

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210
ATTN: Preventative Services
Submitted Electronically

RE: Comment on the coverage of certain preventative services under the Affordable Care Act

Dated: October 21, 2014

Dear Sir or Madam,

We are law professors with expertise in the First Amendment's Religion Clauses and the Religious Freedom Restoration Act ("RFRA").¹ This letter responds to the request published in the Federal Register on August 27, 2014² seeking comments on interim final regulations regarding coverage without cost sharing of certain preventive health services by non-grandfathered group health plans under the Affordable Care Act ("ACA")³ while also establishing a mechanism for claims for religious accommodations from this requirement in light of the Supreme Court's decision in *Hobby Lobby v. Burwell*, 134 S.Ct. 2751 (2014) and its order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

Because they add additional intervening steps to the pre-existing accommodation process, the interim final regulations issued to govern the accommodation process for objecting non-profits raise the likelihood of two critical problems related to effective enforcement and monitoring of the ACA's requirements: 1) additional delays and gaps in coverage without cost sharing of certain preventive health services required for governed group health plans; and 2) a resulting likelihood that the Department will be vulnerable to lawsuits alleging Establishment Clause violations by employees whose access to contraceptive coverage without cost sharing has been impeded, delayed, or sacrificed on account of a claim to a religion-based exemption by their employer.

¹ 42 U.S.C. § 2000bb (2014) et seq.

² Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (published Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147).

³ 42 U.S.C. § 300gg-13(a)(4) (2014).

We therefore submit these comments with two goals. First, we urge the Department to adopt stringent enforcement and monitoring requirements to ensure seamless operation of the accommodation process for both non-profit and for-profit entities objecting to providing contraceptive insurance coverage. Second, we write to express concern that the absence of meaningful and effective monitoring and enforcement of the accommodation process will result in delays or gaps in coverage that could create Establishment Clause violations.

Establishment Clause Issue

The interim final regulations are designed to address covered employers' rights to religious exercise as recognized by the Supreme Court in *Hobby Lobby* and *Wheaton College*. These rights, as framed in the decision and the order, respectively, are statutory in nature and arise under RFRA. That statute protects religious freedom, but it does so in a way that goes far beyond what is required under the Free Exercise Clause of the U.S. Constitution. Therefore, the interpretation of rights that arise under RFRA, like any other federal statute, must conform to the over-arching constraints of the U.S. Constitution generally, and the First Amendment's Religion Clauses specifically. That is, statutes like RFRA may exempt religious actors beyond what is constitutionally required, but only so far as they do not offend superior rights found in the Constitution.⁴

The Establishment Clause can be violated when permissive accommodations shift the burden of a religious observance from those who practice the religion to those who do not.⁵ In a case involving the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),⁶ an analogue of RFRA that applies to prisoner and land use cases, the Supreme Court observed that courts applying RLUIPA must "take adequate account of the burdens a requested accommodation may impose on non-beneficiaries" and it cited other Establishment Clause cases for that proposition.⁷ That principle, namely that accommodations of religion may not shift

⁴ Frederick M. Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 (2014) ("RFRA's stated purpose . . . is to provide more protection for religious exercise than is provided by the Free Exercise Clause after *Employment Division v. Smith*. RFRA, therefore, must satisfy the various Establishment Clause limitations on permissive government accommodation of religion.").

⁵ See *Estate of Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985); *Texas Monthly v. Bullock*, 489 U.S. 1, 14-15 (1989).

⁶ 42 U.S.C. § 2000cc (2014) et seq.

⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (citing *Thornton*, 472 U.S. 703).

burdens to third parties without creating Establishment Clause difficulties, was essential to the Court's holding that RLUIPA was constitutional on its face, and it was designed to guide courts confronting subsequent Establishment Clause challenges to the statute as applied in particular cases.

This concern is evident in the Supreme Court's constitutional free exercise doctrine as well. In *Reynolds v. United States*, the Court rejected a claim by Mormon plaintiffs that they had a religious right to practice polygamy on the grounds that it would produce unacceptable harms for women and children.⁸ And in *United States v. Lee*, the Court held that an Amish business owner had to pay social security taxes despite his religious objection to doing so, in part because exempting him from the requirement would undermine his employees' access to Social Security payments. The Court cautioned that "[w]hen 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 the statutory schemes which are binding on others in that activity" and that granting an exemption in *Lee* would "operate[] to impose the employer's religious faith on the employees."⁹

This concern for the religious freedom of employees was recognized in *Hobby Lobby*, where the Court's opinion emphasized that the non-profit accommodation process could be easily extended to for-profit corporations without any negative effect on access for employees.¹⁰ Justice Kennedy's concurrence, along with the minority's dissent, made clear that there are five justices on the Court who believe that it is impermissible to impose undue burdens on third parties to satisfy an objector's religious beliefs.¹¹ What is more, this concern for the

⁸ *Reynolds v. United States*, 98 U.S. 145 (1878). (We do not take any position on the harms or benefits of polygamous practice here - this example is merely illustrative of the Court's approach.) *See also* *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that Jehovah's Witness could not be excused for religious reasons from compliance with law forbidding children from selling printed material on the street and prohibiting adults from furnishing material to children for such sale).

⁹ *United States v. Lee*, 455 U.S. 252, 261 (1982).

¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) ("In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar objections."). *See also id.* at 2786 (Kennedy, J., concurring) ("That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs.").

¹¹ *Id.* at 2786-87 (Kennedy, J., concurring) ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may

consequences of accommodations on third parties is in keeping with the principles that animated the Establishment Clause when it was originally drafted.¹²

In *Hobby Lobby*, the Court did not challenge the proposition that contraception is essential to women's equality and that the government has a compelling interest in its statutory scheme for ensuring that access.¹³ Scholars have demonstrated that loss of the right to contraceptive coverage without cost sharing is a burden that rises to the level of an Establishment Clause violation if it is imposed on employees in order to accommodate their employer's religion.¹⁴ Most importantly, the Court's assumption that the non-profit accommodation process could be seamlessly extended to the for-profit objectors underlines the idea that this seamless coverage is essential to the validity of an accommodation under RFRA in this context.

Enforcement & Monitoring

For these reasons, we urge the Department to create a centralized oversight and enforcement entity to monitor the accommodation. This is particularly important because the source of insurance coverage will in turn allocate enforcement power for the accommodation among various state and federal entities, creating a fractured and uneven administrative landscape.¹⁵ A centralized monitoring body would allow the Department to screen the accommodation process for both systematic implementation problems and isolated instances of noncompliance or error that lead to women not receiving coverage, receiving only partial coverage (like being required to pay out of pocket copays for contraceptive coverage), or not

that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”).

¹² Gedicks & Van Tassell, *supra* note 4 at 362-63 (2014).

¹³ *Hobby Lobby*, 134 S. Ct. at 2779-80; *see also id.* at 2786 (Kennedy J., concurring) (“It is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.”).

¹⁴ Gedicks & Van Tassell, *supra* note 4 at 374-79. *See also id.* at 379 (“[E]mployees and their covered dependents will lose hundreds of dollars annually as the result of a permissive accommodation from which they derive no benefit. They will suffer health risks as well as healthcare and workplace inequalities. These costs are material because they are significant enough that a reasonable person would consider them in deciding whether to use less effective contraception or forgo it altogether.”); IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 216-25 (2014); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>.

¹⁵ A health plan may be governed by ERISA or both ERISA and state insurance law depending on whether it is self-insured or fully-insured, and some plans will be regulated by the Department of Labor, HHS, and/or state insurance regulators – in addition to IRS oversight and penalization of plans that do not comply with the ACA.

receiving timely and accurate information about how to access no-cost coverage. Because the beneficiaries are the most likely to quickly notice and experience delays or gaps, such a monitoring and enforcement entity should establish a process for beneficiary complaints and appeals. It should also establish a process for employees who want to contest the grant of an accommodation to their employer because they believe the employer does not qualify as an eligible entity to seek the accommodation.

In addition, whether or not it establishes an independent monitoring body, we urge the Department to take steps to facilitate the sharing of information within the multiple government agencies responsible for managing the accommodation process. The Department should require that each relevant agency designate a specific point person at the agency to manage the responsibilities associated with the accommodation at that agency.

Finally, at minimum, there must be a specific process, with clear timelines, regulating the process by which an objecting employer utilizing the notice option notifies HHS, and by which HHS notifies the insurance plan. For self-insured plans, a clear process and timeline should be established governing the communication between the Department of Labor and HHS for the same purpose.

Establishing these enforcement and monitoring systems would ensure that the accommodation operates seamlessly, and that women do not suffer delays in accessing contraceptive coverage due to slow communication between federal and/or state agencies, confusion about the allocation of responsibilities or the process for accepting an accommodation request and notifying the relevant insurance provider, or delays caused by noncompliance by organizations seeking an accommodation. As discussed earlier in these comments, any accommodations the Department grants in order to effectuate the Supreme Court's interpretation of RFRA are *permissive* accommodations that cannot impose impermissible costs on third parties – in this context, delays or excess costs for beneficiaries entitled to contraceptive coverage without cost sharing. If the Department allows organizations to opt out of the contraceptive coverage requirement by granting accommodations without establishing enforcement and monitoring mechanisms, then the Department may be violating the Establishment Clause by imposing harms on third parties via its accommodation process.

Regrettably, it appears that Establishment Clause violations may already be happening.

Given the preliminary injunctions granted in some cases,¹⁶ some non-profit religiously-affiliated organizations are currently under no legal obligation to provide contraceptive coverage to their employees, and presumably the organizations are acting on their asserted religious objections to doing so. In the absence of an appropriate regulatory framework implementing the ruling in *Hobby Lobby* and the order in *Wheaton College*, many employees find themselves without a right to insurance coverage for some or all methods of contraception to which they would otherwise be statutorily entitled. Although hopefully temporary, that gap in coverage must be harming women in ways that are serious and irreversible. The loss of this statutory right is caused by a vacuum in regulatory structure, a vacuum that itself produces an Establishment Clause problem insofar as religious norms are able to trump general laws in American workplaces.¹⁷ This ongoing Establishment Clause violation will persist until the accommodation process is finalized.¹⁸ We urge the Department to finalize the process as soon as possible.

Sincerely,*

Katherine Franke
Isidor and Seville Sulzbacher Professor of Law
Columbia Law School

Kara Loewentheil
Research Fellow
Columbia Law School

Nelson Tebbe
Professor of Law
Brooklyn Law School
Visiting Professor of Law
Cornell Law School

¹⁶ See Brief for Plaintiffs-Appellants at 26-27, *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5371 (D.C. Cir. Feb. 28, 2014), available at http://justsecurity.org/wp-content/uploads/2014/07/priests_for_life_ctadc_brief.pdf; Letter from Plaintiffs-Appellants' counsel to Mark Langer, clerk, United States Court of Appeals for the District of Columbia Circuit, July 8, 2014, available at <http://justsecurity.org/wp-content/uploads/2014/07/PFL.Jonesdayltr.pdf>.

¹⁷ Normally, agency regulations cannot be retroactive. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, the disfavor of retroactivity is a statutory rule that can be overridden in order to avoid an Establishment Clause violation.

¹⁸ See, e.g., Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014), <http://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html>.

Frederick Mark Gedicks
Guy Anderson Chair & Professor of Law
Brigham Young University Law School

Sarah Barringer Gordon
Arlin M. Adams Professor of Constitutional Law and Professor of History
University of Pennsylvania

Ira C. Lupu
F. Elwood & Eleanor Davis Professor of Law, Emeritus
George Washington University Law School

Patricia J. Williams
James L. Dohr Professor of Law
Columbia Law School

Michael Perry
Robert W. Woodruff Professor of Law
Emory University School of Law

J. Stephen Clark
Professor of Law
Albany Law School

Aziza Ahmed
Associate Professor of Law
Northeastern University School of Law

Ari Ezra Waldman
Associate Professor of Law
New York Law School

Richard C. Schragger
Perre Bowen Professor, Barron F. Black Research Professor of Law
University of Virginia School of Law

Claudia E. Haupt
Associate-in-Law, Columbia Law School
Research Fellow, Institute for Religion, Culture and Public Life, Columbia University

Gregory P. Magarian
Professor of Law
Washington University in St. Louis

Elizabeth Sepper
Associate Professor
Washington University School of Law

Caroline Mala Corbin
Professor of Law
University of Miami School of Law

Nan D. Hunter
Professor of Law
Georgetown University Law Center

Caitlin E. Borgmann
Professor of Law
CUNY School of Law

Suzanne B. Goldberg
Herbert and Doris Wechsler Clinical Professor of Law, Director of the Center for Gender &
Sexuality Law and Sexuality and Gender Law Clinic
Columbia Law School

Jessica Waters
Assistant Professor, Department of Justice, Law and Criminology
American University, School of Public Affairs

Micah J. Schwartzman
Edward F. Howrey Professor of Law
University of Virginia School of Law

Laura Rosenbury
Professor of Law
Washington University in St. Louis

Corey Brettschneider**
Professor of Political Science
Brown University
Visiting Professor of Law
University of Chicago Law School.

*(Affiliations with universities are listed for identification only. No signer of this letter claims to speak for the university at which he or she works).

**Denotes signatures added after these comments were submitted.