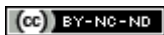


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RFRA'S COMPELLING INTEREST ANALYSIS

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# COMPELLING INTEREST CACODOXY: WHY THE CONTRACEPTION MANDATE FAILS RFRA'S COMPELLING INTEREST ANALYSIS

Wesley A. Prichard\*

*“There is not a single instance in history in which civil liberty was lost, and religious liberty preserved entire. If therefore we yield up our temporal property, we at the same time deliver the conscience into bondage.”*

—John Witherspoon<sup>1</sup>

## INTRODUCTION

Since its birth in 2011, the Patient Protection and Affordable Care Act's ("ACA")<sup>2</sup> Contraception Mandate (the "Mandate")<sup>3</sup> has been a frequent subject of discussion, debate, and litigation. From the outset, the government has defended the Mandate generally in the name of public health and gender equality.<sup>4</sup> While both public health and gender equality are well within the government's regulatory domain, these broadly framed interests are inadequate to survive the compelling

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<sup>1</sup> John Witherspoon, *The Dominance of Providence Over the Passions of Men (1776)*, in *POLITICAL SERMONS OF THE AM. FOUNDING ERA, 1730–1805*, at 529, 549 (Ellis Sandoz ed., 1998).

<sup>2</sup> Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.).

<sup>3</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>4</sup> *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2779 (2014); Brief for Respondents at 54–55, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Zubik* Government Brief].

interest test under the Religious Freedom Restoration Act (“RFRA”)<sup>5</sup> and its companion, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).<sup>6</sup>

As RFRA’s text provides, when a person’s sincere religious exercise is substantially burdened, the government must demonstrate that application of the burden *to the person is in furtherance of* a compelling governmental interest.<sup>7</sup> As the Supreme Court unanimously held in *O Centro*, RFRA’s “to the person” language requires that strict scrutiny is applied to the asserted harm of granting specific exemptions to a particular religious claimant, rather than the broadly formulated interests justifying the general applicability of a law.<sup>8</sup> As will be explained, there is no compelling governmental interest under RFRA to enforce the Mandate against religious non-profits or closely-held businesses that sincerely hold religious objections, especially for coverage of contraceptives that operate to prevent implantation after fertilization.

In *Hobby Lobby*, the Court assumed *arguendo* that the government had a compelling interest in the Mandate in order to base its decision on narrow tailoring.<sup>9</sup> In doing so, the Court never conducted a RFRA compelling interest analysis.<sup>10</sup> The purpose of this Note is to argue that the government lacks a compelling interest in enforcing the Mandate against religious non-profits or closely-held businesses after such an organization proves that the Mandate substantially burdens a sincere religious belief. Part I lays the scope and foundation of this Note, providing information on RFRA’s compelling interest test, the organizations and their beliefs, the Mandate, and the coverage mandated. Part II applies RFRA’s compelling interest test to religious non-profits and closely-held businesses. It notes the numerous

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<sup>5</sup> 42 U.S.C. § 2000bb–bb-4 (2012).

<sup>6</sup> 42 U.S.C. § 2000cc.

<sup>7</sup> 42 U.S.C. § 2000bb-1(b).

<sup>8</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (O Centro)*, 546 U.S. 418, 430–31 (2006) (“[T]his Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants.”).

<sup>9</sup> *Hobby Lobby*, 134 S. Ct. at 2780 (finding it unnecessary to adjudicate the compelling interest issue). However, there are five members of the Court who would have held that the government has satisfied the compelling interest test. *See id.* at 2785–86 (Kennedy, J., concurring) (compelling interest in providing insurance coverage that is necessary to protect the health of female employees broadly); *id.* at 2799 (Ginsburg, J., dissenting) (joined by Justices Breyer, Kagan, and Sotomayor, finding a compelling interest in public health and women’s well-being broadly).

<sup>10</sup> *Hobby Lobby*, 134 S. Ct. at 2780 (finding it unnecessary to adjudicate the compelling interest issue).

exemptions already in place, the lack of evidence supporting the government's claim that the Mandate furthers women's health, and the small impact the Mandate has on a national scale for employers whose sincerely held religious beliefs are not substantially burdened by its imposition. Part III gives the current status of the *Zubik* cases, which in part involve the subject of this Note.

## I. BACKGROUND AND ESTABLISHING SCOPE

### A. RFRA: *The Compelling Interest Test*

RFRA's compelling interest test provides that: "Government may substantially burden a person's exercise of religion only if it demonstrates *that application of the burden to the person*—(1) is *in furtherance of* a compelling governmental interest . . . ."<sup>11</sup> This protection is greater than the balancing test used by the Court in the *Sherbert* line of cases, representing a legislative effort to protect religious freedom by a measure more than required by the First Amendment alone.<sup>12</sup> A compelling governmental interest under RFRA must be supported by two fronts—first, it must be specific to the case at hand,<sup>13</sup> and second, the government's actions must be in furtherance of its asserted interest.<sup>14</sup>

As to the first measure, RFRA contemplates an inquiry "more focused" than interests "couched in very broad terms" such as promoting public health or gender equality.<sup>15</sup> RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."<sup>16</sup> This analysis requires the Court to "loo[k] beyond broadly formulated interests" and "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."<sup>17</sup> In other words, RFRA requires that the Court "look

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<sup>11</sup> 42 U.S.C. § 2000bb-1(b) (emphasis added).

<sup>12</sup> *Hobby Lobby*, 134 S. Ct. at 2761 n.3 ("RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.").

<sup>13</sup> 42 U.S.C. § 2000bb-1(b) (that application of the burden to the person); *O Centro*, 546 U.S. at 433.

<sup>14</sup> 42 U.S.C. § 2000bb-1(b)(1).

<sup>15</sup> *Hobby Lobby*, 134 S. Ct. at 2779.

<sup>16</sup> *O Centro*, 546 U.S. at 430–31 (quoting 42 U.S.C. § 2000bb-1(b)).

<sup>17</sup> *Id.* at 431.

to the marginal interest in enforcing the contraceptive mandate in the[] case[]” at hand.<sup>18</sup>

As to the second measure, the government must evidence how a specific religious burden advances its interest.<sup>19</sup> This analysis looks to the exemptions and exceptions to the law,<sup>20</sup> especially where they are only available for secular<sup>21</sup> or certain religious reasons.<sup>22</sup> In essence, the “in furtherance of” analysis looks to whether the manner in which the regulatory scheme was crafted is consistent with its asserted interest.<sup>23</sup>

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<sup>18</sup> *Hobby Lobby*, 134 S. Ct. at 2779.

<sup>19</sup> *O Centro*, 546 U.S. at 433 (“It is established in strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (internal quotations marks omitted) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)).

<sup>20</sup> *Lukumi*, 508 U.S. at 546–47 (“Where government . . . fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”).

<sup>21</sup> If the government’s interests are not “pursued with respect to analogous nonreligious conduct,” that is evidence that granting a religious exemption would not truly undercut any compelling interest. *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (citing *Lukumi*, 508 U.S. at 546).

<sup>22</sup> *Hobby Lobby*, 134 S. Ct. at 2782 n.41 (“[The government] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests” when it “provides an exception to a general rule for . . . only certain religious reasons.” (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), No. 13-6827)).

<sup>23</sup> Brief for Petitioners at 58, *E. Tex. Baptist Univ. v. Burwell*, 136 S. Ct. 1557 (No. 15-35) [hereinafter ETBU Brief].

### B. *The Organizations and Their Beliefs*

In order to reach the compelling interest test, a claimant must first prove that they face a substantial burden<sup>24</sup> on a sincerely-held<sup>25</sup> religious belief.<sup>26</sup> This Note assumes that the claimant has already done so. To bolster this assumption,<sup>27</sup> this Note further assumes that the claimant is either a religious non-profit<sup>28</sup> or a closely-held business.<sup>29</sup> To further limit this Note's scope, the belief proffered by the business is assumed to be that human life begins at conception, and that deliberate destruction

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<sup>24</sup> Demonstrating that a law that requires, subject to penalty, the claimant to violate their sincere religious belief is generally sufficient to meet the substantial burden requirement. *See, e.g., Holt*, 135 S. Ct. at 862 (claimant faced disciplinary action for growing a beard in accordance with Muslim faith); *O Centro*, 126 S. Ct. at 426 (claimant prohibited from drinking sacramental tea due to its hallucinogenic effect).

<sup>25</sup> It is worth emphasizing that the burden on the claimant is to prove mere *sincerity*, not *validity*, of a religious belief. The Court has repeatedly recognized that judging the validity of a religious belief is an improper undertaking for the tribunal. *E.g., Hobby Lobby*, 134 S. Ct. at 2778 (“[The government] and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.”); *Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.”).

<sup>26</sup> 42 U.S.C. § 2000bb-1(a)–(b) (2012).

<sup>27</sup> Although the proceeding argument would apply with equal force to for-profit businesses in similar factual circumstances, including public corporations, the Court's pre-*Hobby Lobby* jurisprudence is unkind to religious claims by an organization purposed to make a profit. *See United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.”). Although *Lee* is a pre-RFRA case, Justice Ginsburg argues in dissent—with the support of three other Justices—that *Lee* should have controlled *Hobby Lobby*'s outcome. *Hobby Lobby*, 134 S. Ct. at 2803–06 (Ginsburg, J., dissenting). It is unclear if the Court will follow *Hobby Lobby* when presented with a for-profit religious claimant in the future, or if the jurisprudence will return to *Lee*'s restrictive approach. *See Elizabeth Sepper, Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 220–32 (2015) (arguing that sex and sexual orientation cabin *Hobby Lobby*'s rationale).

<sup>28</sup> Religious non-profits for purposes of this Note are those that are tax exempt as 501(c)(3) organizations and permitted to hire on the basis of religion under Title VII. *See* 26 U.S.C. § 501(c)(3) (2012); Title VII of the Civil Rights Act of 1963, 42 U.S.C. § 2000e-1(a).

<sup>29</sup> Closely-held businesses are those “owned and controlled by members of a single family.” *Hobby Lobby*, 134 S. Ct. at 2774.

of life from any stage post-fertilization<sup>30</sup>—even pre-implantation<sup>31</sup>—is immoral.<sup>32</sup> Therefore, the religious objection that serves as the basis of this Note is not to all contraceptives required by the Mandate,<sup>33</sup> but those forms of contraception that have post-fertilization mechanisms of action such as *ella*,<sup>34</sup> Plan B,<sup>35</sup> and Intrauterine Devices (“IUDs”).<sup>36</sup>

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<sup>30</sup> “Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual.” Janetti Signorelli et al., *Kinases, Phosphatases and Proteases During Sperm Capacitation*, 349 CELL TISSUE RES. 765, 765 (2012).

<sup>31</sup> Federal regulations define pregnancy as beginning at implantation. Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997); 45 C.F.R. § 46.202(f) (2013). Therefore, contraceptives that operate to prevent implantation of an already developing human embryo in the uterine wall are not recognized to induce abortions under the current regulatory regime. See generally Christopher M. Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy*, 9 NAT’L CATH. BIOETHICS Q. 542 (2009).

<sup>32</sup> *Hobby Lobby*, 134 S. Ct. at 2764.

<sup>33</sup> Again, the proceeding argument would apply with equal force to an objection to *all* contraceptives if the employer, under similar factual circumstances, could substantiate that it rises out of a sincerely held religious belief that is substantially burdened under RFRA. This Note assumes a narrower scope to avoid objections based on the sincerity of such a belief, and instead focuses on the forms of contraception at issue in *Hobby Lobby* and *Geneva College*. See *Hobby Lobby*, 134 S. Ct. at 2765; *Geneva Coll. v. Burwell*, 778 F.3d 422, 431 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 445 (2015) (No. 15-191).

<sup>34</sup> Ulipristal Acetate (*ella*) has a chemical make-up similar to the abortion drug RU-486, known as Mifeprex. Like Mifeprex, *ella* works by blocking progesterone (preventing the maintenance of the uterine wall), thus either preventing a developing human embryo from implanting in the uterus or by killing the human embryo by starvation. Brief for Association of American Physicians & Surgeons et al. as Amici Curiae Supporting Petitioners at 13–14, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

<sup>35</sup> “If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).” FDA, *FDA’s Decision Regarding Plan B: Questions and Answers* (updated Dec. 7, 2015), <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109795.htm>.

<sup>36</sup> “If fertilization does occur, the IUD keeps the fertilized egg from implanting in the lining of the uterus.” U.S. DEP’T OF HEALTH & HUM. SERVS., BIRTH CONTROL METHODS: FREQUENTLY ASKED QUESTIONS, <http://www.womenshealth.gov/publications/our-publications/fact-sheet/birth-control-methods.pdf> (last updated Nov. 21, 2011).

C. *The Fourth Branch at Work: The Affordable Care Act's Contraception Mandate*

Unless an exemption<sup>37</sup> applies, the ACA requires that an employer's health insurance coverage provide "preventative care and screenings" without "any cost sharing requirements."<sup>38</sup> However, Congress did not define the preventative care to be covered by the ACA.<sup>39</sup> Rather, Congress delegated the decision<sup>40</sup> to the Health Resources and Services Administration ("HRSA").<sup>41</sup> HRSA determined which preventative care fell within the Mandate by consulting a non-profit group of volunteer advisors, the Institute of Medicine ("IOM").<sup>42</sup>

Based on IOM's recommendations, HRSA promulgated the Women's Preventative Services Guidelines, which provide that nonexempt employers must provide coverage, without cost sharing, for all contraceptive methods approved by the Food and Drug Administration ("FDA").<sup>43</sup> Although the majority of the FDA-approved methods of contraception work by preventing the fertilization of an egg, the broad definition suggested by IOM and adopted by HRSA include the

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<sup>37</sup> The difference between exceptions and exemptions is duly noted. However, when discussing the ACA both will be referred to as "exemptions" for simplicity's sake and to avoid unneeded equivocation or confusion.

<sup>38</sup> 42 U.S.C. § 300gg-13(a)(4) (2012).

<sup>39</sup> *Hobby Lobby*, 134 S. Ct. 2751, 2762 (2014).

<sup>40</sup> A plausible argument against the existence of a compelling governmental interest behind the Mandate that this note will not pursue is that, because the Mandate is a regulatory rather than statutory requirement, it cannot qualify as a compelling interest under RFRA. *See O Centro*, 546 U.S. 418, 432 (2006) ("[T]he Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. . . . [T]here [wa]s no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the [church]."); Brief of Bart Stupak and the Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioners at 23–27, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

<sup>41</sup> 42 U.S.C. § 300gg-13(a)(4).

<sup>42</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>43</sup> *Id.* at 8725–26 n.1. HRSA stated during its promulgation that the purpose of the Mandate generally is to safeguard public health and assure that women have access to health care services. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).



forementioned contraceptives that operate by preventing an already fertilized egg from further development via implantation.<sup>44</sup>

HRSA was also authorized to establish an exemption from the Mandate for “religious employers.”<sup>45</sup> The religious employer exemption HRSA adopted encompasses only churches and their integrated auxiliaries.<sup>46</sup> HRSA explained that this exemption was designed to protect only “house[s] of worship” while excluding their non-profit charitable and educational arms.<sup>47</sup> Notably, this particular exemption categorically applies to all entities that fall within its definition, regardless of whether the entities actually object to compliance.<sup>48</sup>

In addition, Congress created a broad exemption for “grandfathered health plans”—those that existed prior to March 23, 2010—and did not make specific changes after that date.<sup>49</sup> There is no legal requirement that these grandfathered plans ever be phased out<sup>50</sup>—employers may add new employees to the grandfathered plans and adjust certain costs without becoming subject to the Mandate.<sup>51</sup> However, even those grandfathered plans were not exempted from compliance with certain “particularly significant” protections of the ACA.<sup>52</sup> But, Congress in its legislative judgment chose not to require grandfathered plans to include coverage for preventative services, placing the Mandate outside the “particularly significant”

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<sup>44</sup> FDA, *Birth Control: Medicines to Help You*, <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (last updated Sept. 8, 2016).

<sup>45</sup> Exemption and Accommodations in Connection with Coverage of Preventive Health Services, 45 C.F.R. § 147.131(a) (2013).

<sup>46</sup> *Id.* The religious employer exemption to the Mandate incorporated 26 U.S.C. §§ 6033(a)(3)(A)(i) & (iii), provisions in the Internal Revenue Code exempting certain entities from the requirement of filing a federal income tax return. *Compare* 26 U.S.C. §§ 6033(a)(3)(A), *with* 42 U.S.C. § 2000e-1(a) (2012) (the broader Title VII exemption).

<sup>47</sup> 76 Fed. Reg. 46,621, 46,623.

<sup>48</sup> 45 C.F.R. § 147.131(a).

<sup>49</sup> 42 U.S.C. § 18011(a), (e) (2012).

<sup>50</sup> *Hobby Lobby*, 134 S. Ct. 2751, 2764 n.7 (2014).

<sup>51</sup> 42 U.S.C. § 18011(b)–(c); Preservation of right to maintain existing coverage, 45 C.F.R. § 147.140(a)–(b), (g) (2010).

<sup>52</sup> *Hobby Lobby*, 134 S. Ct. at 2780 (citing Interim Final Rules for 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 (June 17, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147)).

protections of the ACA.<sup>53</sup> As a second legislative exemption, employers with fewer than fifty full-time employees are not required to provide health insurance at all, much less comply with the Mandate.<sup>54</sup>

Therefore, religious non-profits that do not qualify for the religious, small business, or grandfathered plan exemptions must provide contraception that operates to prevent the implantation and further development of a human embryo in order to comply with the Mandate promulgated by HRSA.<sup>55</sup> In other words, if the non-profit is not a “house of worship” according to the exemption created by HRSA, it must comply with the Mandate even though the non-profit would otherwise qualify for federal conscience protection in other healthcare and employment decisions.<sup>56</sup>

## II. COMPELLING INTEREST: THE CONTROVERSY

Two recent decisions, *O Centro* and *Holt*, provide guidance for the compelling interest test’s application.<sup>57</sup> In *O Centro*, a minority religion with origins in the Amazon Rainforest was prohibited from receiving its communion, which consisted of sacramental tea brewed from plants containing a hallucinogen regulated under the

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<sup>53</sup> 42 U.S.C. § 18011(a)(4). Some portions of the ACA that Congress deemed “particularly significant” over the preventative services requirement include the elimination of lifetime limits and covering dependents up to age 26. *Id.*; Interim Final Rules for Group Health Plans and Health Insurance, 75 Fed. Reg. at 34,540.

<sup>54</sup> 26 U.S.C. § 4980H(c)(2) (2012).

<sup>55</sup> Nonexempt religious employers who hold sincere religious objections to contraception must comply with the Mandate through an “accommodation.” ETBU Brief, *supra* note 23, at 18–20. The details of the accommodation are complex and beyond the scope of this Note, but its objective is to effectuate contraceptive coverage from inside the employer’s “insurance coverage network” using the employer’s existing “coverage administration infrastructure” to make the coverage flow. *Id.*; Coverage of Certain Preventative Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). Therefore, there is significant differential treatment between truly exempt religious employers and those who must comply with the Mandate via the “accommodation.” Exempt employers need not file any form with the government while nonexempt employers must provide the government information about their insurance network as a necessary condition for ensuring that cost-free contraceptive coverage is provided through their own plan infrastructure. ETBU Brief, *supra* note 23, at 19. This Note pertains to nonexempt religious employers described in Part I(B) *infra* who must comply with the Mandate, whether through the accommodation or otherwise.

<sup>56</sup> See, e.g., 42 U.S.C. § 300a-7 (2012) (safeguarding entities that oppose sterilization or abortion on the basis of religious beliefs or moral convictions); *id.* § 1395w-22(j)(3)(B) (precluding Medicare plans from being forced to provide certain services to which sponsors object on moral or religious grounds); *id.* § 1396u-2(b)(3)(B) (precluding same for Medicaid); *id.* § 2000e-1(a) (allowing religious corporations, associations, educational institutions, or societies to use religion as a criterion in employment decisions).

<sup>57</sup> See *O Centro*, 546 U.S. 418 (2006); *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

federal Controlled Substances Act.<sup>58</sup> The sect sued under RFRA to block enforcement of the Act's ban of the sacramental tea.<sup>59</sup> The government's primary position was that it had a compelling interest in the uniform application of the Act, such that no exception could be made to accommodate the sect's concededly sincere religious practice.<sup>60</sup> Unanimously,<sup>61</sup> the Court held that the government had not carried their burden of proving a compelling interest under RFRA.<sup>62</sup>

The *O Centro* Court held that although Congress had a compelling interest in generally banning Schedule I substances due to their dangerous nature, mere invocation of the general characteristics of Schedule I substances could not meet its burden in this specific case.<sup>63</sup> RFRA required a "more focused inquiry" whereby the government must consider the harms posed by the particular use at issue—the circumscribed, sacramental use of the tea by the church.<sup>64</sup> The government could not show that it considered such use when listing the substance under Schedule I, and the Court held that Congress's determination that the tea's hallucinogen be listed under Schedule I did not provide a categorical answer to relieve the government of the obligation to shoulder that burden of proof.<sup>65</sup>

Further, the *O Centro* Court did not find the Government's asserted interest—uniform application of the Act—to be genuine, as the Act contained an exemption made to a Schedule I ban for religious use.<sup>66</sup> The Native American Church for thirty five years enjoyed a regulatory exemption<sup>67</sup> for the use of peyote, an exemption extended by Congress to all members of every recognized Indian Tribe.<sup>68</sup> Comparing the religious use of peyote to the religious use of the sacramental tea, the Court found

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<sup>58</sup> *O Centro*, 546 U.S. at 423.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Chief Justice Roberts delivered the opinion of the eight-justice Court; Justice Alito took no part in the decision. *Id.* at 422.

<sup>62</sup> *Id.* at 439.

<sup>63</sup> *Id.* at 432.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 433.

<sup>67</sup> Native American Church, 21 C.F.R. § 1307.31 (2010).

<sup>68</sup> Traditional Indian religious use of peyote, 42 U.S.C. § 1996a(b)(1) (2012).

it “difficult to see how” Congress could rely on the same findings of fact to justify exempting one and banning the other.<sup>69</sup>

In *Holt*, an Arkansas inmate and devout Muslim wished to grow a half-inch beard in accordance with his religious belief, but he was precluded from doing so due to the Arkansas Department of Correction’s grooming policy.<sup>70</sup> The petitioner sued under RLUIPA<sup>71</sup> to block the shaving of his beard.<sup>72</sup> The government’s primary position was that it had a compelling interest in prison safety and security such that an exception could not be made to accommodate the inmate’s sincere religious exercise.<sup>73</sup> In another unanimous<sup>74</sup> decision, the Court held that the government

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<sup>69</sup> *O Centro*, 546 U.S. at 433.

<sup>70</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>71</sup> *Holt* was decided under RLUIPA, which has a compelling interest test identical to RFRA’s. *Compare* 42 U.S.C. § 2000cc-1(a) (2012) *with* § 2000bb-1(b).

<sup>72</sup> *Holt*, 135 S. Ct. at 859.

<sup>73</sup> *Id.* at 863.

<sup>74</sup> Justice Ginsburg filed a concurring opinion, in which Justice Sotomayor joined. *Id.* at 867 (Ginsburg, J., concurring). Justice Sotomayor also filed a concurring opinion of her own. *Id.* (Sotomayor, J., concurring). Justice Ginsburg’s concurring opinion in *Holt* is of particular interest because *Holt* was handed down only one year after *Hobby Lobby*. As previously noted, Justice Ginsburg’s four-member dissent in *Hobby Lobby* would have found that the government proved a compelling interest “in public health and women’s well being,” interests which she found “concrete, specific, and demonstrated by a wealth of empirical evidence.” *Hobby Lobby*, 134 S. Ct. 2751, 2799 (Ginsburg, J., dissenting). Justice Ginsburg’s dissent in *Hobby Lobby*, however, does not undergo RFRA’s focused compelling interest analysis that she and all other members of the Court supported in both *O Centro* and *Holt*—her *Hobby Lobby* dissent does not consider how the broad governmental interests in public health and women’s well being, that are supported by empirical evidence generally, would be affected by the exemption of *Hobby Lobby* specifically. *See id.* Justice Ginsburg takes two sentences to explain her shift of supporting a focused interest inquiry in *O Centro* to a general interest inquiry in *Hobby Lobby* and back to a focused interest inquiry in *Holt*. *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring). Justice Ginsburg explained that unlike the exemption approved by the Court in *Hobby Lobby*, the exemption approved in *Holt* (and presumably in *O Centro*) “would not detrimentally affect others who do not share petitioner’s belief.” *Id.* (Ginsburg, J., concurring) (citations omitted). From Justice Ginsburg’s *Holt* concurrence, it is unclear why she believes that an exemption’s effect on third parties controls the scope of the compelling interest analysis (a general inquiry when third parties are affected versus a focused inquiry when no third parties are affected). Nothing in RFRA’s text or its basic purposes support changing the scope of the compelling interest inquiry based on third party benefits, although third party benefits could certainly be factors considered in a focused compelling interest inquiry and the accompanying least restrictive means analysis. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

failed to carry its burden of proving a compelling interest under RFRA and RLUIPA.<sup>75</sup>

The *Holt* Court found the government's argument "hard to take seriously" that allowing Petitioner's half-inch beard would compromise the compelling interest of prison safety by enabling the flow of contraband.<sup>76</sup> Although prison officials are due respect as experts in their opinions evaluating the likely effects of altering prison rules, "a degree of deference that is tantamount to unquestioning acceptance" would have been necessary to accept the government's argument.<sup>77</sup> The Court, unwilling to abdicate the responsibility conferred by Congress to apply RLUIPA and RFRA's rigorous compelling interest inquiry, did not afford the government that unwavering deference.<sup>78</sup>

Neither did the *Holt* Court accept the government's second argument, that its grooming policy is necessary to further the compelling interest of security by preventing prisoners from disguising their identities.<sup>79</sup> The Court held that the government failed to prove why the risk that a prisoner will shave a half-inch beard to disguise himself is so great that half-inch beards cannot be allowed, even though prisoners were allowed a quarter-inch beard under an exemption for medical reasons.<sup>80</sup> The quarter-inch beards allowed for medical reasons, like the half-inch beard requested by Petitioner for religious reasons, could be shaved off at a moment's notice, but the government "apparently d[id] not think that this possibility raise[d] a serious security concern."<sup>81</sup>

Finally, the Court held that the government did not adequately respond to two arguments implicated in the compelling interest analysis: why its grooming policy is substantially underinclusive and why the vast majority of states and the federal government can permit inmates to grow half-inch beards for religious reasons, but Arkansas cannot.<sup>82</sup> As to the underinclusive argument, the Court held that a half-inch

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<sup>75</sup> *Holt*, 135 S. Ct. at 859.

<sup>76</sup> *Id.* at 863.

<sup>77</sup> *Id.* at 864.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 864–65.

<sup>80</sup> *Id.* at 865.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 865–66.

beard would not impair a compelling interest in safety any more than the quarter-inch beard already allowed, and rejected the government's argument as a reformulation of the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."<sup>83</sup> As to the second argument, the Court held that when so many exemptions exist, at a minimum, the government must offer persuasive reasons why it believes that it must take a different course in a particular instance.<sup>84</sup>

In sum, the Court in *O'Centro* and *Holt* made clear that RFRA's "to the person" language requires a "focused inquiry" whereby the government must substantiate their compelling interest to the specific religious objectors.<sup>85</sup> Further, the government's compelling interest may be undercut by exemptions<sup>86</sup> and a failure to consider relevant factors that may affect the purported interest.<sup>87</sup>

#### A. *To the Person*

Similar to *Holt* and *O Centro*, the government cannot prove a compelling interest in enforcing the Mandate so as to substantially burden the sincere religious exercise of religious non-profits and closely-held businesses. The government has supported its interest by stating that "requiring [women] to take steps to learn about, and sign up for, a new health benefit, would make that coverage accessible to fewer women."<sup>88</sup> This claim, however, is unsubstantiated by any meaningful evidence. Like in *O Centro*, even if the government has a compelling interest in enforcing a law as a general matter, that does not provide a categorical justification for denying a specific exemption for the narrow category of religious objectors.<sup>89</sup>

In *Hobby Lobby*, the government did not assert a compelling interest sufficient to meet RFRA's focused inquiry.<sup>90</sup> Instead, the government put forth three interests

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<sup>83</sup> *Id.* at 866 (quoting *O Centro*, 546 U.S. 418, 436 (2006)).

<sup>84</sup> *Id.*

<sup>85</sup> *O Centro*, 546 U.S. 418, 432 (2006); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>86</sup> *O Centro*, 546 U.S. at 433; *Holt*, 135 S. Ct. at 865.

<sup>87</sup> *Holt*, 135 S. Ct. at 865–66.

<sup>88</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>89</sup> *O Centro*, 546 U.S. at 432; Brief for Petitioners at 54–55, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Zubik* Petitioner Brief].

<sup>90</sup> Brief for Petitioners at 38–51, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354) [hereinafter *Hobby Lobby* Government Brief].

couched in broad terms: (1) protection of rights of corporate-respondents' employees in a comprehensive insurance system, (2) public health, and (3) equal access for women to health-care services.<sup>91</sup> Although the government mentioned once at argument and once in its brief that the employees of Hobby Lobby and Mardel and their covered family members would be affected, the government never particularized *how* they would be affected if the closely-held businesses were granted a religious objector exemption.<sup>92</sup> Instead, the government's argument rested on the general findings that led to the Mandate's promulgation and concluded, *ipso facto*, that the same findings apply to Hobby Lobby and Mardel specifically.<sup>93</sup> Such an *ipse dixit* cannot carry the day for the government. Like in *O Centro*, RFRA requires a "more focused inquiry" whereby the government must consider the harms posed by the particular exemption at issue—the exemption requested by Hobby Lobby and Mardel.<sup>94</sup>

In *Zubik v. Burwell*, a group of seven consolidated cases<sup>95</sup> recently remanded by the Supreme Court,<sup>96</sup> the government followed the same course. The government in *Zubik* and its companion cases offered the compelling interest of "ensuring that women receive the full and equal benefits of preventive health coverage guaranteed by the Affordable Care Act, including coverage of contraception and other services of particular importance to women's health."<sup>97</sup> The government's brief again

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 51; Transcript of Oral Argument at 56, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354).

<sup>93</sup> *Hobby Lobby* Government Brief, *supra* note 90, at 51.

<sup>94</sup> *O Centro*, 546 U.S. at 432.

<sup>95</sup> *Zubik* was consolidated with (1) *Priests for Life v. Department of Health & Human Services*; (2) *Roman Catholic Archbishops of Washington v. Burwell*; (3) *East Texas Baptist University v. Burwell*; (4) *Little Sisters of the Poor Home for the Aged v. Burwell*; (5) *Southern Nazarene University v. Burwell*; and (6) *Geneva College v. Burwell*. *Zubik v. Burwell*, 136 S. Ct. 1557, 1557 (2016) (per curiam).

<sup>96</sup> *Id.* at 1561.

<sup>97</sup> *Zubik* Government Brief, *supra* note 4, at 54–55. Interestingly, the government asserted a new compelling interest at oral arguments: that female employees receive coverage *seamlessly*. *E.g.*, Transcript of Oral Argument at 60, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Zubik* Transcript]. This rephrasing is more than semantic—it "collapses the compelling interest analysis with the least restrictive means analysis." Supplemental Brief for Petitioners at 14 n.2, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Zubik* Petitioners Supplemental Brief]. This collapse is beyond the scope of this note, but is worth pointing out. As Chief Justice Roberts and Justice Alito said at oral argument, this new compelling interest is essentially that (1) female employees not have a separate insurance card for contraceptives, and (2) female employees need not file paperwork to obtain the coverage. *Zubik* Transcript, *supra*, at 47, 48, 51, 72, 75. Boiled down, the "seamless coverage" argument

provided evidence for why the Mandate is supported by a compelling interest *generally*, but failed to provide evidence backing a compelling interest in enforcing the Mandate against sincere religious objectors *specifically*.<sup>98</sup> The government's only attempt at satisfying RFRA's focused compelling interest inquiry was the bald assertion that the government has a compelling interest in ensuring that all women, including those employed by religious non-profits, can make the choice of whether to take the objected-to contraception<sup>99</sup>—which if true, still did not meet the burden of evidencing a compelling interest as to the seven consolidated petitioners.<sup>100</sup> As in *Holt*, the Court should have been unwilling to abdicate the responsibility conferred by Congress to apply RFRA's rigorous compelling interest inquiry,<sup>101</sup> and not afforded the government unwavering deference in broad assertions to specific cases.<sup>102</sup>

One of the *Zubik* cases, *Little Sisters of the Poor*, provides a perfect example. *Little Sisters* is a Catholic non-profit whose insurance coverage consists of both a church plan<sup>103</sup> (the Christian Brothers Benefits Trust, or the "Trust") and a third party

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is that an employer should file the paperwork and violate "a basic principle of faith," rather than the employee assume the "administrative burden" of filing the paperwork. *Id.* at 75.

<sup>98</sup> *Zubik* Government Brief, *supra* note 4, at 54–58.

<sup>99</sup> *Id.* at 59. At oral arguments, the government asserted that several issues would arise if female employees obtained contraceptive coverage through an exchange rather than their employers. *See Zubik* Transcript, *supra* note 97, at 79–80. The issues are generally that a woman would not be able to go to her regular doctor, would have to pay for the doctor, and would have to pay for the contraceptive coverage. *Id.* Such concerns assume that if contraceptive-only plans were available on the exchanges that (1) doctors would not accept them, (2) a single doctor would not accept as payment insurance for one set of advice and a separate insurance for another set of advice, and (3) the employees, rather than the government or a segregated fund, would have to pay for coverage. The government never gave foundation for those assumptions. *Id.*

<sup>100</sup> *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are achieved.").

<sup>101</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). *Holt* was decided under RLUIPA, which has a compelling interest test identical to RFRA's. *Compare* 42 U.S.C. § 2000cc-1(a) (2012) *with* § 2000bb-1(b).

<sup>102</sup> *Holt*, 135 S. Ct. at 864.

<sup>103</sup> ETBU Brief, *supra* note 23, at 68 (explaining that Church plans are insurance plans exempt from ERISA—plans that Congress itself has exempted from other federal requirements in an effort to accommodate religious exercise).



administrator (“TPA”)<sup>104</sup> that share its religious objections to contraception.<sup>105</sup> Both the Trust and the TPA have informed the government that they do not intend to provide contraceptive coverage even if Little Sisters is forced to comply with the Mandate.<sup>106</sup> And because Congress has accommodated the religious beliefs of the Trust and the TPA, the government *concedes* it has no authority to force Little Sisters’ insurance to provide contraceptives in compliance with the Mandate.<sup>107</sup> The government, however, insists that its compelling interest is not undermined by its reliance on the voluntary participation of the Trust and TPA,<sup>108</sup> even though both have stated in no uncertain terms that they will under no circumstances voluntarily provide contraception pursuant to the Mandate.<sup>109</sup> Such a conjecture cannot possibly satisfy RFRA’s focused compelling interest test.<sup>110</sup> “If the government is going to assert the extraordinary power to override concededly sincere religious beliefs, then at the very least it should be required to demonstrate that doing so will *actually*—not just hypothetically—‘further[]’ its purportedly ‘compelling interest.’”<sup>111</sup>

However, there is one degree of separation between cases involving the Mandate and *Holt* and *O Centro*—one that works against the Mandate being supported by a compelling interest. In both *Holt* and *O Centro*, the law that substantially burdened sincere religious exercise was a statute promulgated by Congress, whereas the Mandate is purely a result of administrative rulemaking. In the ACA, Congress did not mandate abortifacients and contraception in general, much less in connection with health plans of religious non-profits and closely-held businesses.<sup>112</sup> As the Mandate for non-profit organizations and closely-held businesses is the result of administrative rulemaking, the same bureaucracy that created it could unilaterally decide to revoke it at any time.<sup>113</sup> Even further, where

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<sup>104</sup> *Id.* at 15–16 (“A third party administrator . . . is the entity that a self-insured plan typically uses to process claims.”).

<sup>105</sup> *Id.* at 68–69.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Zubik* Government Brief, *supra* note 4, at 60.

<sup>109</sup> ETBU Brief, *supra* note 23, at 68–69.

<sup>110</sup> *See O Centro*, 546 U.S. 418, 432 (2006).

<sup>111</sup> ETBU Brief, *supra* note 23, at 69–70 (quoting 42 U.S.C. § 2000bb-1 (2012)).

<sup>112</sup> *Zubik* Petitioner Brief, *supra* note 89, at 62.

<sup>113</sup> *Id.*

Congress did explicitly address the importance of the Mandate, it chose not to include it as part of the “particularly significant” protections of the ACA.<sup>114</sup> As Congress chose to “leave[] unprohibited” the option of eliminating the Mandate altogether—or never mandating abortifacients in the first place—the Mandate cannot possibly be considered necessary to protect “an interest ‘of the highest order.’”<sup>115</sup> Giving administrative agencies such unfettered discretion “is not how [Congress] addresses a serious social problem” where it determines that there is a compelling interest.<sup>116</sup> This is especially true where the fundamental right to the free exercise of religion—protected first by the First Amendment and further by RFRA—is implicated.<sup>117</sup>

## B. *In Furtherance Of*

### 1. Exemptions Abound

The government also cannot carry its burden under the second prong of the compelling interest analysis—that substantially burdening the sincere religious exercise of religious non-profits and closely-held businesses *actually furthers* the alleged compelling interest.<sup>118</sup> Like in *Holt* and *O Centro*, the government’s refusal to extend an exemption to religious non-profits and closely-held businesses that can establish a substantial burden on sincere religious exercise is undermined by the already existing exemptions to the Mandate.

As already noted, grandfathered plans are exempt from the Mandate entirely by virtue of their statutory exemption from providing coverage for women’s preventative care.<sup>119</sup> This broad exemption was given to “avoid the inconvenience of amending an existing plan.”<sup>120</sup> To ensure that Congress’s interests in the ACA were not upended by the grandfathered plan exemption, Congress identified “particularly significant” protections of the ACA and required them even for grandfathered

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<sup>114</sup> Preservation of Right to Maintain Existing Coverage, 42 U.S.C. § 18011(a)(4) (2012).

<sup>115</sup> See *O Centro*, 546 U.S. at 433 (citation omitted); *Zubik* Petitioner Brief, *supra* note 89, at 62.

<sup>116</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740 (2011); *Zubik* Petitioner Brief, *supra* note 89, at 62.

<sup>117</sup> *Zubik* Petitioner Brief, *supra* note 89, at 62.

<sup>118</sup> 42 U.S.C. § 2000bb-1(b) (2012).

<sup>119</sup> *Id.* § 18011; Interim Final Rules for Grandfathered Plans Under the ACA, 75 Fed. Reg. 34,538, 34,542 Table 1 (June 17, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>120</sup> *Hobby Lobby*, 134 S. Ct. 2751, 2780 (2014).

plans.<sup>121</sup> The Mandate is expressly excluded from the “particularly significant” subset.<sup>122</sup>

Congress’s choice not to include the Mandate as a “particularly significant” protection<sup>123</sup> excludes a substantial number of employees from the Mandate’s provision, as “over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013.”<sup>124</sup> As the grandfathered plan exemption has no phase-out,<sup>125</sup> there is no reason for that number to decrease. In fact, a recent survey found that 35% of all employers and 25% of all covered employees in the nation are insured by a grandfathered plan.<sup>126</sup>

In addition to grandfathered plans, Congress exempted small businesses from following the Mandate—indeed, small businesses are not required to provide any health insurance coverage at all.<sup>127</sup> Therefore, if a small business objects to contraceptive coverage, it can decline to provide *any* coverage and face no penalty.<sup>128</sup>

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<sup>121</sup> 42 U.S.C. § 18011(a)(4) (2012); 75 Fed. Reg. at 34,542.

<sup>122</sup> *Id.*

<sup>123</sup> Among the “particularly significant” provisions is the extension of dependent coverage until age 26. 75 Fed. Reg. at 34,542. In the *Zubik* oral arguments, Justice Alito noted:

It would have been no great administrative difficulty for the grandfathered plans to put in contraception coverage . . . right away. . . . And yet Congress said, for the really important things, like covering the twenty-five-year-old graduate student, yes, you have to do that right away. But for [contraception coverage], you can continue to have—not to provide that coverage for women as long as you maintain your grandfathered status.

*Zubik* Transcript, *supra* note 97, at 54–55.

<sup>124</sup> *Hobby Lobby*, 134 S. Ct. at 2764 (citations omitted).

<sup>125</sup> *Id.* at 2764 n.10.

<sup>126</sup> GARY CLAXTON ET AL., KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST EMPLOYER HEALTH BENEFITS 2015 ANNUAL SURVEY 214–15 (2015), <http://files.kff.org/attachment/report-2015-employer-health-benefits-survey>.

<sup>127</sup> Shared responsibility for employers regarding health coverage, 26 U.S.C. § 4980H(c)(2) (2012).

<sup>128</sup> In the *Zubik* oral arguments, the government attempted to distinguish obstacles that a female employee who desires free contraception would face where her employer is a small business that does not provide any health insurance from obstacles the same employee would face where her employer is a religious non-profit whose health insurance does not include contraception. *Zubik* Transcript, *supra* note 97, at 71. The distinction offered is that under the former permissible instance, the employee already has to get insurance. *Id.* However, under the latter impermissible instance, the employee has to obtain separate contraceptive insurance in addition to her regular health insurance. *Id.* Essentially, the line between permissible and impermissible obstacles is not whether the employee will have to avail herself of the exchange for

This is another substantial exemption to the Mandate granted by Congress, as small businesses account for 96% of all businesses,<sup>129</sup> employing thirty four million workers nationwide.<sup>130</sup>

To be sure, if one of the more than eighty million employees or their beneficiaries who are not guaranteed access to free contraception due to the grandfathered plan and small business exemptions desired to procure free contraceptives, they may avail themselves by purchasing a plan or supplementing their current coverage on an exchange.<sup>131</sup> The government has deemed this method a sufficient “gap-filling” measure.<sup>132</sup>

Therefore, the government’s claim that its interest in enforcing HRSA’s regulatory definition of “preventative services” is so compelling as to preclude religious exemptions is severely undercut since Congress not only “contemplate[d],” but actually created exemptions to the preventative services requirement for more than a quarter of private sector employees, pursuant to which the Mandate was created.<sup>133</sup> Like in *Holt*, when so many exemptions already exist, the government must, at a minimum, offer a persuasive reason why it believes that it must take a different course in each particular instance.<sup>134</sup>

The current exemptions are not limited to those created by Congress. After creating the Mandate by defining “preventative services,” HRSA created a religious exemption for houses of worship and their integrated auxiliaries, treating them the same as grandfathered plans.<sup>135</sup> By making the religious exemption in accordance

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coverage, but whether the employee will have to carry one or two insurance cards. It is worth noting that this justification for the small business exemption does not support the compelling governmental interest of “seamless” coverage that was offered at oral arguments, *supra* note 97, because in either instance above, the employee must avail herself of the exchange to obtain the coverage desired.

<sup>129</sup> EXEC. OFFICE OF THE PRESIDENT, COUNSEL OF ECON. ADVISORS, THE ECONOMIC EFFECTS OF HEALTH CARE REFORM ON SMALL BUSINESSES AND THEIR EMPLOYEES 1 (2009), <http://1.usa.gov/1ZMxuji>.

<sup>130</sup> *Hobby Lobby*, 134 S. Ct. 2751, 2764 (2014) (citations omitted).

<sup>131</sup> ETBU Brief, *supra* note 23, at 62.

<sup>132</sup> *Id.*

<sup>133</sup> *O Centro*, 546 U.S. 418, 432 (2006); ETBU Brief, *supra* note 23, at 61.

<sup>134</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015).

<sup>135</sup> Exemption and Accommodations in Connection with Coverage of Preventive Health Services, 45 C.F.R. § 147.131(a) (2013).

with the language of an obscure portion of the Internal Revenue Code,<sup>136</sup> the accommodation is tied not to religious beliefs or practices, but to the form in which the organization is incorporated. This is because HRSA provided for the exemption to apply automatically to any organization within its definition, *regardless* of whether they hold a sincere religious objection.<sup>137</sup> Therefore, organizations within HRSA's religious exemption definition may deny employees access to contraceptives based on cost or convenience without a sincerely held religious belief as to their use.

If the government's asserted interests in the Mandate do not preclude it from granting exemptions to "thousands of [non-profits] practicing their faith" without regard to whether their faith actually leads them to object to such coverage, "it is difficult to see how those same [interests] can preclude any consideration of a similar exception" for other religious non-profits who want to practice their faith.<sup>138</sup> The government maintains that houses of worship and their integrated auxiliaries are more likely than their separately incorporated non-profit charitable and educational arms to employ people of the same faith who would share the same objection to abortifacients.<sup>139</sup> However, the government has no support for this assumption, as there is no requirement that houses of worship or their integrated auxiliaries primarily employ only people of the same faith.<sup>140</sup> The government explains that there is no such requirement because it intended to ensure that a religious employer would not be disqualified from the exemption because the employer hires or serves people of different faiths.<sup>141</sup>

Setting aside that the government's explanation for the lack of such a requirement cuts against its reasoning for disallowing an exemption for the non-profit charitable and educational arms of religious entities, separately incorporated non-profits have the same freedom to hire based on an employee's faith under Title VII as houses of worship and their integrated auxiliaries.<sup>142</sup> The religious exemption

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<sup>136</sup> Returns by Exempt Organizations, 26 U.S.C. § 6033(a)(3)(A)(i) & (ii) (2012).

<sup>137</sup> 45 C.F.R. § 147.131(a).

<sup>138</sup> *O Centro*, 546 U.S. at 433.

<sup>139</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>140</sup> *Id.* at 39,873.

<sup>141</sup> *Id.* at 39,874.

<sup>142</sup> Title VII of the Civil Rights Act of 1963, 42 U.S.C. § 2000e-1(a) (2012).

is therefore both overinclusive and “underinclusive when judged against its asserted justification.”<sup>143</sup> HRSA exempted some religious non-profits from the Mandate even if they do not hire any employees of the same faith and have no religious objection to the mandate, yet still demand compliance from other religious non-profits even if they hire only employees of the same faith and do object on religious grounds.<sup>144</sup> Having excused compliance with the Mandate for some on religious grounds, the government’s rationale for denying exemptions to other similarly situated religious non-profits is based solely on the organization’s method of incorporation.<sup>145</sup> This distinction as the basis for refusing to accommodate a sincere exercise of religious belief is like the purportedly crucial difference between a quarter-inch and half-inch beard in *Holt*—“hard to take seriously.”<sup>146</sup>

Another one of the *Zubik* consolidated cases provides an example of the irrationality of this distinction. One of the Petitioners in *Zubik v. Burwell*, Catholic Charities of Pittsburgh, is formally incorporated separately from the Diocese of Pittsburgh.<sup>147</sup> Its counterpart to the north, Catholic Charities of Erie, is formally operated as a department of the Roman Catholic Diocese of Erie.<sup>148</sup> Because of these differing arrangements, Catholic Charities of Pittsburgh must comply with the Mandate, while Catholic Charities of Erie is considered exempt as a religious employer.<sup>149</sup> In every material respect, the two organizations are identical: they operate in adjacent counties, employ the same type of people, and perform the same religious mission.<sup>150</sup> “Everything th[at could be said] about [the exempt entity] applies in equal measure to” the non-exempt entity, both of which are religious non-profit groups.<sup>151</sup> There is no rational basis to treat the two entities differently—

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<sup>143</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740 (2011).

<sup>144</sup> ETBU Brief, *supra* note 23, at 67.

<sup>145</sup> *Id.* at 67–68.

<sup>146</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015).

<sup>147</sup> *Zubik* Petitioner Brief, *supra* note 89, at 58.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *O Centro*, 546 U.S. 418, 433 (2006) (holding that the Government could not deny a religious exemption for *hoasca* when it had granted a virtually identical religious exemption for peyote); *Zubik* Petitioner Brief, *supra* note 89, at 59.

“burdening one while [exempting] the other—when it may treat both equally by offering both of them the same [exemption].”<sup>152</sup>

## 2. Concerned for Women’s Health?

Additionally, the Mandate cannot be in furtherance of the asserted interest in promoting women’s health because the government failed to consider the health risks of taking contraceptives. The IOM Report relied on by HRSA in creating the Mandate failed to even recognize research showing the increased risks of cancer and other serious diseases associated with taking oral contraceptive pills and long-acting contraceptives such as IUDs.<sup>153</sup>

Oral contraceptives have been shown to double the risk of a heart attack,<sup>154</sup> triple to quadruple the risk of cervical cancer,<sup>155</sup> increase the risk of liver tumors and cancer,<sup>156</sup> and create a greater susceptibility to sexually transmitted diseases.<sup>157</sup> Oral contraception is also categorized as a Group 1 carcinogen for breast, cervical, and liver cancers by the World Health Organization’s International Agency on Research of Cancer.<sup>158</sup> Long-acting contraceptives, such as IUDs, have been shown to increase the risk of: uterine perforation or damage to the surrounding organs,<sup>159</sup> permanent

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<sup>152</sup> *Hobby Lobby*, 134 S. Ct. 2751, 2786 (Kennedy, J., concurring); *Zubik* Petitioner Brief, *supra* note 89, at 59.

<sup>153</sup> Brief for The Breast Cancer Prevention Institute as Amicus Curiae Supporting Petitioner at 13, *Zubik v. Burwell*, 136 S. Ct. 444 (2015) (No. 14-1418) (“BCPI Brief”).

<sup>154</sup> *Id.* at 15–16 (citing B.C. Tanis et al., *Oral Contraceptives and the Risk of Myocardial Infarction*, 345 NEW ENG. J. MED. 1787 (2001)).

<sup>155</sup> *Id.* at 18–19 (citing NAT’L CANCER INST.: ORAL CONTRACEPTIVES AND CANCER RISK (Mar. 21, 2012)).

<sup>156</sup> *Id.* at 19 (citing NAT’L CANCER INST.: ORAL CONTRACEPTIVES AND CANCER RISK (Mar. 21, 2012)).

<sup>157</sup> *Id.* at 19–20 (citing S. Franceschi et al., *Genital Warts and Cervical Neoplasia: An Epidemiological Study*, 48 BR. J. CANCER 621 (1983); C.C. Wang et al., *Risk of HIV Infection in Oral Contraceptive Pill Users: A Meta-Analysis*, 21 JAIDS 51 (1999); S. Girma et al., *The Impact of Emergency Birth Control on Teen Pregnancy and STIs*, 30 J. HEALTH ECON. 373 (2011)).

<sup>158</sup> *Id.* at 16–17 (citing World Health Organization, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans: Combined Estrogen-Progestogen Contraceptives and Combined Estrogen-Progestogen Menopausal Therapy*, 91 IRAC MONOGRAPHS 1, 174–84 (2007), <http://monographs.iarc.fr/ENG/Monographs/vol91/mono91.pdf>).

<sup>159</sup> *Id.* at 21 (citing K.P. Braaten et al., *Malpositioned IUDs: When you Should Intervene (and When you Should Not)*, 24 OBG MGMT. 39 (2012)) (explaining risk of FDA-Approved Paragard® Intrauterine Copper IUD).

loss of fertility,<sup>160</sup> ectopic pregnancies,<sup>161</sup> pulmonary emboli,<sup>162</sup> strokes,<sup>163</sup> loss of bone mineral density,<sup>164</sup> more than double the risk of breast cancer,<sup>165</sup> and double the risk of acquiring and transmitting HIV.<sup>166</sup>

Rather than addressing and balancing the significantly increased risks of these serious conditions, the IOM Report selectively focused on the non-contraceptive benefits of oral contraception, including treatment of menstrual disorders and acne.<sup>167</sup> “[A]pparently[,]” the government “does not think that th[ese] possibilit[ies] raise[] a serious . . . concern” for women’s health.<sup>168</sup> As the IOM Report relied on by HRSA in establishing the Mandate entirely ignored the mandated drugs’ serious health risks, the Mandate cannot meet the RFRA requirement of being in furtherance of the asserted compelling interest in promoting women’s health.

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<sup>160</sup> *Id.* at 22 (citing Mirena© Label, Warnings and Precautions) (explaining risk of FDA-Approved Mirena© levonorgestrel-releasing IUD).

<sup>161</sup> *Id.* at 23 (citing Implanon© Warnings, <http://www.implanon-usa.com/en/HCP/learn-about-it/get-the-facts/warnings/index.asp> (last visited Nov. 9, 2016)) (explaining risk of FDA-Approved Implanon©). An ectopic pregnancy occurs when a fertilized egg implants somewhere other than the main cavity of the uterus, and can result in life-threatening blood loss if left untreated. MAYO CLINIC STAFF, *Diseases and Conditions: Ectopic Pregnancy Definition*, <http://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/basics/definition/con-20024262> (last visited Nov. 9, 2016).

<sup>162</sup> BCPI Brief, *supra* note 153, at 23 (citing Implanon© Warnings, <http://www.implanon-usa.com/en/HCP/learn-about-it/get-the-facts/warnings/index.asp> (last visited Nov 9, 2016)) (explaining risk of FDA-Approved Implanon©). A pulmonary embolism is a possibly life-threatening blockage in one of the pulmonary arteries in the lungs. MAYO CLINIC STAFF, *Diseases and Conditions: Pulmonary Embolism Definition*, <http://www.mayoclinic.org/diseases-conditions/pulmonary-embolism/basics/definition/con-20022849> (last visited Nov. 9, 2016).

<sup>163</sup> BCPI Brief, *supra* note 153, at 23 (citing Implanon© Warnings, <http://www.implanon-usa.com/en/HCP/learn-about-it/get-the-facts/warnings/index.asp> (last visited Nov. 9, 2016)) (explaining risk of FDA-Approved Implanon©).

<sup>164</sup> *Id.* at 23 (explaining risk of FDA-approved Depo-Provera©).

<sup>165</sup> *Id.* at 23 (citing C. Li et al., *Effect of Depo-Medroxyprogesterone Acetate on Breast Cancer Risk Among Women 20 to 44 Years of Age*, 72 *CANCER RES.* 2028, 2034 nn.4–7 (2012)) (explaining risk of FDA-approved Depo-Provera©).

<sup>166</sup> *Id.* at 23–25 (explaining risk of FDA-approved Depo-Provera©) (citing R. Heffron et al., *Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study*, 12 *LANCET INFECT. DIS.* 19 (2012)).

<sup>167</sup> *Id.* at 13–14 (citing INST. OF MED., *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011), [http://www.nap.edu/catalog.php?record\\_id=13181](http://www.nap.edu/catalog.php?record_id=13181)).

<sup>168</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 865 (2015).



Aside from failing to consider the risks of taking the mandated contraceptives, the government has failed to demonstrate any causal relationship between the Mandate and improved health for women.<sup>169</sup> While the government claims cost is a significant barrier to use of contraceptives<sup>170</sup> such that that access to free contraception is necessary, the evidence available and cited in the IOM Report indicates that cost plays a small role in women's decisions about contraception.<sup>171</sup> In fact, the government's own reports concede that the primary reasons that women choose to eschew contraception are its side effects, health risks, and failure rate.<sup>172</sup> Therefore, the government has not shown that the Mandate actually increased usage of contraceptives.<sup>173</sup>

But even if the Mandate *could* increase the usage of contraceptives, the government has not substantiated its claim that this will lead to lower rates of unintended pregnancy and abortion.<sup>174</sup> Roughly half of all unintended pregnancies occur among women who *are* using contraception,<sup>175</sup> as an estimated 12.4% of all women using contraception will become pregnant each year.<sup>176</sup> But even if free

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<sup>169</sup> Brief for Women Speak for Themselves as Amicus Curiae in Support of Petitioners at 14, *Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 1557 (2015) (No. 15-105) [hereinafter *Women Speak Brief*].

<sup>170</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>171</sup> *Women Speak Brief*, *supra* note 169, at 16 (citing William D. Mosher & Jo Jones, *Use of Contraception in the U.S.: 1982-2008*, U.S. DEP'T OF HEALTH & HUMAN SERVS. 5, 9 (2010)).

<sup>172</sup> *Id.* at 16–17 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., *Female Contraceptive Development Program (U01)*, NAT'L INST. OF HEALTH (Nov. 5, 2013), <http://grants.nih.gov/grants/guide/rfa-files/RFA-HD-14-024.html>).

<sup>173</sup> To the contrary, the available studies indicate that contraception mandates do not reduce rates of unintended pregnancy or abortion. A comprehensive analysis of state level public health data from nearly all fifty states found that state level contraceptive mandates produced no discernible reduction in rates of unintended pregnancy or abortion. Brief for Michael J. New, Ph. D. as Amicus Curiae in support of Petitioners at 6, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (citing New, *Impact of State Level Contraception Mandates*, at 356–58 (Table 1)).

<sup>174</sup> *Women Speak Brief*, *supra* note 169, at 21.

<sup>175</sup> *Id.* at 22 (GUTTMACHER INST., *Facts on Unintended Pregnancy in the United States* 3 (2012), <https://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf> (indicating that 41% of unintended pregnancies occur to women who use contraception “inconsistently,” while 5% of such pregnancies occur to women who use contraception “consistently”)).

<sup>176</sup> *Id.* at 22 (citing William D. Mosher & Jo Jones, *Use of Contraception in the U.S.: 1982-2008*, U.S. DEP'T OF HEALTH & HUMAN SERVS. 5, 9 (2010)).

contraception *could* lead to fewer unintended pregnancies, the government has not linked unintended pregnancy with specific health outcomes for women.<sup>177</sup> The government has published regulations making specific claims linking unintended pregnancy to smoking, drinking, depression, and violence,<sup>178</sup> but nowhere does the government, or the IOM Report it relies on, demonstrate this nexus.<sup>179</sup> In fact, an IOM report from 1995 acknowledges that extant studies were unable to demonstrate whether the health effects that the government cites were “caused by or merely associated with unwanted pregnancy.”<sup>180</sup>

Therefore, as the government has not shown the Mandate to actually improve women’s health, the Mandate cannot meet the RFRA requirement of being in furtherance of the asserted compelling interest in promoting women’s health.

### 3. Un-compelling or Unneeded?

Finally, assuming *arguendo* that the government had substantiated a compelling interest for the Mandate to satisfy RFRA, it is unclear whether the Mandate *itself*—enormous existing exemptions aside—substantially furthered that interest. When passed, over 85% of employer-sponsored health insurance plans already provided the coverage required by the Mandate.<sup>181</sup> Further, the government found that the coverage required by the Mandate was at least cost neutral, and may in some instances result in cost savings.<sup>182</sup> Therefore, the Mandate could not have affected more than 15% of employers nationwide (less taking the grandfathered plan and small business exemptions into account) and was not purposed to effectuate a cost-prohibitive measure. Given that the possible impact of the Mandate, even without pre-existing congressional exemptions, is relatively low on a national scale and the Mandate’s coverage is at least cost neutral, only those employers objecting

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<sup>177</sup> *Id.* at 30–36.

<sup>178</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>179</sup> Women Speak Brief, *supra* note 169, at 30.

<sup>180</sup> *Id.* at 31 (citing INST. OF MED., *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* (1995)).

<sup>181</sup> Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>182</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8463 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 148, and 156).

to the Mandate on religious grounds and not granted an exemption are likely to be burdened by its imposition.<sup>183</sup>

### III. ZUBIK: THE CURRENT STATUS

As previously mentioned, a group of seven consolidated cases—the *Zubik* cases—were recently before the Supreme Court. Because the cases in part concern this Note’s thesis, a brief update on their evolving status is included. On March 29, 2016, only six days after oral arguments, the Court made a rare request for supplemental briefing.<sup>184</sup> The Court essentially suggested a result by way of a specific hypothetical outcome for the parties to consider, making the request even more extraordinary.<sup>185</sup> Both parties’ supplemental briefs and supplemental reply briefs mainly focused on whether the posited hypothetical was sufficiently narrowly tailored.<sup>186</sup> After reviewing the briefs, on May 16, 2016 the Court filed a brief *per curiam* remanding the cases,<sup>187</sup> which can only be described as a punt. The opinion “anticipate[s] that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.”<sup>188</sup>

All seven cases are still pending before their respective Court of Appeals<sup>189</sup> and none of them have reached a resolution.<sup>190</sup> On July 21, 2016 the Departments of

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<sup>183</sup> *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”).

<sup>184</sup> Order, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

<sup>185</sup> *Id.* at 1–2.

<sup>186</sup> See generally Supplemental Brief for Respondents, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418); Supplemental Reply Brief for Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418); Supplemental Reply Brief for Respondents, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418); *Zubik* Petitioners Supplemental Brief, *supra* note 97.

<sup>187</sup> *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*per curiam*). Justice Sotomayor, joined by Justice Ginsburg, filed a brief concurring opinion warning lower courts to not “construe either today’s *per curiam* or our [order for supplemental briefing] as signals of where this Court stands.” *Id.* at 1561 (Sotomayor, J., concurring).

<sup>188</sup> *Id.* at 1560.

<sup>189</sup> As of Friday, September 16, 2016.

<sup>190</sup> E. Tex. Baptist Univ. v. Burwell, No. 15-35 (5th Cir. remanded May 16, 2016); Geneva Coll. v. Burwell, No. 15-191 (3d Cir. remanded May 16, 2016); Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105 (10th Cir. remanded May 16, 2016); Priests for Life v. Dep’t of Health & Human Servs., No. 14-453 (D.C. Cir. remanded May 16, 2016); Roman Catholic Archbishop v. Burwell, No. 14-

Labor, Health and Human Services, and the Treasury filed a Request for Information (“RFI”) seeking comment

on whether there are alternative ways (other than those offered in current regulations) for eligible organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still ensuring that women enrolled in the organizations’ health plans have access to *seamless* coverage of the full range of Food and Drug Administration-approved contraceptives without cost sharing.<sup>191</sup>

The comment period ended September 20, 2016<sup>192</sup> and the request garnered over 149 public comments.<sup>193</sup> Simultaneously, on July 21, 2016, the government filed a status report in all seven *Zubik* cases notifying the various Courts of Appeals of the RFI and of the government’s intent to enforce the mandate against Petitioners until the existing regulations are changed.<sup>194</sup>

## CONCLUSION

Under RFRA, the government lacks a compelling interest in enforcing the Mandate against any religious non-profit or closely-held business after such organization demonstrates a substantial burden in the sincere exercise of its religion. The government has not, in any case, even attempted to furnish evidence to prove that the Mandate’s application to claimants objecting based on a sincerely held belief is a compelling interest.<sup>195</sup> The government also has failed to show how disallowing an exemption to such claimants would further any purported interest on three fronts.<sup>196</sup> First, the substantial exemptions that already exist undermine any argument

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1505 (D.C. Cir. remanded May 16, 2016); *S. Nazarene Univ. v. Burwell*, No. 15-119 (10th Cir. remanded May 16, 2016); *Zubik v. Burwell*, No. 14-1418 (3d Cir. remanded May 16, 2016).

<sup>191</sup> Coverage for Contraceptive Services, 81 Fed. Reg. 47,741, 47,741 (July 22, 2016) (emphasis added). It appears the government will stick with the emphasis on seamlessness.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* This count was as of September 16, 2016. A count after September 20, 2016 is not available at press time, because the government empties their comment docket in order to redact or withhold certain submissions. See <https://www.regulations.gov/docket?D=EBSA-2016-0011>.

<sup>194</sup> Status Report at 2–6, *Geneva Coll. v. Burwell*, 136 S. Ct. 445 (2015) (No. 13–3536). The status report is substantially the same for all seven cases.

<sup>195</sup> *E.g.*, *Hobby Lobby* Government Brief, *supra* note 90, at 38–51.

<sup>196</sup> *E.g.*, *id.*

that exempting a specific religious employer would squash a compelling interest.<sup>197</sup> Second, because the government failed to consider the risks of the mandated contraceptives and further has not shown a nexus between the Mandate and any improvement in women's health, the Mandate could not be said to adequately further the asserted compelling interest of women's health.<sup>198</sup> Finally, as the vast majority of American employees already enjoyed the mandated contraceptives prior to the Mandate's existence, the Mandate primarily serves to burden those employers who object to its imposition on religious grounds.<sup>199</sup>

As a result, the government must exempt any non-profit or closely-held business that can demonstrate that the Mandate substantially burdens its sincere exercise of religion under RFRA.<sup>200</sup>

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<sup>197</sup> See *supra* Part II(B)(1).

<sup>198</sup> See *supra* Part II(B)(2).

<sup>199</sup> See *supra* Part II(B)(3).

<sup>200</sup> This is the case even though current law would have to be changed to make the accommodation. *Zubik* Transcript, *supra* note 97, at 74. As Chief Justice Roberts told the Government at *Zubik* oral arguments, “[w]ell, the way constitutional objections work is you might have to change current law.” *Id.*