Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule

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On August 1, 2012, the Obama administration's contraceptive coverage rule went into effect. That marked a year since the Department of Health and Human Services first announced that

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

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

As interpreted by the U.S. Supreme Court for the past two decades, the First Amendment is not offended where a neutral law of general applicability has an incidental impact on religious exercise. The Free Exercise Clause is triggered only when a law intentionally targets religion. In the 1990 opinion establishing this framework, Justice Antonin Scalia explained that society

How does that relate to the contraception rule?

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

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

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

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

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

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

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

The contraceptive coverage rule does not run afoul of religious liberty protections for yet another independent reason – it JEeed,-4(r)7(ot)-7 furthers the government's compelling interest in women's equality and health. Indeed, the fact that meaningful access to contraception is key to advancing women's equality – in health care benefits, and in society as a whole – was central to the decisions by the high courts of California and New York upholding laws in those states similar to the federal rule.[15] -5(j) do)(n)-2(ey (a)

Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception in *Griswold v. /ETB(. Su)-f6 0. cT1 0 0 1 24*

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

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

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> *Planned Parenthood of Southeastern Pa. v. Casey*,

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

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

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

reproductive lives."[26] Ensuring insurance coverage for contraception promotes equality on multiple, intersecting fronts. These are exactly the kinds of interests that are considered "compelling" by legal and lay audiences alike.

Objections in the name of religion are far-reaching.

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

> Shortly after the enactment of the Civil Rights Act of 1964, prohibiting discrimination based on race in public accommodations, the owner of a restaurant chain argued that the Act violated his religious beliefs opposing integration, and that he should therefore be allowed to exclude African-Americans from his restaurant.[27] Two decades later, Bob Jones University used the same argument. It wanted to maintain its policy denying admission to "applicants engaged in an interracial

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

What lies ahead?

This story is still developing. On February 10, 2012, President Obama announced that in addition to the exemption for houses of worship, the administration would extend an accommodation to certain non-

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

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

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Endnotes

[1] Press Release, Planned Parenthood Federation of America, New Research Shows Yet Again that Americans Overwhelmingly Support Access to Affordable Birth Control (June 20, 2012), www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-shows-yet-again-americans-overwhelmingly-support-access-affordable-birth-control-

[14] *See*

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

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

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

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