

Nor is RFRA triggered, because the rule does not place a substantial burden on religious exercise – the link between the coverage requirement and religiously objectionable behavior is too distant.<sup>13</sup>

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In many respects, employer-based insurance coverage is akin to salary. Both forms of compensation – insurance and salary – can be used to obtain contraception, neither necessarily will be, and in either case, it is the employee herself who will make the actual decision to use birth control. Consider the following: An employer knows that its employees will almost certainly use their salary for housing. Yet it would be hard to argue that there is a great burden on an employer's religion if an employee uses her salary to pay for an apartment where she cohabitates unmarried with her boyfriend, contrary to her employer's religious beliefs. The connection between the employer's beliefs, payment of salary to employees, and the eventual use of the funds is far too remote.

While not identical, the relationship between furnishing an insurance plan that includes coverage of contraception, among many other benefits, and the eventual possible use of that insurance to obtain contraception, is similarly attenuated. That is how the contraception rule functions. When an employer selects a health plan – as part of the compensation employees receive – it will include coverage of contraception by virtue of the rule (negating the claim that the inclusion will be seen as the employer's proactive endorsement of birth control). Typically, the employee will also have contributed to the cost of the plan. It is then up to her, making an independent intervening choice, to decide whether she will use that insurance to obtain birth control – just as she decides how to use her salary.

Similarly, courts have rejected claims by individuals who argue that they should not pay taxes or fees into a system that covers others' health care they find objectionable.<sup>14</sup> The reasoning is the same – the connection is too remote. Put otherwise, opposition to someone *else's* decision to use birth control does not mean that their use of it violates *your* religious liberty, even where your money indirectly contributes to their access.

Objectors' religious beliefs are certainly genuine, and they deserve respect. But they do not warrant limiting the health care coverage that other individuals – with other religious beliefs – receive.

### We've Been Here Before

- **28 states** require health plans that include prescription drug coverage to cover contraception. These laws were passed in response to decades of gender discrimination in the provision of health insurance.
- In *Catholic Charities of Sacramento, Inc. v. Super. Ct.* and *Catholic Charities of Diocese of Albany v. Serio*, employers challenged the California and New York laws under the federal and state constitutions and lost.<sup>iv</sup> The high courts of both states concluded that the contraceptive coverage laws did not violate religious liberty, and that they promote gender equality.<sup>v</sup>
- The exemption for **houses of worship** in the federal rule is modeled after the California and New York statutes. Neither state law had a special accommodation for non-profits with religious objections, as is being contemplated by the Obama administration for the federal rule.

### There are compelling reasons for this rule: contraception changes women's lives.

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The contraceptive coverage rule does not run afoul of religious liberty protections for yet another independent reason – it furthers the government's compelling interest in women's equality and health. Indeed, the fact that meaningful access to contraception is key to advancing women's equality – in health care benefits, and in society as a whole – was central to the decisions by the high courts of California and New York upholding laws in those states similar to the federal rule.<sup>15</sup>

Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception in *Griswold v. Connecticut*, both maternal and infant mortality rates have declined.<sup>16</sup> Pregnancy spacing reduces harmful birth outcomes such as low birth-weight and premature birth, and pregnancy planning can help women control a number of conditions that negatively impact their own health, such as gestational diabetes and high blood pressure. Indeed, the Centers for Disease Control and Prevention hailed family planning as one of the ten greatest public health achievements of the last century.<sup>17</sup>

But that's only where the impact of contraception begins. Access to affordable and effective contraception plays an important role in facilitating women's participation in all parts of society. When asked how birth control impacts their lives, women report that it has allowed them "to support [themselves] financially," "to stay

in school,” and “to get or keep [a] job or have a career.”<sup>18</sup> Researchers have found that the availability of oral contraception has played a significant role in allowing women to attend college and choose post-graduate paths, including law, medicine, dentistry, and business administration.<sup>19</sup> Indeed, the ability to advance in the workplace through education or on-the-job training, because of the ability to control whether and when to have children, has narrowed the wage gap between men and women. One study shows that the birth control pill led to “roughly one-third of the total wage gains for women in their forties born in the mid-1940s to early 1950s.”<sup>20</sup> In short, contraception helps women take control over their lives; inconsistent access undermines that.

The ACA was designed to redress gender discrimination in health benefits. As Senator Barbara Mikulski, author of the provision on women’s preventive services, noted: “Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . .”<sup>21</sup>

Prescription contraceptives are a form of health care particular to women. Omitting contraception from an insurance package – as so many plans have done in the past – discriminates against women; it means men receive comprehensive health care coverage while women do not. The Equal Employment Opportunity Commission pointed this out over a decade ago. It explained that prohibitions on sex discrimination require employers to include contraceptive coverage when they offer coverage for comparable drugs and devices.<sup>22</sup> As one court explained, “carv[ing] out benefits uniquely designed for women” discriminates against them.<sup>23</sup>

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*Planned Parenthood of Southeastern Pa. v. Casey*,  
505 U.S. 833, 856 (1992)

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Without comprehensive coverage, women of childbearing age routinely pay more than men in health care costs. These costs are not insignificant, are a true barrier to women’s access to effective birth control, and the financial barriers are aggravated by the fact that women typically earn less than men. The cost of contraceptive methods can cause women to have gaps in their use, or to use less effective methods with lower upfront costs like condoms, as opposed to more effective long-acting reversible methods like the IUD.<sup>24</sup> The contraceptive coverage rule helps to eliminate those disparities and their negative consequences. Indeed, a recent study shows that no-cost contraception is likely to significantly decrease unintended pregnancy rates by making long-acting methods more accessible.<sup>25</sup>

The U.S. Supreme Court said it well: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their

reproductive lives.”<sup>26</sup> Ensuring insurance coverage for contraception promotes equality on multiple, intersecting fronts. These are exactly the kinds of interests that are considered “compelling” by legal and lay audiences alike.

## Objections in the name of religion are far-reaching.

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This isn’t the first time that there has been opposition to equality-advancing laws in the name of religion. Institutions have claimed religious objections to everything from integration to equal pay to child labor prohibitions. Time and again, courts have rejected these claims.

### Not Just About Contraception

- The Affordable Care Act requires that health plans cover many more health services than contraception, either as **preventive services**<sup>vi</sup> or **essential health benefits**.<sup>vii</sup> These range from cancer screenings to vaccinations; from prenatal care to mental health care. Accepting the theory contraception opponents are putting forward would mean that any of these services could be at risk.
- In fact, Senator Roy Blunt (R-Mo.) filed an amendment to the transportation authorization bill, Moving Ahead for Progress in the 21<sup>st</sup> Century Act, which would have allowed any insurer or employer to refuse coverage of any health service otherwise required under the Affordable Care Act. The Senate rejected the Blunt Amendment 51 to 48 on March 1, 2012.
- Proponents of these sweeping loopholes, however, continue to press for congressional action.<sup>viii</sup>

Shortly after the enactment of the Civil Rights Act of 1964, prohibiting discrimination based on race in public accommodations, the owner of a restaurant chain argued that the Act violated his religious beliefs opposing integration, and that he should therefore be allowed to exclude African-Americans from his restaurant.<sup>27</sup> Two decades later, Bob Jones University used the same argument. It wanted to maintain its policy denying admission to “applicants engaged in an interracial marriage or known to advocate interracial marriage or dating,”<sup>28</sup> but still get special tax status reserved for institutions that don’t discriminate – all justified by reference to religious belief.<sup>29</sup>

Other entities have argued that they should be allowed to pay women less or give them inferior benefits based on religious beliefs that “the husband is the head of the house.”<sup>30</sup> When faced with equal pay and employment discrimination laws that require employers to treat women equally, these institutions said those laws were an infringement of their religious liberty.<sup>31</sup> Yet other institutions have attempted to evade labor laws by asserting that wage and hour rules<sup>32</sup> or child labor prohibitions<sup>33</sup> impede the religious liberty rights of groups who believe, for example, that children should work, even in hazardous commercial enterprises.<sup>34</sup>

These scenarios may sound unfamiliar or outmoded, but the religious beliefs at issue in these cases were no less real than religious beliefs opposing use of contraception. Nor is the discrimination women face when contraception coverage is withheld. One need not equate harms to recognize that the

theory employed by contraception opponents – if accepted – would not just undermine women’s equality and health, but could lead to exemptions from other civil rights and labor laws. The underlying argument is no different. Religious freedom means everyone is entitled to their religious beliefs. We neither rank the legitimacy of those beliefs, nor allow them to be used as a license to discriminate or harm others. Dismantling the contraception rule would violate these principles.

## What lies ahead?

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This story is still developing. On February 10, 2012, President Obama announced that in addition to the exemption for houses of worship, the administration would extend an accommodation to certain non-profits with religious objections to contraception, wherein those organizations could opt out of contributing to insurance coverage for contraception, but “women will still have access to free preventive care that includes contraceptive services” through their insurance plans.<sup>35</sup> On March 16, 2012, the administration took the first step in that process by asking for public comment on how to craft the proposed modification. In the meantime, a one-year “safe harbor” is in place for non-profit institutions with religious objections to contraception, meaning that these organizations have a reprieve from compliance until August 1, 2013.<sup>36</sup>

Meanwhile, the lawsuits continue to unfold. The challenges fall into roughly two categories – non-profits that qualify for the safe harbor, and for-profit businesses that do not. Some of the lawsuits in the first category have been dismissed as “unripe” because the plaintiffs may end up with an accommodation that addresses the claims they have made; the courts in the remaining non-profit cases are likely to follow suit. The for-profit cases are on a faster track because they will not be affected by the forthcoming modification in the rule. As of publication, only one court – a federal district court in Missouri – has reached the merits of the suit. The court upheld the contraception rule, explaining that “requiring indirect financial support of a practice, from which the plaintiff himself abstains according to his religious principles”<sup>37</sup> is not a substantial burden on religious exercise. Importantly, the court recognized that RFRA “is not a means to force one’s religious practices upon others.”<sup>38</sup> Meanwhile, a district court in Colorado granted a hearing and air conditioning manufacturing company a preliminary injunction, preventing the rule from being enforced against that one business while the court makes a final decision about the substance of the

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claims. Both decisions have been appealed. In one form or another, the contraception litigation is likely to reach the U.S. Supreme Court.

In every sense, contraception has been a game-changer for women and their families, and we see the impacts in society daily. The federal contraceptive coverage rule is another huge step forward. It enables meaningful access for millions of women, who will decide for themselves, based on their own beliefs, whether and when to use birth control. The rule coexists peacefully with *true* religious freedom, where no set of religious beliefs is privileged, imposed on others, or used as a license to discriminate.

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## Endnotes

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<sup>1</sup> Press Release, Planned Parenthood Federation of America, New Research Shows Yet Again that Americans Overwhelmingly Support Access to Affordable Birth Control (June 20, 2012), [www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-shows-yet-again-americans-overwhelmingly-support-access-affordable-birth-control-39719.htm](http://www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-shows-yet-again-americans-overwhelmingly-support-access-affordable-birth-control-39719.htm) (“nearly three in four voters (73 percent) . . . agreed that all women should have access to affordable prescription birth control and that cost should not be a barrier to using the most effective form of birth control”).

<sup>2</sup> RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INSTITUTE, COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 3 (2011), *available at* <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf>.

<sup>3</sup> Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 975 (2007).

<sup>4</sup> *See Executive Overreach: The HHS Mandate Versus Religious Liberty: Hearing Before H. Comm. on the Judiciary*, 112th Cong. (2012); *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?: Hearing Before Subcomm. on Health of the H. Comm. on Energy and Commerce*, 112th Cong. (2012); *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012); Respect for Rights of Conscience Act of 2011, H.R. 1179/S. 1467, 112th Cong. (2011); Religious Freedom Restoration Act of 2012, H.R. 3897/S.2043, 112th Cong. (2012); Religious Liberty Protection Act of 2012, H.R. 3982, 112th Cong. (2012); Religious Freedom Tax Repeal Act of 2012, H.R. 6097, 112th Cong. (2012); Religious Freedom Protection Act of 2012, S. 2092, 112th Cong. (2012).

<sup>5</sup> Jessica Yellin, *Evangelical leaders urged to mobilize against administration contraception policy*, CNN, Mar. 16, 2012, <http://religion.blogs.cnn.com/2012/03/16/evangelical-leaders-urged-to-mobilize-against-administration-contraception-policy>.

<sup>6</sup> Erin Mershon, *Mike Kelley Compares Birth Control Mandate to Pearl Harbor, 9/11*, HUFFINGTON POST, Aug. 1, 2012, [http://www.huffingtonpost.com/2012/08/01/mike-kelly-birth-control-mandate\\_n\\_1729242](http://www.huffingtonpost.com/2012/08/01/mike-kelly-birth-control-mandate_n_1729242).

<sup>7</sup> Certain Preventive Services Under the Affordable Care Act, Fed. Reg. 16501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

<sup>8</sup> *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

<sup>9</sup> *See, e.g.,* *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1368-69 (9th Cir. 1986); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990); *United States v. Lee*, 455 U.S. 252, 258 (1982).

<sup>10</sup> *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

<sup>11</sup> *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 93 (Cal. 2004).

<sup>12</sup> *Lee*, 455 U.S. at 261.

<sup>13</sup> Recently, a federal court rejected a RFRA challenge to the Affordable Care Act's individual mandate, concluding that it imposed no substantial burden, despite claims that the plaintiffs “believe[] in trusting in God to protect [them] from illness or injury” and did not “want to be forced to buy . . . health insurance coverage.” *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *cert. denied*, 2012 WL 2470101 (U.S. June 29, 2012) (No. 11-679). If a law requiring an individual to acquire insurance coverage for herself despite claims that it is contrary to her beliefs doesn't trigger RFRA, the even more tenuous connection between an employer's contribution to an insurance plan for its workers and the health services accessed by workers under that plan should certainly be on safe ground.

<sup>14</sup> See *Tarsney v. O’Keefe*, 225 F.3d 929 (8th Cir. 2000) (taxpayers who religiously oppose abortion lack the ability to claim that paying taxes that support Medicaid, which covers abortion in limited circumstances, violates their free exercise rights because any harm is too attenuated); *Goehring v. Brophy*, 94 F.3d 1294, 1297, 1300 (9th Cir. 1996) (rejecting students’ objections to a university registration fee that was used to subsidize the school’s health program which covered abortion care, reasoning that the payments did not impose a substantial burden on the plaintiffs’ religious exercise because “the plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services”), *overruled on other grounds by* *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Goehring*, 94 F.3d at 1300 n.5 (noting that “it does not logically follow . . . that any governmental action at odds with [sincerely held religious] beliefs constitutes a substantial burden on the right to free exercise of religion”).

<sup>15</sup> See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92 (“The [contraceptive coverage requirement] serves the compelling state interest of eliminating gender discrimination.”); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) (describing the “State’s substantial interest in fostering equality between the sexes, and in providing women with better health care”).

<sup>16</sup> Donna L. Hoyert, Centers for Disease Control, *Maternal Mortality and Related Concepts*, 33 VITAL HEALTH AND STAT. 2 (2007), available at [http://www.cdc.gov/nchs/data/series/sr\\_03/sr03\\_033.pdf](http://www.cdc.gov/nchs/data/series/sr_03/sr03_033.pdf); Marian F. MacDorman & Harry M. Rosenberg, Centers for Disease Control, *Trends in Infant Mortality by Cause of Death and Other Characteristics, 1960-88*, 20 VITAL AND HEALTH STAT. 3 (1993), available at [http://www.cdc.gov/nchs/data/series/sr\\_20/sr20\\_020acc.pdf](http://www.cdc.gov/nchs/data/series/sr_20/sr20_020acc.pdf).

<sup>17</sup> Centers for Disease Control and Prevention, *Ten Great Public Health Achievements – United States, 1990-1999*, MORBIDITY AND MORTALITY WEEKLY REPORT 242 (1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf>

<sup>18</sup> Jennifer Frost & Laura Duberstein Lindberg, Guttmacher Institute, *Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics*, CONTRACEPTION (forthcoming Nov. 2012).

<sup>19</sup> See Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. OF POL. ECON., 730, 764 (2002), available at [http://dash.harvard.edu/bitstream/handle/1/2624453/Goldin\\_PowerPill.pdf?sequence=4](http://dash.harvard.edu/bitstream/handle/1/2624453/Goldin_PowerPill.pdf?sequence=4).

<sup>20</sup> Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, AM. ECON. J.: APPLIED ECON. 26-27 (2012), available at [http://www-personal.umich.edu/~baileymj/Opt\\_In\\_Revolution.pdf](http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf).

<sup>21</sup> 155 CONG. REC. S11979, S11988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

<sup>22</sup> Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html> (“Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.”); see also *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). *But see* *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

<sup>23</sup> *Erickson*, 141 F. Supp. 2d at 1271.

<sup>24</sup> Guttmacher Institute, Testimony before the Committee on Preventive Services for Women, Institute of Medicine 8 (Jan. 12, 2011).

<sup>25</sup> Jeffrey F. Peipert, et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, OBSTETRICS & GYNECOLOGY (forthcoming Dec. 2012).

<sup>26</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>27</sup> *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

<sup>28</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 581 (1983).

<sup>29</sup> *Id.* at 580.

<sup>30</sup> *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990); *see also E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

<sup>31</sup> *Dole*, 899 F.2d at 1393; *Fremont Christian Sch.*, 781 F.2d at 1367.

<sup>32</sup> *Tony & Susan Alamo Found'n v. Sec'y of Labor*, 471 U.S. 290, 298-99 (1985).

<sup>33</sup> *Brock v. McGee Bros.*, 867 F.2d 196, 198-99 (4th Cir. 1989) (“the religious beliefs of church members cannot immunize the employers from enforcement of federal statutes”).

<sup>34</sup> *Id.* at 199 (“the sectarian purposes of church members . . . cannot be sought by putting children to productive work at power saw tables and on brick masons’ scaffolding, in violation of the nation’s labor laws”).

<sup>35</sup> President Barack Obama, Remarks on Preventive Care at James S. Brady Press Briefing Room (Feb. 10, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>).

<sup>36</sup> Center for Consumer Information and Insurance Oversight and Centers for Medicare & Medicaid Services, 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 (Aug. 15, 2012).

<sup>37</sup> *O'Brien v. U.S. Dept. of Health & Human Servs.*, No. 4:12-CV-476, slip op. at 11 (E.D. Mo. Sept. 28, 2012).

<sup>38</sup> *Id.* at 12.

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<sup>i</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Fed. Reg. 8725, 8726 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130).

<sup>ii</sup> Certain Preventive Services Under the Affordable Care Act, Fed. Reg. 16501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

<sup>iii</sup> Center for Consumer Information and Insurance Oversight and Centers for Medicare & Medicaid Services, 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 (Aug. 15, 2012).

<sup>iv</sup> *See Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 74 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006). Although those courts did not address the Religious Freedom Restoration Act (“RFRA”) because it is inapplicable to state laws, the analysis those courts applied under state constitutional law is similar to the analysis courts conduct under RFRA.

<sup>v</sup> *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92 (“The [contraceptive coverage requirement] serves the compelling state interest of eliminating gender discrimination.”); *Catholic Charities of Diocese*

*of Albany*, 859 N.E.2d at 468 (describing the “State’s substantial interest in fostering equality between the sexes, and in providing women with better health care”).

<sup>vi</sup> Section 1001, § 2713(a)(1)-(5) of the Affordable Care Act requires that insurance plans cover preventive services as outlined in guidelines issued by the U.S. Preventive Service Task Force, the Advisory Committee on Immunization Practices, and the Health Resources and Services Administration. 42 U.S.C. § 300gg-13 (2012).

<sup>vii</sup> Section 1302 of the Affordable Care Act requires that ten categories of care be covered as essential health benefits in small group and individual plans. 42 U.S.C. § 18022 (2012).

<sup>viii</sup> *See, e.g.*, Letter from Cardinal DiNardo, Chairman, Comm. of Pro-Life Activities, U.S. Conference of Catholic Bishops, to Members of Congress (Aug. 3, 2012), *available at* <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Cardinal-DiNardo-s-August-2012-Letter-to-Congress-Regarding-Conscience-Protection.pdf> (urging Congress not to let Senate tabling of the Blunt amendment be the last effort made this year).