

Summer 2012

A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligates Catholic Organizations to Cover Their Employees' Prescription Contraceptives

Destyn D. Stallings

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Destyn D. Stallings, *A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligates Catholic Organizations to Cover Their Employees' Prescription Contraceptives*, 48 *Tulsa L. Rev.* 117 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol48/iss1/5>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

A TOUGH PILL TO SWALLOW: WHETHER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OBLIGATES CATHOLIC ORGANIZATIONS TO COVER THEIR EMPLOYEES' PRESCRIPTION CONTRACEPTIVES

I. INTRODUCTION	118
II. BACKGROUND.....	121
A. Benefits of Prescription Contraceptives.....	121
B. Legislative Backdrop: The Emergence of the HHS's Contraceptive Coverage Mandate	123
III. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS' SPECIFIC OBJECTIONS	124
IV. THE SUPREME COURT'S FREE EXERCISE JURISPRUDENCE AND ANALYSIS OF CLAIMS.....	126
A. Limitation of Free Exercise Protection	126
B. The <i>Sherbert</i> Test.....	126
C. The <i>Smith</i> Test.....	128
1. Neutral and General Applicability	129
2. The HHS's Contraceptive Mandate is Neutral and Generally Applicable.....	131
3. The <i>Sherbert</i> Exception	133
4. The <i>Sherbert</i> Exception Does Not Apply to the HHS's Contraceptive Coverage Mandate	134
V. RELIGIOUS FREEDOM RESTORATION ACT JURISPRUDENCE AND ANALYSIS.....	135
A. RFRA Jurisprudence and <i>O Centro</i>	135
B. Catholic Employers Can Raise a Prima Facie Case that the Contraceptive Coverage Mandate Violates Its Rights Under RFRA	137
C. The HHS's Contraceptive Coverage Mandate is the Least Restrictive Means of Furthering a Compelling Government Interest	138
VI. CONCLUSION.....	141

I. INTRODUCTION

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹ Due to the advent of pregnancy prevention devices such as prescription contraceptives, women are able to postpone childbirth while investing in academic degrees and careers.² Because prescription methods of contraceptives are currently available to women only, it is women who typically bear the financial burden of the cost of birth control.³ Since birth control is the most commonly-prescribed drug for women between the ages of eighteen and forty-four,⁴ perhaps it is unsurprising that, when compared to men, women of reproductive age spend sixty-eight percent more on out-of-pocket health care expenditures.⁵ This disparity is due, in large part, to the cost of reproductive health care services.⁶

Though it is well established that the Constitution protects a woman’s right to use birth control,⁷ the issue of whether all women should have access to it at the behest of the federal government has long been a source of political and legislative debate.⁸ Proponents of mandatory contraceptive coverage legislation are primarily concerned with the overwhelming percentage of unintended pregnancies in the United States, which absorbs billions of taxpayer dollars each year⁹ and contributes to the number of abortions

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (internal citation omitted).

2. *History & Successes*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/who-we-are/history-and-successes.htm> (last visited Sept. 10, 2012) (“Women’s progress in recent decades—in education, in the workplace, in political and economic power—can be directly linked to . . . women’s ability to control their own fertility.”).

3. Pema Levy, *Does Providing Birth Control Without Co-Pays to Women Let Men off the Hook?*, AMERICAN PROSPECT (Aug. 5, 2011), <http://prospect.org/article/trojan-plan>. Under many health insurance plans, women must often pay twenty to fifty dollars per month for oral contraceptives and hundreds of dollars for longer-acting methods. Michelle Andrews, *Preventing Pregnancy: Should Patients Get Contraceptives from Health Plans at No Cost?*, KAISER HEALTH NEWS (July 6, 2010), <http://www.kaiserhealthnews.org/Features/Insurance-Your-Health/cost-of-birth-control.aspx>.

4. N.C. Aizenman, *New U.S. Rules Require Insurance Coverage for Contraception*, WASH. POST (Aug. 1, 2011), http://www.washingtonpost.com/national/health-science/new-us-rules-require-insurance-coverage-for-contraception/2011/08/01/gIQAwdTRoI_story.html.

5. *Planned Parenthood Applauds Sen. Stabenow and Rep. Schakowsky for Introduction of Health Care for Women Act*, PLANNED PARENTHOOD (Feb. 11, 2011), <http://www.plannedparenthood.org/> (follow “About Us” hyperlink; then follow “Newsroom” hyperlink; then follow “Press Releases” hyperlink then search “Press Releases” for “Stabenow”; then follow “PLANNED PARENTHOOD APPLAUDS SEN. STABENOW AND...” hyperlink) [hereinafter *Planned Parenthood*]. See also *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, HEALTHCARE.GOV (Aug. 1, 2011), <http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html> [hereinafter *Expanding Access*] (explaining that, compared to men, women typically need more preventive health services but usually have fewer financial resources to pay for them).

6. *Planned Parenthood*, *supra* note 5.

7. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

8. See generally Megan Colleen Roth, Note, *Rocking the Cradle with Erikson v. Bartell Drug Co.: Contraceptive Insurance Coverage Takes a Step Forward*, 70 UMKC L. REV. 781 (2002) (arguing that federal contraceptive coverage legislation is warranted to decrease the percentage of unintended pregnancies and abortion in the United States).

9. Rebecca Wind, *Nation Pays Steep Price for High Rates of Unintended Pregnancy*, GUTTMACHER INST. (May 19, 2011), <http://www.guttmacher.org/media/nr/2011/05/19/index.html>.

performed.¹⁰ Conversely, Catholic individuals and affiliated organizations deem any act that renders procreation impossible as “intrinsically evil”¹¹ and therefore stand in staunch opposition to laws that force them to partake in coverage of contraceptive medications.¹²

While the majority of state legislatures have enacted laws that require the inclusion of contraceptive drugs and devices in all health plans,¹³ congressional efforts to pass federal contraceptive coverage legislation have consistently failed.¹⁴ The federal government’s inability to mandate such coverage, however, ended on March 23, 2010, when President Barack Obama signed into law the Patient Protection and Affordable Care Act (“PPACA”), the first comprehensive health care reform bill in the United States.¹⁵ In an effort to make preventive health care for women more affordable, the PPACA requires all health insurance plans¹⁶ and issuers¹⁷ to cover all items and services recommended by the United States Department of Health and Human Services (“HHS”) without charging a co-payment, co-insurance, or a deductible.¹⁸ This includes, amongst other medical

10. See Rebecca Wind, *Abortion and Unintended Pregnancy Decline Worldwide as Contraceptive Use Increases*, GUTTMACHER INST. (Oct. 13, 2009), <http://www.guttmacher.org/media/nr/2009/10/13/index.html> (“The evidence is strong and growing that empowering women with the means to decide for themselves when to become pregnant and how many children to have significantly lowers unintended pregnancy rates and thereby reduces the need for abortion . . .”). According to experts, the cost of contraceptives is a contributing factor to unintended pregnancies. Andrews, *supra* note 3. While women can purchase generic versions of birth control pills for prices as low as nine dollars a month, even modest co-pays can act as a deterrent. Ricardo Alonso-Zaldívar, *The Associated Press, Insurers to Cover Birth Control*, FISCAL TIMES (Aug. 1, 2011), <http://www.thefiscaltimes.com/Articles/2011/08/01/AP-Insurers-to-Cover-Birth-Control.aspx#page1>.

11. CATECHISM OF THE CATHOLIC CHURCH § 2730, at 629 (Doubleday, 2nd ed. 2003) (1994) (“[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible’ is intrinsically evil.”) (quoting PAUL VI, HUMANAE VITAE § 14 (1968)).

12. See Annamarya Scaccia, *Religious Exemptions and Contraceptive Coverage: How Far Can Denial Go and Still Be Constitutional?*, DAILY KOS (Sept. 30, 2011), <http://www.dailykos.com/story/2011/09/30/1021600/-Religious-Exemptions-and-Contraceptive-Coverage:-How-Far-Can-Denial-Go-and-Still-Be-Constitutional?detail=hide>.

13. *State Policies in Brief: Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Dec. 1, 2011), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf [hereinafter *State Policies in Brief*].

14. *Insurance Coverage for Contraception: A Proven Way to Protect And Promote Women’s Health*, NARAL PRO-CHOICE AMERICA FOUNDATION 4 (Jan. 1, 2010), <http://www.prochoiceamerica.org/media/factsheets/birth-control-insurance-coverage.pdf> [hereinafter *Insurance Coverage for Contraception*].

15. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as 42 U.S.C. §§ 18001–18121 (2012)).

16. “A group health plan is an employee welfare benefit plan established or maintained by an employer or by an employee organization (such as a union), or both, that provides medical care for participants or their dependents directly through insurance, reimbursement, or otherwise.” *Health Plans and Benefits*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/health-plans/index.htm> (last visited Sept. 11, 2012).

17. A health insurance issuer is “[a]n insurance, insurance service, or insurance corporation (including an HMO) that is required to be licensed to engage in the business of insurance in a state and that is subject to state law that regulates insurance.” *Health Insurance Issuer*, U.S. DEP’T OF LABOR, http://www.dol.gov/elaws/ebsa/health/glossary.htm?wd=Health_Insurance_Issuer (last visited Sept. 10, 2012).

18. Patient Protection and Affordable Care Act § 2713(a)(4) (codified as 42 U.S.C. § 300gg–13 (2012)). To assist the HHS in developing these comprehensive guidelines, the Institute of Medicine (“IOM”) conducted a scientific study of “preventive services [that] are important to women’s health and well-being.” *Clinical Preventive Services for Women: Closing the Gaps*, INST. OF MED. I (July 19, 2011), http://iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf [hereinafter *Preventive Services*]. During the study, “[t]he IOM] defined preventive health services as measures—including medications, procedures, devices, tests, education, and counseling—shown to improve well-being and/or decrease the likelihood or delay the onset of a targeted disease or condition.” *Id.* at 1–2. According to the HHS Secretary Kathleen Sebelius, “These

items and services, all Food and Drug Administration (“FDA”) approved prescription contraceptive methods.¹⁹

Although employers that qualify as “religious” under the mandate may seek an exemption from the contraceptive coverage requirement, the exemption criteria are inextricably narrow and only afford protection to churches, houses of worship, and monasteries.²⁰ Religion-based entities such as hospitals, colleges, universities, and charitable organizations do not meet the criteria and are therefore excluded.²¹ This restrictive exemption provision is particularly problematic for Catholic-affiliated organizations because they will be forced to comply with the mandate or pay a penalty for failing to do so.²² As a result, numerous Catholic organizations across the country have reacted strongly against the HHS’s contraceptive regulation.²³ The United States Conference of Catholic Bishops (“USCCB”) has become the front-runner in attacking both the constitutionality and legality of the mandate.²⁴

This article examines the USCCB’s religious challenges to the contraceptive coverage mandate under the Free Exercise Clause of the Constitution²⁵ as well as the statutory terms of the Religious Freedom Reformation Act of 1993 (“RFRA”)²⁶ and, in doing so, ultimately posits that the mandate does not violate the free exercise rights of Catholic employers. Section II provides background information about the social and economic benefits of prescription contraceptives and presents a brief overview of the contraceptive equity legislation that preceded the HHS’s contraceptive mandate.²⁷ Section III sets forth the USCCB’s objections to the contraceptive coverage mandate, focusing specifically on its religious exercise challenges.²⁸ Section IV evaluates the constitutionality of the con-

historic guidelines are based on science and existing literature and will help ensure women get the preventive health benefits they need.” *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, HHS.GOV (Aug. 1, 2011), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html> [hereinafter *No Additional Cost*].

19. *No Additional Cost*, *supra* note 18.

20. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147) (“[T]he Departments seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions.”).

21. Julie Rovner, *Religious Groups Want Relief from Birth Control Mandate*, NPR (Nov. 2, 2011), <http://www.npr.org/blogs/health/2011/11/02/141949921/religious-groups-want-relief-from-birth-control-mandate>.

22. Igor Volsky, *Pat Toomey: Religious Employers Need Additional Exemptions from Offering Coverage for Contraceptives*, THINKPROGRESS (Sept. 26, 2011), <http://thinkprogress.org/health/2011/09/26/328588/pat-toomey-religious-employers-need-additional-exemptions-from-offering-coverage-for-contraceptives/>.

23. See *Catholic Colleges Unite to Defend Religious Liberty, Oppose Illegal Contraceptive Mandate*, CARDINAL NEWMAN SOCIETY (Sept. 29, 2011), <http://www.cardinalnewmansociety.org/Home/tabid/36/ctl/Details/mid/435/ItemID/1127/Default.aspx> (“Eighteen Catholic colleges and universities . . . joined [together] in an appeal to the Obama administration to exempt all religious objectors from a mandate requiring health insurance plans to cover . . . contraceptives . . .”); Scaccia, *supra* note 12.

24. See *USCCB Urges Rescission of HHS Contraceptive Mandate, Criticizes ‘Inexplicably Narrow’ Definition of Religious Freedom*, U.S. CONF. OF CATHOLIC BISHOPS (Aug. 31, 2011), <http://www.usccb.org/news/2011/11-168.cfm>.

25. U.S. CONST. amend. I.

26. Religious Freedom Reformation Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb–4 (2012). Since 1997, the RFRA has not applied to state law. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

27. See generally Staci D. Lowell, Note, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 CLEV. ST. L. REV. 441, 443–45 (2004–2005).

28. See Anthony R. Picarello, Jr. & Michael F. Moses, *Interim Final Rule on Preventive Services*, U.S. CONF. OF CATHOLIC BISHOPS 2, 7–11, 13 (Aug. 31, 2011), <http://www.usccb.org/about/general->

traceptive mandate as it relates to the Supreme Court's free exercise jurisprudence,²⁹ and Section V analyzes the legality of the mandate as it pertains to the terms of the RFRA.³⁰ Section VI concludes that, because the federal contraceptive coverage mandate does not violate Catholic employers' constitutional or federally guaranteed free exercise rights, Catholic-affiliated organizations are required to cover their employees' prescription contraceptives.³¹

II. BACKGROUND

A. *Benefits of Prescription Contraceptives*

Women derive many benefits from the use of prescription contraceptives.³² For example, when used consistently and correctly, oral contraceptives are ninety-nine percent effective in preventing unintended pregnancies.³³ In the United States, for every ten women who are having sex, nine do not desire to become pregnant.³⁴ Since the average American woman wants only two children, a woman must use contraceptives for approximately three decades if she wishes to remain sexually active throughout the duration of her reproductive years.³⁵ Without contraceptives, a sexually active woman with normal fertility has an eighty-five percent chance of conceiving a child within one year.³⁶ Due to its effectiveness, ninety-eight percent of women in the United States have used contraception at some point during their reproductive years.³⁷

An unintended pregnancy imposes detrimental consequences for both the woman and her baby.³⁸ In the United States, half of all pregnancies are unintended, and of this

counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf.

29. See generally Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions From Smith*, 75 N.Y.U. L. REV. 1045 (2000).

30. 42 U.S.C. §§ 2000bb to 2000bb-4.

31. See *Empl't Div. v. Smith*, 494 U.S. 872, 878 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

32. While contraceptives do provide many health benefits to women, they can pose serious health risks as well. Studies have shown that contraceptives may increase women's risk of developing blood clots. *FDA Drug Safety Communication: Safety Review Update on the Possible Increased Risk of Blood Clots with Birth Control Pills Containing Drospirenone*, U.S. FOOD & DRUG ADMIN. (Sept. 26, 2011), <http://www.fda.gov/Drugs/DrugSafety/ucm273021.htm>. Additionally, taking hormonal contraceptives has been linked to women acquiring HIV-1. Harold L. Martin Jr. et al., *Hormonal Contraception, Sexually Transmitted Diseases, and Risk of Heterosexual Transmission of Human Immunodeficiency Virus Type 1*, 178 J. INFECTIOUS DISEASE 1053, 1053 (1998).

33. H.R. 463, 111th Cong. § 2 (2009). "If [birth control] pills are taken every day at the same time, and each pack is started on time, oral contraceptives are 99% effective in preventing pregnancy. On average, oral contraceptives are 93-97% effective because women often miss pills or do not start a new pack on time." *Oral Contraceptives: Birth Control Pills*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/preventingpregnancy/birthcontrolpills.html> (last updated Aug. 2003).

34. Lowell, *supra* note 27, at 443.

35. Michelle Andrews, *Health Insurers May Soon Offer Contraceptives at No Extra Cost*, WASH. POST (July 6, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/02/AR2010070204641.html>.

36. Omnia M. Samra, *Birth Control Behavioral Methods*, EMEDICINEHEALTH, http://www.emedicinehealth.com/birth_control_behavioral_methods/article_em.htm (last updated Aug. 8, 2005).

37. *Title X*, NAT'L FAM. PLANNING & REPROD. HEALTH ASS'N, http://www.nfprha.org/main/policy_action.cfm?Category=Key_NFPRHA_Issues&Section=Title%20X%20Action%20Plan (last visited Sept. 28, 2011).

38. See Adam Sonfield, *Preventing Unintended Pregnancy: The Need and the Means*, 6 GUTTMACHER REP. ON PUB. POL'Y 7 (2003), <http://www.guttmacher.org/pubs/tgr/06/5/gr060507.html>.

percentage, four in ten end in abortion.³⁹ These abortions impose physical and emotional costs on women.⁴⁰ Because contraceptives are an effective means of preventing unintended pregnancies, it follows that affordable contraception decreases the number of abortions performed.⁴¹ Furthermore, women who become pregnant unintentionally are less likely to receive timely prenatal care and are more likely to drink alcohol, smoke, become depressed, and become victims of domestic violence during pregnancy.⁴² Consequently, a child born as a result of an unintended pregnancy is at greater risk of being born at a low weight, dying within the first year of life, being subject to abuse, and experiencing developmental problems later in life.⁴³ By preventing unintended pregnancies, contraceptives have contributed to a dramatic decrease in maternal and infant mortality⁴⁴ and have improved women's overall health by allowing them to plan and space their pregnancies.⁴⁵

Prescription contraceptives are not only preventive medications; they provide many therapeutic health benefits as well.⁴⁶ Doctors often prescribe birth control pills to treat medical conditions such as polycystic ovary syndrome, endometriosis, amenorrhea (i.e., lack of periods), menstrual cramps, premenstrual syndrome, heavy periods, and acne.⁴⁷ Furthermore, since less menstrual bleeding occurs when taking oral contraceptive pills, the likelihood of developing anemia, endometrial cancer, ovarian cancer, and ovarian cysts decreases.⁴⁸

In addition to the many medical purposes it serves, the use of contraceptives poses several social and economic benefits as well.⁴⁹ By reducing the risk of unplanned pregnancy, contraceptives allow women to achieve greater freedom by enabling them to invest in a higher education and a career.⁵⁰ From a cost-benefit approach, contraceptive coverage saves public and private health dollars that would otherwise be spent on expenditures derived from unintended pregnancies.⁵¹ Even if a baby born as a result of an

39. *Facts on Induced Abortions in the United States*, GUTTMACHER INST. (Aug. 2011), http://www.guttmacher.org/pubs/fb_induced_abortion.html. When considering the percentage of unintended pregnancies that end in abortion, it is important to note that studies show that contraceptive programs do not consistently reduce abortion rates. See *Greater Access to Contraception Does Not Reduce Abortions*, U.S. CONF. OF CATHOLIC BISHOPS (July 17, 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/contraception/greater-access-to-contraception-does-not-reduce-abortions.cfm>.

40. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 367 (1998). See also Adam Sonfield, *Preventing Unintended Pregnancy: The Need and the Means*, 6 GUTTMACHER REP. ON PUB. POL'Y 7 (2003), <http://www.guttmacher.org/pubs/tgr/06/5/gr060507.html>.

41. See Law, *supra* note 40, at 367.

42. See Jason Kane, *Women Should Get Free Birth Control*, HHS-Backed Group Urges, PBS NEWSHOUR (July 19, 2011), <http://www.pbs.org/newshour/rundown/2011/07/women-should-get-free-birth-control-hhs-backed-report-urges.html>.

43. H.R. 463, 111th Cong. § 2 (2009).

44. *Id.*

45. *Expanding Access*, *supra* note 5.

46. See generally *Medical Uses of the Birth Control Pill*, CTR. FOR YOUNG WOMEN'S HEALTH, <http://www.youngwomenshealth.org/med-uses-ocp.html> (last updated Oct. 18, 2011).

47. *Id.*

48. *Id.*

49. See Lowell, *supra* note 27 at 443–44.

50. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7 (2011), <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf>.

51. See Law, *supra* note 40, at 366–68.

unintended pregnancy is healthy, the financial costs associated with childbirth far outweigh the costs of contraceptive coverage.⁵² For example, the average bill for a vaginal birth, when accounting for facility variations, is \$7,500, and the average bill for a cesarean section is \$13,200.⁵³ Over a five-year study, researchers found that third-party payers, i.e., employers who provide contraceptive coverage, generally benefit as a result of savings incurred through lower premium costs and increased profits.⁵⁴ According to the Washington Business Group on Health and William M. Mercer, employers that include contraceptive coverage in their employees' health plans save fifteen to seventeen percent after factoring in the direct costs of pregnancy and the indirect costs associated with pregnancy, e.g., employee absenteeism and decreased productivity.⁵⁵ Thus, it is economically efficient for employers to include contraceptive coverage in their employees' health insurance plans.⁵⁶

B. *Legislative Backdrop: The Emergence of the HHS's Contraceptive Coverage Mandate*

While the emergence of contraceptive equity legislation has become prominent among the states in the last decade, it was not until insurance companies began to cover Viagra, a well-known male impotence drug, in the mid-1990s that interest groups began pressuring lawmakers to pass mandatory contraceptive coverage legislation.⁵⁷ As a result of this seeming inequity between the sexes, twenty-eight states have enacted some form of contraceptive equity legislation to date.⁵⁸ However, state laws are unable to regulate self-insured plans (plans funded by the employer instead of an insurance company), which are governed exclusively by the Employee Retirement Income Security Act ("ERISA").⁵⁹ Since nearly half of all Americans who rely on employer-sponsored insurance work for employers offering self-insured plans, state efforts to provide women unrestricted contraceptive access have proven only mildly effective.⁶⁰ In 1998, the federal government implemented the Federal Employees Health Benefits Plan ("FEHBP"), which extended coverage of all prescription contraceptives to federal employees.⁶¹ Since the FEHBP only applies to federal workers, leaving millions of private-sector em-

52. *Id.* at 366.

53. Jennifer Brown, *Women Pay up to 50% More for Health Insurance Premiums*, DENVER POST (Oct. 25, 2009), http://www.denverpost.com/frontpage/ci_13636522.

54. James Trussell et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AM. J. PUB. HEALTH 494, 500 (1995).

55. Adam Sonfield, *Contraception: An Integral Component of Preventive Care for Women*, 13 GUTTMACHER POL'Y REV. 2, 7 (2010), <http://www.guttmacher.org/pubs/gpr/13/2/gpr130202.html>.

56. See *Covering Prescription Contraceptives in Employee Health Plans: How This Coverage Saves Money*, NAT'L WOMEN'S LAW CTR. 1–2 (May 2006), <http://www.cluw.org/PDF/ContraceptiveCoverageSavesMoney.pdf>.

57. *Contraceptive Equity Bills Gain Momentum in State Legislatures*, CTR. FOR REPROD. RIGHTS (Aug. 1, 2005), <http://reproductiverights.org/en/document/contraceptive-equity-bills-gain-momentum-in-state-legislatures> [hereinafter *Contraceptive Equity Bills*].

58. *State Policies in Brief*, *supra* note 13.

59. See Roth, *supra* note 8, at 788–89.

60. See *Insurance Coverage for Contraception*, *supra* note 14, at 3. See also Roth, *supra* note 8, at 792 ("The maximum number of women who could possibly be affected by state laws is roughly thirteen percent.").

61. Cheyrl A. Danner, *Prescription Contraceptives: Educate Yourself on the Discrimination You May Be Suffering Because You Work for a Private Educational Institution*, 31 J. L. & EDUC. 513, 518 (2002).

ployees without coverage, Congress has repeatedly introduced the Equity in Prescription Insurance and Contraceptive Coverage Act (“EPICC”).⁶² The EPICC would require all health plans, including self-insured plans, that provided coverage for prescription drugs to provide comparable coverage for all FDA-approved prescription contraceptive methods.⁶³ Due to religious freedom concerns, however, the EPICC lacked the support necessary for passage.⁶⁴ Thus, the HHS mandate is the first piece of federal legislation that extends contraceptive coverage to every health plan in the United States.⁶⁵ Since it reaches self-insured plans as well as plans that do not provide prescription drug coverage, it is the most comprehensive contraceptive mandate in the history of the United States.⁶⁶

III. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS’ SPECIFIC OBJECTIONS

In response to the HHS’s contraceptive coverage mandate, the USCCB submitted a comment in which it urged the HHS to reconsider its decision to include contraceptives as a preventive service.⁶⁷ In setting forth its religious objections to the contraceptive mandate, the USCCB vehemently argued that requiring employers to provide contraceptive coverage in their health plans violates a spectrum of constitutional and other federally guaranteed rights.⁶⁸ Specifically, the USCCB asserts that the mandate violates constitutional guarantees under the Free Exercise Clause of the First Amendment, as well as statutory protections under the terms of the RFRA.⁶⁹

As a basis for its challenges, the USCCB claims that the contraceptive mandate triggers strict scrutiny⁷⁰ — the highest level of judicial review — pursuant to which laws and regulations must be “narrowly tailored” to achieve a “compelling government interest” to pass constitutional muster.⁷¹ When determining the constitutionality of a particular law, the court’s standard of review is very important to, if not dispositive of, the outcome.⁷² Here, the USCCB argues that disease prevention is not a compelling government interest because contraceptives do not prevent disease; rather, contraceptives are a method by which women “prevent the healthy state of pregnancy.”⁷³ Moreover, the

62. *Id.*

63. Lowell, *supra* note 27, at 451.

64. *See* Danner, *supra* note 61.

65. *See* Picarello & Moses, *supra* note 28, at 4.

66. *Id.*

67. *Id.* at 1.

68. *Id.* at 5–13.

69. *Id.* at 7–13. USCCB also challenges the constitutionality and legality of the inclusion of sterilization and contraceptive counseling in the comprehensive guidelines and argues that mandating coverage of contraceptives, sterilization, and related counseling violates the Administrative Procedure Act. *Id.* at 2, 13. Since certain FDA-approved contraceptives are believed by some to operate as abortion-inducing medications, the USCCB contends that the mandate violates the Weldon Amendment and the PPACA’s abortion and non-preemption provisions. *Id.* at 5–7. These issues are outside the scope of this comment.

70. *Id.* at 9–10.

71. *See generally* *Constitutional Law — First Amendment — En Banc Third Circuit Strikes Down Federal Statute Prohibiting the Interstate Sale of Depictions of Animal Cruelty*. — United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (*En Banc*), 122 HARV. L. REV. 1239, 1242 (2009) (discussing the importance of the application of strict scrutiny in First Amendment analysis).

72. *Id.* at 1239–43.

73. Picarello & Moses, *supra* note 28, at 10–11.

USCCB argues, Congress itself did not seek to include contraceptive coverage in the PPACA; therefore, the HHS's decision to include contraceptives as a preventive service cannot possibly fulfill a compelling government interest.⁷⁴ In the alternative, the USCCB argues that, even if the government could prove that its interest was somehow compelling, the means used to achieve that interest — i.e., the contraceptive mandate — are not narrowly tailored because several religious organizations and individuals will drop health insurance coverage altogether to avoid compromising their beliefs.⁷⁵

The Free Exercise Clause is embedded within the First Amendment of the Constitution, which provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁷⁶ As a basis for its free exercise challenge, the USCCB argues that the federal contraceptive coverage mandate triggers strict scrutiny review because, while neutral on its face, it implicitly targets Catholicism in its operation and therefore discriminates against religion.⁷⁷ Alternatively, the USCCB alleges that because the mandate forces those religiously opposed to contraceptive use to contradict their religious beliefs, the mandate imposes a “substantial burden” upon Catholic employers.⁷⁸ Since the mandate provides a religious exemption for a select group of Catholic organizations, the USCCB argues that this substantial burden is applied pursuant to a system of “individualized exemptions,” thereby triggering strict scrutiny review.⁷⁹

In addition to asserting objections pursuant to these constitutional theories, the USCCB argues that the contraceptive coverage mandate is unlawful because it violates the RFRA,⁸⁰ which provides that the government may not “substantially burden a person’s exercise of religion,” even by a law of general applicability, without demonstrating that the application of that burden is “the least restrictive means” to advance a “compelling government interest.”⁸¹

In sum, the USCCB demands that the HHS rescind the contraceptive mandate in its entirety.⁸² If the HHS is unwilling to do so, the USCCB argues, then it must expand the narrow religious exemption to rectify the grave constitutional and legal problems that currently exist.⁸³ The USCCB warns the HHS that unless it promulgates a broader exemption that encompasses all stakeholders with a religious objection to contraceptives, the courts will not uphold the mandate as applied to Catholic organizations.⁸⁴

74. *Id.* at 11.

75. *Id.*

76. U.S. CONST. amend. 1.

77. Picarello & Moses, *supra* note 28, at 8–9.

78. *Id.* at 9–10.

79. *Id.* at 10.

80. *Id.* at 13.

81. Religious Freedom Reformation Act of 1993, 42 U.S.C. §§ 2000bb–1(a)–(b) (2012).

82. Picarello & Moses, *supra* note 28, at 23.

83. *Id.*

84. *See id.*

IV. THE SUPREME COURT'S FREE EXERCISE JURISPRUDENCE AND ANALYSIS OF CLAIMS

A. *Limitation of Free Exercise Protection*

As a nation founded upon the principle of religious freedom, the United States remains wedded to the notion of religious practice free from governmental intrusion.⁸⁵ The principle of religious freedom as protected by the First Amendment is not, however, without limitation;⁸⁶ the Supreme Court's free exercise jurisprudence establishes the degree to which the government may infringe upon an individual's practice of religion.⁸⁷ In discerning whether a governmental law or regulation unconstitutionally interferes with an individual's manifestation of religion, the Supreme Court has distinguished between "religious beliefs" and "religious conduct."⁸⁸ In 1940, the Supreme Court first began articulating rules pertaining to when the government can impose regulations that infringed on individuals' free exercise rights.⁸⁹ In *Cantwell v. Connecticut*,⁹⁰ the Court distinguished religious beliefs from religious conduct, stating that the Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."⁹¹ *Cantwell* clearly conveyed that while religious beliefs and speech are absolute, freedom of individual conduct that is motivated by religious belief is afforded less protection.⁹²

B. *The Sherbert Test*

Prior to 1900, the Supreme Court applied the "substantial burden" test to almost all general laws that burdened the free exercise of religion, whereby a law imposing a substantial burden on religion cannot be enforced unless it survives strict scrutiny — i.e., serves a compelling state interest and is narrowly tailored to advance that interest.⁹³ The Supreme Court first applied the substantial burden test in 1963 in the landmark case of *Sherbert v. Verner*,⁹⁴ where the Court held that the State's interest in preventing the filing of fraudulent unemployment compensation claims was not compelling enough to jus-

85. See, e.g., *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222–23 (1963) ("The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion.")

86. See, e.g., *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (holding that the government need not comply with an individual's claim that making his Social Security number available violated his religious beliefs).

87. Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1725 (1999) (explaining that the Supreme Court's free exercise jurisprudence established the boundaries for government infringement on an individual's religious practices).

88. See Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1200 (2005).

89. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

90. *Id.*

91. *Id.* at 303–04.

92. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) (citation omitted) ("Not all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.")

93. The Supreme Court made exceptions to the application of strict scrutiny for laws and regulations dealing with prisons and the military. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503, 506–07 (1986) (military).

94. *Sherbert v. Verner*, 374 U.S. 398 (1963).

tify infringing on a citizen's right to free exercise.⁹⁵ The plaintiff in *Sherbert*, a member of the Seventh-Day Adventist Church, was fired for refusing to work on Saturday because her religion forbade laboring on that day.⁹⁶ Because the plaintiff refused to work on Saturdays, she was unable to locate new employment and subsequently filed an application for unemployment benefits.⁹⁷ The state unemployment commission denied the plaintiff benefits on the ground that she would not "accept suitable work when offered."⁹⁸

In applying the substantial burden test to the Free Exercise Clause for the first time, the Court first inquired as to whether the State's action did in fact substantially burden the plaintiff because of her religious beliefs.⁹⁹ The Court observed that the State's denial of benefits to the plaintiff "derive[d] solely from the practice of her religion . . . and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."¹⁰⁰ This type of burden on the free exercise of religion, the Court believed, was tantamount to imposing a fine against an individual for worshipping on Saturday.¹⁰¹ Next, the Court examined whether or not the State's action furthered a compelling state interest.¹⁰² In response to this inquiry, the Court held that the State's unemployment statute abridged the plaintiff's right to free exercise of her religion because the State's interest in unifying its unemployment compensation rules to prevent fraudulent religious objections was not compelling.¹⁰³ Additionally, the Court found that even if the State's interest in unifying its unemployment benefits rules was compelling, it would nevertheless be incumbent upon the government to prove that the law was narrowly tailored and that, as such, it was the least restrictive means of furthering that interest.¹⁰⁴

The most prominent application of the substantial burden test came nine years later in *Wisconsin v. Yoder*,¹⁰⁵ which modified the *Sherbert* test by requiring that the religious belief at issue be "legitimate."¹⁰⁶ In *Yoder*, the Court analyzed whether the Free Exercise Clause protected the Amish community's belief that children should not go to school through the age of sixteen by asking whether the belief was "one of deep religious conviction, shared by an organized group, and intimately related to daily living."¹⁰⁷ Finding that the belief satisfied all three criteria, the Court held that the application of Wisconsin's compulsory school attendance law was invalid as applied to Amish students.¹⁰⁸ The Court justified its extensive analysis by reasoning that, "[w]here fundamental claims of

95. *Id.* at 407.

96. *Id.* at 399.

97. *Id.* at 399–400.

98. *Id.* at 401 (citation and quotation marks omitted).

99. *Id.* at 403.

100. *Id.* at 404.

101. *Id.*

102. *Id.* at 406.

103. *Id.* at 406–07.

104. *Id.* at 407.

105. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

106. *Id.* at 214–15.

107. *Id.* at 216.

108. *Id.* at 216–17, 234.

religious freedom are at stake, . . . we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.”¹⁰⁹ The balancing test of *Sherbert*, as modified by *Yoder*, came to be known as the substantial burden test, which can be articulated as follows: if a law substantially burdens an individual’s free exercise of religion, the government must exempt the religious believer from the law, unless the government can demonstrate that the law serves a compelling government interest and is narrowly tailored to achieve that interest.¹¹⁰ This test governed free exercise jurisprudence until 1990.¹¹¹

C. *The Smith Test*

In 1990, however, the Supreme Court limited the applicability of the substantial burden test in *Employment Division v. Smith*.¹¹² In *Smith*, the Court held that laws of “neutral law and general applicability” need not be subject to strict scrutiny review, even if the laws have the incidental effect of burdening religious free exercise.¹¹³ Thus, the Court restricted the application of the substantial burden test so as to only invalidate laws that specifically target a religious practice.¹¹⁴ In *Smith*, the South Carolina unemployment commission denied two men unemployment compensation benefits after they were fired from their jobs for ingesting peyote, a hallucinogenic drug used by adherents to the Native American Church for sacramental purposes.¹¹⁵ Since peyote was a prohibited substance under the State’s law, the unemployment agency determined that the employees were discharged for “misconduct” and, therefore, ineligible for unemployment benefits.¹¹⁶

The plaintiffs claimed that the State’s refusal to grant them unemployment benefits based on their use of peyote was a violation of their free exercise rights under *Sherbert*’s test.¹¹⁷ The Court, however, held that the State’s denial of the plaintiffs’ employment compensation benefits did not violate the Free Exercise Clause.¹¹⁸ As a basis for its holding, the Court noted that the law at issue was neutral because it did not specifically target the Native American Church and was generally applicable because it prohibited all citizens from using peyote.¹¹⁹ The Court explained that:

[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of

109. *Id.* at 221.

110. *See, e.g.,* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520 (1993); *Sherbert*, 374 U.S. 398.

111. *See* *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

112. *Id.*

113. *Id.* at 878-79 (holding that where a restraint on religion “is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended”).

114. *See id.* at 878.

115. *Id.* at 874.

116. *Id.*

117. *Id.* at 876.

118. *Id.* at 890.

119. *Id.* at 878.

policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him by virtue of his beliefs, “to become a law unto himself,”—contradicts both constitutional tradition and common sense.¹²⁰

Thus, *Smith* implicitly overruled *Sherbert* by establishing that unless a challenged law or regulation intentionally discriminates against religious conduct, courts have no discretion to decide whether or not the plaintiff should be granted a religious exemption from the law.¹²¹ *Smith* alleviated the strictness of this new rule, however, by preserving the courts’ ability to apply strict scrutiny when the government action “len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct.”¹²² *Smith* set a new standard for free exercise jurisprudence, which can be expressed as follows: when a law lacks neutrality, general applicability, or is applied pursuant to a system of individualized exceptions, the law must survive strict scrutiny review to avoid violating the Free Exercise Clause.¹²³ The meanings of each of these standards, as developed and refined by subsequent case law, are discussed in turn below.

1. Neutral and General Applicability

In *Smith*, the Supreme Court merely laid out the bare contours of the “neutral and generally applicable” test, providing relatively little guidance to lower courts as to how the test should be applied in future cases.¹²⁴ Since *Smith*, only one Supreme Court decision has interpreted and applied the neutral and generally applicable test: *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.¹²⁵ In *Lukumi*, the plaintiffs were adherents of the Santeria religion, which sacrifices animals as a form of worship.¹²⁶ After the Santerians announced their plans to establish a house of worship in Hialeah, Florida, the city adopted ordinances prohibiting ritual sacrifice of animals, which it claimed furthered the government’s interest in promoting public health and preventing animal cruelty.¹²⁷ After concluding that the ordinances were neither neutral nor generally applicable, the Court

120. *Id.* at 885 (internal citations omitted).

121. *Id.* at 878.

122. *Id.* at 884. Many cases following *Sherbert* involved religious individuals who were denied unemployment benefits by government employees who were accorded a high degree of discretion in assessing applicants’ eligibility benefits. *See, e.g.,* *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829 (1989) (holding that denial of unemployment benefits to worker who refused to work on Sundays violates free exercise rights); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987) (holding that denial of unemployment benefits to Seventh Day Adventist who refused to work on Saturdays violates free exercise rights); *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981) (holding that denial of unemployment benefits to Jehovah’s Witness who quit job in factory when transferred to manufacturing armaments position violates free exercise rights).

123. Kaplan, *supra* note 29, at 1074.

124. *Smith*, 494 U.S. 872.

125. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

126. *Id.*

127. *Id.*

applied strict scrutiny.¹²⁸ The Court held that the law was unconstitutional because the government could have achieved the goal of safe and sanitary disposal of animal remains without targeting the Santeria religion — i.e., the ordinance was not the least restrictive means of accomplishing the purported interest.¹²⁹

When evaluating whether a law is neutral as applied to a religious practice, a court's fundamental concern is whether the government intends to prohibit conduct for "religiously motivated" reasons.¹³⁰ When conducting this determination, three questions are relevant: (1) "does the law target religious practices on its face?"¹³¹; (2) if the law is neutral on its face, does it discriminate "in its object or purpose?"¹³²; and (3) if the law has a discriminatory intent, "[d]oes the law discriminate in its actual operation or effect?"¹³³ In applying this tripartite test in *Lukumi*, the Court noted that the law prohibiting the ritual sacrifice of animals was facially neutral.¹³⁴ Nonetheless, the Court acknowledged its duty to inquire further to determine whether the law was discriminatory in its object or purpose.¹³⁵ Therefore, the Court reviewed the legislative record for any evidence that was suggestive of discriminatory intent on the part of the legislators.¹³⁶ Under this examination, the Court found that the particular resolution adopted recited that residents of the city had expressed their concerns regarding a certain religion's practices.¹³⁷ The resolution also reiterated the city's commitment to prohibiting such acts by religious groups.¹³⁸ Furthermore, the Court noted that the text of the ordinance spoke of "sacrifice" and "ritual," which the Court believed offered support for a finding of discriminatory intent in the legislative record.¹³⁹ Review of this evidence, however, did not conclude the Court's inquiry as to the neutrality of the law, for, as the Court indicated, a law must *actually* discriminate in its effect to be considered an unconstitutional burden on the free exercise of religion.¹⁴⁰

In evaluating the effect of the ordinances, the Court delved into a general applicability analysis, which focuses on the design, construction, and enforcement of a law and

128. *Id.* at 546–47.

129. *Id.* at 546.

130. *See* Kaplan, *supra* note 29, at 1076.

131. *Id.* at 1077 "[A] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* (quoting *Lukumi*, 508 U.S. at 533).

132. *Id.* "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment of official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540. It is not completely clear whether a neutrality inquiry should entail delving into the subjective motivations of the legislature or should only focus on the effect of the law in its operation. *See* Kaplan, *supra* note 29, at 1076 n.146 (noting that Justice Kennedy wrote for the majority in *Lukumi*, but only Justice Stevens joined the part of the opinion in which the Court found that the judiciary should consider circumstantial evidence).

133. Kaplan, *supra* note 29, at 1077.

134. *Lukumi*, 508 U.S. at 534–35.

135. *Id.* at 534.

136. *Id.* at 534–35.

137. *Id.*

138. *Id.*

139. *Id.* at 534 (noting that while the use of the words "sacrifice" and "ritual" were not sufficient to compel a finding that the legislature targeted the Santeria religion, the words did garner support for the conclusion that there was discriminatory intent on the part of the legislature in drafting the ordinance).

140. *Id.* at 535.

is best suited for determining whether the law's actual purpose is to discriminate against a religious practice.¹⁴¹ When conducting a general applicability inquiry, two questions are relevant, and an affirmative response to either question is sufficient to determine that a law lacks general applicability.¹⁴² First, did the legislature design the law to achieve a specific, as opposed to a general, purpose?¹⁴³ And second, does the construction of the law warrant an actual operation that exclusively targets religious conduct or a particular religion?¹⁴⁴

In light of the city's purported interest in preventing animal cruelty, the *Lukumi* Court focused on the exceptions to the law that allowed the killing of animals by other religions, such as kosher slaughtering of animals, as well as those that allowed the killing of animals for nonreligious purposes, such as hunting.¹⁴⁵ Because the ordinances were designed to proscribe animal killings for religious sacrifice, but to exclude virtually all secular killings, the Court noted that the ordinances constituted a "religious gerrymander" and, as such, "an impermissible attempt to target [Santeria believers] and their religious practices."¹⁴⁶ When evaluating the actual operation of the law, the Court found that the rituals of Santeria Church members were virtually the only conduct subject to the ordinance.¹⁴⁷ This led the Court to conclude that the law, while neutral on its face, specifically targeted Santeria religious practices in operation.¹⁴⁸ Therefore, the Court determined that the ordinance was neither neutral nor generally applicable, and as such, the constitutionality of the ordinance was subject to strict scrutiny review.¹⁴⁹

2. The HHS's Contraceptive Mandate is Neutral and Generally Applicable

Pursuant to free exercise jurisprudence established by *Smith* and *Lukumi*, the USCCB argues that the HHS mandate constitutes a "religious gerrymander" that targets Catholicism" and that, while neutral on its face, the mandate discriminates in its actual operation.¹⁵⁰ In reaching this conclusion, the USCCB misconstrues the reasoning in *Lukumi* and incorrectly applies the neutral and general applicability test.¹⁵¹

Upon an initial textual reading of the mandate, it appears facially neutral.¹⁵² Therefore, pursuant to the *Smith* test, a court must look to any evidence that suggests the HHS intended to discriminate against Catholicism.¹⁵³ In its comment to the HHS, the USCCB notes that many secular employers provided contraceptive coverage to their employees prior to the federal mandate, which indicates that the purpose of the mandate is

141. Kaplan, *supra* note 29, at 1077.

142. *See id.* at 1078–79.

143. *Id.* at 1078.

144. *Id.* at 1079.

145. *Lukumi* 508 U.S. at 536–37.

146. *Id.* at 535.

147. *Id.* at 535–36.

148. *Id.* at 535.

149. *Id.* at 542–57.

150. Picarello & Moses, *supra* note 28, at 8 (quoting *Lukumi*, 508 U.S. at 535).

151. *Lukumi*, 508 U.S. at 535–37.

152. Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (2011).

153. *Lukumi*, 508 U.S. at 534.

to force employers with religious objections to do the same.¹⁵⁴ In *Lukumi*, the Court noted that it would consider certain types of evidence when evaluating discriminatory intent.¹⁵⁵ Such evidence includes, but is not limited to, the historical background of the government's challenged action, events preceding the enactment of the law at issue, and administrative or legislative history.¹⁵⁶ Since the percentage of secular employers that provided contraceptive coverage prior to the federal mandate provides relevant historical background information, this evidence may suggest that the purpose of the mandate is to discriminate against the Catholic religion.¹⁵⁷ Therefore, a court must determine whether the mandate *actually* discriminates in operation.¹⁵⁸

Although the USCCB adopts *Lukumi*'s phrasing — claiming the mandate is a “religious gerrymander”¹⁵⁹ — the circumstances that prompted the particular finding in *Lukumi* do not exist here.¹⁶⁰ In *Lukumi*, the Court found that the ordinances were designed to regulate the specific animal killings by Santeria Church members as opposed to the killings of animals in general.¹⁶¹ In this situation, the federal contraceptive coverage mandate is very comprehensive with regard to the purported interest that it seeks to advance — i.e., providing women contraceptive coverage.¹⁶² With the exception of health plans that are grandfathered in, the mandate ensures that every woman with health insurance will have access to contraceptives as well as a host of other services that are vital to women's reproductive well-being.¹⁶³

Furthermore, the construction of the contraceptive mandate does not warrant an actual operation that exclusively targets Catholicism.¹⁶⁴ The USCCB argues that, “the class that suffers under the mandate is defined precisely by their beliefs.”¹⁶⁵ This contention, however, is not accurate.¹⁶⁶ Employers associated with the Catholic Church are not the only employers impacted by the mandate; indeed, several secular employers did not provide contraceptive coverage prior to the federal mandate and must also conform their conduct accordingly.¹⁶⁷ For this reason, there is no evidence that the mandate targets only Catholic practices or that the HHS has singled out the Catholic Church for purposes of discrimination.¹⁶⁸

Therefore, a correct application of the Court's reasoning in *Lukumi* warrants a

154. Picarello & Moses, *supra* note 28, at 8 n.16.

155. *Lukumi*, 508 U.S. at 540.

156. *Id.*

157. *See id.*

158. *Id.*

159. Picarello & Moses, *supra* note 28, at 8 (quoting *Lukumi*, 508 U.S. at 535).

160. *Lukumi*, 508 U.S. at 535–36.

161. *Id.* at 535–37.

162. *Cf. id.* at 547 (noting that the uniform purpose of preventing cruelty to animals was extensively undermined by the numerous secular exceptions because animals that were killed for secular purposes, such as scientific research, would be no less likely to constitute animal cruelty than animals killed for religious purposes).

163. *See Expanding Access*, *supra* note 5.

164. *Cf. Lukumi*, 508 U.S. at 535 (“[A]most the only conduct subject to [the ordinances was] the religious exercise of Santeria church members.”).

165. Picarello & Moses, *supra* note 28, at 8.

166. *Cf. Lukumi*, 508 U.S. at 535.

167. *See generally State Policies in Brief*, *supra* note 13.

168. *Cf. Lukumi*, 508 U.S. at 535.

finding that the HHS mandate is both neutral and generally applicable.¹⁶⁹ Thus, the mandate will not be subject to strict scrutiny review under the Free Exercise Clause unless it contains a “mechanism for individualized exemptions,” i.e., the *Sherbert* exception applies.¹⁷⁰

3. The *Sherbert* Exception

When determining whether a law contains a mechanism for individualized exemptions — thereby placing it outside the scope of *Smith* — courts focus on the enforcement of the law to determine whether it is being applied inconsistently among different religions or as between religious and secular individuals.¹⁷¹ Under this type of analysis, the courts’ primary concern is the government’s ability to assess who is exempt from and who must comply with the law.¹⁷² This concern stems from the fact that such a decision is purely discretionary, and the government can use this decision-making authority in a discriminatory manner.¹⁷³ In *Smith*, the Court noted that the *Sherbert* line of cases all involved religious individuals who were denied unemployment benefits by government employees who were accorded a high degree of discretion in assessing the applicants’ eligibility benefits.¹⁷⁴ In other words, unelected officials were making entirely subjective determinations of whether an applicant’s reason for seeking unemployment benefits constituted “good cause.”¹⁷⁵

When determining whether the *Sherbert* exception is applicable, a court must first consider whether the law in question contains a mechanism akin to the “good cause” criterion, allowing significant discretion.¹⁷⁶ If such a mechanism is present, the court must then determine whether the law is enforced discriminatorily.¹⁷⁷ This determination focuses on whether the exemption is enforced impartially as between secular and religious applicants or among different religious applicants.¹⁷⁸ However, it is not enough that a challenged law or regulation allows exemptions based on subjective criteria; if the government does not enforce the law in a discriminatory manner, the *Sherbert* exception is inapplicable.¹⁷⁹

169. See generally *id.* at 531–47.

170. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb–4 (2012) (citation omitted).

171. Kaplan, *supra* note 29, at 1080–81.

172. *Id.* at 1083.

173. *Lukumi*, 508 U.S. at 542 (“All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.”). See also *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (reasoning that the government’s “refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent”).

174. *Smith*, 494 U.S. at 884.

175. Kaplan, *supra* note 29, at 1081.

176. *Id.* This includes laws, statutes, regulations and policies that contain “good cause” exceptions, or prohibit conduct “other than in cases of hardship,” or that apply in “exceptional circumstances.” *Id.* at 1081 n.175. Each of these exceptions requires an assessment of an individual’s specific circumstances “without reference to any . . . objective standard.” *Id.*

177. *Id.* at 1081.

178. See, e.g., *Rader v. Johnson*, 924 F. Supp. 1540, 1546–47, 1551 (D. Neb. 1966) (finding that an exemption that required a university administrator to determine whether a student should be allowed to live off-campus due to “significant and truly exceptional circumstances” was not enforced impartially as between religious and secular applicants and was therefore subject to strict scrutiny review).

179. Kaplan, *supra* note 29, at 1081.

4. The *Sherbert* Exception Does Not Apply to the HHS's Contraceptive Coverage Mandate

Under the HHS's contraceptive coverage mandate, an employer may apply for a religious exemption, pursuant to which the employer will not be penalized if it does not provide contraceptive coverage in its employees' health plans.¹⁸⁰ For an organization to qualify as a "religious employer," it must meet the following four criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)A(i) or (iii) of the Internal Revenue Code of 1986, as amended.¹⁸¹

In addressing this religious exemption provision, the USCCB argues that the HHS's contraceptive coverage mandate contains a system of "individualized exemptions," whereby the HHS will apply this exemption to exclude certain employers from complying with the contraceptive mandate on a case-by-case basis.¹⁸² The USCCB claims that the mandate triggers the *Sherbert* exception because it "stands in stark contrast to the kind of across-the-board rules that the Court in *Smith* was so concerned to insulate from constitutional challenge in cases where they happen to burden religious [free] exercise."¹⁸³

This assertion constitutes an inaccurate interpretation of the *Sherbert* exception, for it assumes that the law is subject to strict scrutiny review any time the government applies an exemption on a case-by-case basis.¹⁸⁴ The USCCB fails to consider that although *Smith* established that the government is not required to grant religious believers an exemption from a law of neutral and general applicability, the legislature still has the option to grant religious believers exemptions from the law or regulation at issue.¹⁸⁵ Writing for the majority in *Smith*, Justice Scalia explained that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."¹⁸⁶ Thus, *Smith's* free exercise precedent did not prohibit

180. Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (2011).

181. *Id.* In issuing this narrow exemption, the HHS intended to extend contraceptive coverage "to as many women as possible" by "respect[ing] the unique relationship between a house of worship and its employees in ministerial positions." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

182. Picarello & Moses, *supra* note 28, at 9–10.

183. *Id.* at 10.

184. *Id.*

185. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb–4 (2012).

186. *Id.*

legislatures from exempting religious institutions from laws of neutral and general applicability, but rather encouraged it.

Under a *Sherbert* exception analysis, the court must first determine if the HHS's authority to assess whether a particular organization qualifies as a "religious employer" for purposes of the exemption constitutes a mechanism similar to the "good cause" criterion, affording the HHS unrestricted discretionary interpretation.¹⁸⁷ In regard to this inquiry, the contraceptive coverage mandate is vulnerable to attack because the HHS will effectively assess each organization that applies for an exemption based on whether it has the "purpose" of inculcating religious values and whether it "primarily" serves and employs persons who share the religious tenets of the organization.¹⁸⁸ The terms "purpose" and "primarily" are so amorphous that a court could easily view the exemption provision as a grant of unchecked discretion.¹⁸⁹ Therefore, the court must continue its analysis to determine whether the HHS enforces the exemption impartially among different religions.¹⁹⁰ To prevail under this inquiry, a Catholic organization must show that the HHS denied it an exemption from the contraceptive mandate, but granted one to some other religiously affiliated organization.¹⁹¹ Absent a Catholic employer's ability to show such evidence of discrimination in the enforcement of the regulation, the *Sherbert* exception does not apply, and the mandate will not be subject to strict scrutiny review under the Free Exercise Clause.¹⁹²

In summary, the HHS's contraceptive coverage mandate is neutral, generally applicable, and does not contain a mechanism of individualized exemptions; therefore, the court will presume its constitutionality under the Free Exercise Clause.¹⁹³ Consequently, a Catholic employer must prove that the contraceptive coverage mandate violates the statutory protections of the RFRA in order to subject the mandate to strict scrutiny review.¹⁹⁴

V. RELIGIOUS FREEDOM RESTORATION ACT JURISPRUDENCE AND ANALYSIS

A. RFRA Jurisprudence and *O Centro*

The Supreme Court's holding in *Smith* sparked public outrage and prompted several religious leaders, churches, civil liberties and religious organizations, and politicians to lobby Congress to overturn *Smith* by statute.¹⁹⁵ In 1993, Congress overtly countermanded the Supreme Court's interpretation of the Free Exercise Clause in *Smith* by pass-

187. Kaplan, *supra* note 29, at 1081.

188. Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (2011).

189. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 717 (1981) (noting that Indiana requires individuals who apply for unemployment compensation to demonstrate that they left their job for "good cause" in connection with the job).

190. Kaplan, *supra* note 29, at 1080–81. Since the exemption only applies to religious organizations, it is not necessary to inquire as to whether the standards are applied impartially as between secular and religious organizations.

191. *See id.*

192. *See id.* at 1080–83.

193. *Id.* at 1074.

194. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb–4 (2012).

195. *See* Kaplan, *supra* note 29, at 1049 n.18.

ing the RFRA, which has become “one of the most controversial pieces of legislation” enacted during the Clinton administration.¹⁹⁶ The RFRA provides that the government may not “substantially burden a person’s exercise of religion,” even by a law of general applicability, without demonstrating that the application of the burden is “the least restrictive means” to advance a “compelling government interest.”¹⁹⁷ Congress based its decision to pass the RFRA on findings that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”¹⁹⁸ In essence, where the Supreme Court failed to recognize a constitutional right to religious free exercise, Congress created one by statute.¹⁹⁹

Four years later in *City of Boerne v. Flores*,²⁰⁰ the Supreme Court declared the RFRA unconstitutional as applied to state laws on the ground that it created rights against state governments that Congress had no power to impose under Section Five of the Fourteenth Amendment.²⁰¹ The Court was silent, however, with regard to whether the RFRA could be applied to federal laws.²⁰² Then, in 2006, the Supreme Court unanimously upheld the RFRA as valid and enforceable against the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.²⁰³ In *O Centro*, the Court pronounced guiding principles for determining when courts should exempt a religious believer from a federal law under the RFRA.²⁰⁴ First, the plaintiff must establish a prima facie RFRA case by proving that the application of a federal law or regulation imposes a substantial burden on a sincere exercise of his religion.²⁰⁵ If the plaintiff is successful, the burden of proof then shifts to the government to demonstrate that the burden furthers a compelling government interest and is the least restrictive means of advancing that interest.²⁰⁶

In *O Centro*, the plaintiffs were members of a Brazilian Spiritist sect that consumed a hallucinogenic tea for sacramental purposes.²⁰⁷ The tea contained dimethyltryptamine (generally referred to as “DMT”), a hallucinogen that is outlawed under the Controlled Substances Act.²⁰⁸ After customs inspectors seized a shipment containing three drums of the tea, the sect filed suit against the government seeking declaratory and in-

196. Travis C. Wheeler, Note, *An Economic Analysis of the Religious Freedom Restoration Act*, 63 LAW & CONTEMP. PROBS. 573, 573 (2000). While the RFRA invokes debate over the meaning of the Constitution’s text, the intent of the Fourteenth Amendment drafters, and basic policy questions concerning separation of powers, federalism, and individual rights, these issues are outside the scope of this discussion.

197. 42 U.S.C. § 2000bb-1(a)-(b). The stated purpose of the RFRA, reflected in the title of the act, was “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.” *Id.* § 2000bb(b)(1).

198. *Id.* § 2000bb(a)(2).

199. Wheeler, *supra* note 196, at 575.

200. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

201. *Id.* at 508.

202. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006) (“As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, we held the application to States to be beyond Congress’ legislative authority under [Section Five] of the Fourteenth Amendment.” (internal citation omitted)).

203. *Id.* at 418-39.

204. *Id.* at 428.

205. *Id.*

206. *Id.* at 424.

207. *Id.* at 423.

208. *Id.* at 425.

junctive relief under the RFRA.²⁰⁹ Conceding substantial burden of a sincere religious belief, the government sought to justify its actions by arguing that it had a compelling interest in preventing the diversion of DMT from the members of the sect to nonreligious users.²¹⁰ To support this purported interest, the government noted an increase in the illegal use of hallucinogens, and DMT in particular.²¹¹

In contesting the government's assertion, the sect members argued that the market for DMT was small, that the sect only imported small amounts of the tea, and that there had been no problem with diversion in the past.²¹² Upon concluding that the evidence of diversion to nonreligious users was "virtually balanced," the Court held that the government failed to demonstrate a compelling interest.²¹³ By upholding the application of the RFRA to federal law, the Supreme Court left *Smith* intact but also recognized a new framework in free exercise jurisprudence, which can be articulated as follows: if a religious believer establishes that the application of a federal law or regulation constitutes a substantial burden on a sincere exercise of religion, the government must provide sufficient evidence that application of the law or regulation is the least restrictive means of achieving a compelling interest.²¹⁴

B. Catholic Employers Can Raise a Prima Facie Case that the Contraceptive Coverage Mandate Violates Its Rights Under RFRA

According to the precedent set forth in *O Centro*, a Catholic employer can successfully raise a prima facie case under the RFRA because the HHS's contraceptive coverage mandate imposes a substantial burden on a sincere exercise of the Catholic religion by forcing Catholic employers to provide their employees coverage for contraceptives.²¹⁵ Although the existence of a substantial burden was a nonissue in *O Centro*, *Sherbert* previously established that a substantial burden exists, at a minimum, when the law or regulation at issue forces an individual "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept [government benefits], on the other hand."²¹⁶ Catholic employers will likely meet this threshold because the HHS's contraceptive coverage mandate would force them to choose between providing contraceptive coverage in their employees' health plans and paying a penalty for dropping its employees' health insurance coverage altogether.²¹⁷

Furthermore, courts should find that the Catholic Church's religious objection to

209. *Id.* at 425–26.

210. *Id.* at 426. The government also set forth two additional compelling interests arguments to justify its action: "protecting the health and safety of [the sect] members . . . and complying with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the United States." *Id.* These arguments present issues that are outside the scope of this article.

211. *Id.*

212. *Id.*

213. *Id.* at 426–27, 439 (citation omitted).

214. *See, e.g., id.* at 428–39.

215. *See id.* at 428 (stating that a claimant must prove that enforcement of a federal law "would (1) substantially burden (2) a sincere (3) religious exercise" to establish a prima facie RFRA case).

216. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

217. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119 (2010) (codified as 42 U.S.C. § 1320d-2 (2012)).

birth control is sincere, for its belief that contraception is “intrinsically evil” is deeply rooted in its religious teachings on the sacrament of marriage, human sexuality, and procreation.²¹⁸ The sincerity of this belief is further illustrated by the Catholic Church’s maintenance of its stance against the use of birth control, despite mounting opposition towards its position on the issue.²¹⁹ If, as the foregoing argument suggests is possible, a Catholic employer establishes a prima facie case under the RFRA, the HHS must demonstrate that the mandate furthers a compelling government interest and is the least restrictive means of furthering that interest.²²⁰

C. *The HHS’s Contraceptive Coverage Mandate is the Least Restrictive Means of Furthering a Compelling Government Interest*

Once the burden of proof shifts to the government, the HHS will be able to prove that it has a compelling interest in providing women the preventive care necessary to stay healthy and that the contraceptive coverage mandate is the least restrictive means of achieving that interest. The Supreme Court has not provided clear guidance as to what constitutes a compelling interest, but has rather addressed each case on an *ad hoc* basis.²²¹ However, the Supreme Court has noted 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.”²²² In *Lukumi*, the Court found that the government’s purported interest in preventing animal cruelty was not compelling because the ordinance only applied to the sacramental killing of animals and failed to prevent acts of animal cruelty caused by other religious and secular animal killings.²²³ Hence, the government’s interest is not compelling if it restricts religiously motivated conduct but fails to restrict other conduct that would produce the type of harm caused by the religious exercise.²²⁴

In its comment to the HHS, the USCCB argues that the contraceptive coverage mandate fails to further a compelling government interest because contraceptives do not save lives or prevent disease, but rather “prevent the healthy state of pregnancy . . . and can actually introduce health risks.”²²⁵ This argument serves as a basis for the USCCB’s contention that the government has left the interest that it seeks to protect — i.e., women’s health — exposed to the type of harm that contraceptives purportedly prevent.²²⁶

218. CATECHISM OF THE CATHOLIC CHURCH § 2730 (Doubleday, 2nd ed. 2003) (1994) (“[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible is intrinsically evil.”) (quoting PAUL VI, HUMANAE VITAE § 14 (1968)).

219. Susan J. Stabile, *Christian Realism and Public Life: Catholic and Protestant Perspectives: Article: An Effort to Articulate a Catholic Realist Approach to Abortion*, 7 U. ST. THOMAS L.J. 340, 365–66 (2010).

220. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–1(b) (2012).

221. *Compare, e.g., Sherbert*, 374 U.S. at 406–07 (holding that the government’s interest in unifying unemployment compensation rules to prevent fraudulent religious objections was not compelling), with *United States v. Lee*, 455 U.S. 252, 258–59 (1982) (holding that the government’s interest in unifying the collection of Social Security taxes was compelling).

222. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citations omitted).

223. *Id.* at 546–47.

224. *Id.* at 546.

225. Picarello & Moses, *supra* note 28, at 10–11.

226. *Id.* at 11.

Indisputably, the use of birth control pills can increase women's risk of stroke and blood clots; however, women who take birth control pills are less likely to develop blood clots than women who become pregnant.²²⁷ Therefore, a Catholic employer cannot successfully argue that the government has left considerable damage to the very interest that it seeks to protect.

Along the same line of reasoning, the USCCB argues that because Congress did not explicitly require the HHS to include contraceptives as a preventive service, the contraceptive coverage mandate cannot serve a compelling interest.²²⁸ This argument is fallacious because it presumes that a federal agency's interest is only compelling if the particulars of the regulation were previously specified by congressional statute.²²⁹ To the contrary, agencies exist, at least in large part, to utilize their expertise and resources to regulate technical areas of law, and courts will often rely on an agency's expertise in determining that the government action furthers a compelling interest.²³⁰ Here, the HHS's decision to mandate contraceptive coverage is a direct result of the Institute of Medicine's scientific study and is therefore a well-informed medical decision.²³¹ For these reasons, courts should find that the HHS's contraceptive coverage mandate serves a compelling government interest.

With regard to the second prong of the strict scrutiny inquiry, the contraceptive mandate is narrowly tailored to serve the government's compelling interest in providing women preventive health care. When evaluating whether a law is narrowly tailored as applied to religious practice, courts consider three elements.²³² First, the government's infringement of free exercise rights must be necessary — i.e., there can be no less restrictive alternatives by which the government could accomplish its compelling interest.²³³ Second, the government action that infringes on religious exercise cannot be underinclusive.²³⁴ That is, the government cannot fail to regulate activities that pose the same type of harm that the government's purported compelling interest is designed to prevent.²³⁵ By precluding underinclusive regulations, courts seek to ensure that the government will not infringe on religious exercise when doing so will predictably fail to further a purported governmental interest.²³⁶ And third, the infringement must not be overbroad.²³⁷ This prohibition essentially repeats the first requirement that the government regulation must be necessary; however, unlike the least restrictive alternative formulation, courts may condemn a government regulation for being overbroad even if there are no less restric-

227. Natasha Singer, *Health Concerns over Popular Contraceptives*, N.Y. TIMES (Sept. 25, 2009), <http://www.nytimes.com/2009/09/26/health/26contracept.html?pagewanted=all>.

228. Picarello & Moses, *supra* note 28, at 11 (“The law at issue here, at a minimum, admits of a construction that allows no advancement *at all* of the interest of maximizing coverage for contraception . . . as HHS is entirely free not to declare them ‘preventive services.’”).

229. *Id.*

230. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (relying on the agency's expertise to determine that the State has a compelling interest in protecting minors from harmful speech).

231. *See No Additional Cost*, *supra* note 18.

232. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326–29 (2007).

233. *Id.* at 1326.

234. *Id.* at 1327.

235. *Id.*

236. *Id.*

237. *Id.* at 1328.

tive alternatives.²³⁸

In contesting the legality of the contraceptive coverage mandate under the RFRA, the USCCB argues that the mandate is underinclusive because many Catholic individuals and employers will drop their health insurance coverage to avoid compromising their religious beliefs.²³⁹ However, an evaluation of the PPACA reveals that the mandate is in fact narrowly tailored.²⁴⁰ Although some Catholic individuals and organizations may contemplate dropping their health insurance coverage, the PPACA imposes a penalty on individuals who do not obtain health insurance coverage as well as employers who do not provide health plans to their employees.²⁴¹ These penalty provisions serve as enforcement mechanisms and will deter the majority of individuals and employers — not just Catholic employers — from dropping coverage.²⁴² Therefore, the USCCB's argument that several Catholic individuals and employers will drop health insurance coverage does not support a finding that the mandate is underinclusive.

Another arguable claim for underinclusiveness is that, notwithstanding the federal mandate, several women will not have access to contraceptive coverage because the HHS has allowed Catholic Churches and houses of worship to apply for religious exemptions. Although the USCCB did not voice this objection in its comment to the HHS, this argument was raised by a Catholic organization that sought exemption under California's contraceptive coverage law, which contained a religious exemption identical to the one at hand.²⁴³ In that case, however, the California Supreme Court, finding that the State's mandate was neutral, generally applicable, and did not fall under the *Sherbert* exception, dismissed the issue of underinclusiveness.²⁴⁴ Nevertheless, this argument of underinclusiveness is likely to resurface under a RFRA claim, and is therefore worthy of evaluation.

In this situation, a court is not likely to find that the federal contraceptive mandate is underinclusive because nonreligious employees generally comprise a small portion of a Church's staff.²⁴⁵ Since the majority of church employees tend to share the same religious beliefs as their employer, the religious exemption will affect few women.²⁴⁶ Contrariwise, the government can prove that granting exemptions to Catholic-based organizations that employ non-Catholic workers — e.g., Catholic hospitals — would inhibit the effectiveness of providing contraceptive coverage to women because doing so would place a great number of women at risk of facing barriers to contraceptive access.²⁴⁷ Be-

238. *Id.*

239. Picarello & Moses, *supra* note 28, at 11 (“[T]he mandate is not well tailored to the goal of *expanding* access to coverage, because it encourages individuals and organizations to *drop* coverage.” (citation omitted)).

240. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501, 1513, 124 Stat. 119 (2010) (codified as 42 U.S.C. § 18091, 26 U.S.C. § 4980H (2012)).

241. *Id.*

242. *Id.*

243. Petitioner's Reply Memorandum, *Catholic Charities of Sacramento v. California*, 543 U.S. 816 (2004) (No. 03-1618), 2004 WL 1900732 at *8 (arguing that the law mandating contraceptive coverage is far more underinclusive than the ordinances in *Lukumi* because “it allows employers unilaterally to opt out altogether from the provision of prescription drug coverage”).

244. *Catholic Charities of Sacramento v. Super. Ct. of Sacramento Cnty.*, 32 Cal. 4th 527 (Cal. 2004).

245. See Lowell, *supra* note 27, at 460.

246. *Id.*

247. *Id.* at 457–58.

cause excluding such a large pool of workers would severely undermine the government's interest in expanding contraceptive access to women, the government can demonstrate that the mandate is not overbroad.²⁴⁸ Since the federal mandate is neither underinclusive nor overbroad and is the least restrictive means of furthering the government's interest, it is narrowly tailored.²⁴⁹ Therefore, the mandate does not violate the statutory protections of the RFRA, and courts will not exempt Catholic employers who do not otherwise qualify for an exemption under the contraceptive regulation.

VI. CONCLUSION

While the federal government's contraceptive coverage mandate will greatly benefit the reproductive health of women across the country, several Catholic employers will be forced to contradict their religious teachings against the use of birth control. Because the United States was founded upon and remains committed to the concept of religious exercise free from governmental intrusion, the constitutionality and legality of the contraceptive coverage mandate are controversial issues, and courts will be called upon to balance these competing public interests. Analysis of the free exercise doctrine reveals that the HHS's contraceptive coverage mandate is a valid exercise of the government's legislative power in light of Supreme Court precedent — in particular, *Smith*, *Lukumi*, and *O Centro*. When *Smith* and *Lukumi* are read together, these cases stand for the proposition that the contraceptive coverage mandate is neutral and generally applicable and does not contain a system of individualized exemptions. Therefore, courts will presume the mandate's constitutionality under the Free Exercise Clause. However, the contraceptive coverage mandate does impose a substantial burden on Catholic employers' religious exercise, and therefore, pursuant to the Supreme Court's holding in *O Centro*, the mandate must withstand strict scrutiny to pass muster. Under this heightened standard of judicial review, the government can demonstrate a compelling interest in providing women preventive health care and that the contraceptive mandate is narrowly tailored to advance this interest. Therefore, the federal contraceptive coverage mandate does not constitute a violation of Catholic employers' constitutional or federally guaranteed free exercise rights.

—Destyn D. Stallings*

248. See Fallon, *supra* note 232, at 1328.

249. See *id.* at 1326.

* I want to thank Professor Sam Halabi and Professor Samuel Wiseman for their assistance in guiding the development of this Comment. Thanks also to Shannon Holman, Emilie Blanchard, and Megan Hull for their superb editorial skills. I also want to thank my parents, Mike and Penny, for always supporting me and believing in me.

