

Written Statement of the American Civil Liberties Union

Calls to expand the religious employer exception in the HHS rule or pass radical bills like H.R. 1179, the Respect for Rights of Conscience Act of 2011, must be rejected. Each time more entities are allowed to deny women contraceptive coverage, the religious beliefs of some are imposed on the lives of others, and gender equality is undermined.

I. Background

The Patient Protection and Affordable Care Act (ACA) provides that certain preventive services must be provided in health insurance plans without cost-sharing.² The preventive services provision is designed to ensure that health insurance provides real access to vital health

Also on August 1, HHS promulgated amendments to the interim final regulation implementing the preventive services provision, creating an exception to the HRSA Guidelines contraceptive coverage requirement. The rule allows HRSA to establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.⁸ HHS explained that its purpose in creating this exception was to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions, while extending contraceptive coverage to as many women as possible.⁹ The definition of religious employer in the rule tracks the definition of the exempted entities in contraceptive equity laws in California and New York, each of which has been upheld against challenges arguing for expansion.¹⁰

II. Contraceptive Coverage is Essential for Women’s Health and Equality

Access to safe and effective contraception is a critical component of basic health care for women. Virtually all sexually active women use contraception over the course of their lives.¹¹ Since 1965, when the U.S. Supreme Court first protected a woman’s access to contraception,¹² maternal and infant mortality rates have declined.¹³ Without contraception, women have more unplanned pregnancies and are less likely to obtain adequate prenatal care in a timely manner.¹⁴ Controlling pregnancy spacing affects birth outcomes such as low birth-weight and premature birth. Pregnancy planning can also help women control a number of conditions that negatively impact their health, such as gestational diabetes and high blood pressure.¹⁵

⁸ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

⁹ *Id.* at 46,623.

¹⁰ See *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 31 P.3d 67 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Superior Ct.*, 859 N.E.2d 459 (NY 2006).

¹¹ Guttmacher Institute, Testimony before the Committee on Preventive Services for Women, Institute of Medicine 7 (Jan. 12, 2011) [hereinafter Guttmacher Institute Testimony].

¹² *Griswold v. Conn.*, 381 U.S. 479 (1965).

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Access to contraception gives women control of their fertility, enabling them to decide whether and when to become a parent. Contraception not only furthers the health of women and their children but equality as well, allowing women to make educational and employment choices that benefit themselves and their families. It is imperative that the benefits of access to birth control reach all women.

Contraception has an important role in women's preventive care beyond

Short of removing the requirement, family planning opponents want an expansion of the exception to give any individual or entity a veto over the coverage available in any health plan.²⁹ They seek a regime under which individuals, insurers, secular employers, and organizations that self-identify as religious but employ a religiously diverse workforce – such as hospitals, social service agencies, and universities – would be able to deny others contraceptive coverage, despite the IOM’s conclusion that contraception is indicated preventive care for all women, without regard to whom they happen to work for, be insured by, or share enrollment in a health plan with.

Requiring coverage of contraception in insurance plans does not infringe on religious liberty. The HRSA Guidelines – like the contraceptive coverage laws that have come before them³⁰ and a host of generally applicable anti-discrimination and labor laws across the country – are constitutionally unremarkable. Opposition to neutral laws from religious organizations is not unique to contraception. For example, individuals and institutions have claimed religious objections to desegregation and to equal pay laws:

In 1964, three African-American residents of South Carolina brought a suit against Piggie Park restaurants, and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964’s public accommodations provision violated his religious freedom “since his religious beliefs compel[ed] him to oppose any integration of the races whatever.”³¹

In 1976, Roanoke Valley Christian Schools added a “head of household” supplement to their teachers’ salaries – but only to heads of household as determined by scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, “[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”³² When sued under the Equal Pay Act,

coverage of medical abortion. Any arguments, therefore, that by including all FDA-approved contraceptives the HRSA Guidelines violate restrictions on abortion in the ACA or other federal laws is pure misdirection.

²⁹ See USCCB, *supra* note 27, at 18-19; see also *The Respect for Rights of Conscience Act*, H.R. 1179/S. 1467, 112th Cong. (2011). The USCCB endorsed this legislation as their response to the HRSA Guidelines. See Press Release, USCCB, HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights (Aug. 1, 2011), <http://www.usccb.org/news/2011/11-154.cfm>.

³⁰ First Amendment claims brought against the California and New York contraceptive equity laws were rejected by the high court of each state. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d at 74; *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 461. Those courts did not address the Religious Freedom Restoration Act (RFRA) because it is inapplicable to state laws.

³¹ *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

³² *Dole v. Shenandoah Baptist Church*, 69 F.2d 1389, 1392 (4th Cir. 1990).

Roanoke Valley claimed a right to an exemption from equal pay laws because its head-of-household practice was based on a sincerely-held belief derived from the Bible.³³

But just as it was not a violation of religious freedom to require segregated restaurants to integrate,³⁴ or schools to pay their teachers equally,³⁵ in the face of longstanding and sincerely held religious objections, it is not a violation of religious freedom to require that women have access to contraceptive coverage.

A. The First Amendment

The United States Supreme Court has rejected the notion that the Free Exercise Clause of the First Amendment requires exemptions from generally applicable and neutral laws like the Women's Health Amendment.³⁶ As the Court noted in *Employment Division v. Smith* to do otherwise would be to create a system in which each conscience is a law unto itself.³⁷ The WHA requires all new insurance plans to include coverage of the preventive services listed in the HRSA Guidelines. It applies to plans held by secular and religiously affiliated employers alike. Such a neutral law does not violate the First Amendment, despite the existence of theological doctrines opposing contraception.

Second, the USCCB invokes the "hybrid rights" exception to *Smith* claiming that the contraceptive coverage requirement violates freedom of speech and association. In *Smith* the Supreme Court explained its prior precedents, which did require exemptions from neutral laws, as implicating both religious liberty and a separate constitutional right. The lower federal courts have disagreed about whether the Court created a new "hybrid rights" exception to the *Smith* doctrine, and if so, what showing it demands of a religious adherent.³⁹ But even the most expansive view of the hybrid rights excep both ree129g(x)-ld no itcaep bc th0(e)4WiaeIwdhe

is not implicated here for the simple reason that the contraceptive coverage requirement does not impose a substantial burden on religion. And even if the statute did impose such a burden, it furthers a compelling state interest in promoting gender equality, reproductive autonomy, and religious liberty.

1. Substantial Burden

tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.⁴⁶

Importantly, nothing in the HRSA Guidelines requires any person to use contraception. The requirement is merely that contraceptive services be covered in insurance plans at no cost-sharing, such that individuals may choose whether or not to access those services. Senator Barbara Mikulski, the author of the Women's Health Amendment, put it well when explaining the purpose of the provision on the Senate floor: "[W]e do not mandate that you have the service; we mandate that you have access to the service. The decision as to whether you should get it will be a private one, unique to you."⁴⁷

Any entity covered by this provision remains free to relate its teachings about contraception to its adherents, its employees, and the general public, and attempt to persuade them not to use birth control. Indeed, when Wisconsin enacted a contraceptive equity provision with no religious refusal, a spokesman for the Diocese of Madison explained "Our employees know what church teaching is. And we trust them to use their conscience and do the right thing."⁴⁸

Insurance typically provides a broad range of benefits, some of which individual insureds will never use. Because Jehovah's Witnesses believe that accepting blood transfusions is a sin, devout Jehovah's Witnesses presumably do not use transfusion coverage. But this is a long way from asserting that a Jehovah's Witness employer should be entitled to purchase customized health plans that exclude coverage for blood transfusions for all its employees. As New York's

that have been held to justify legislation that burdened the exercise of religious convictions.⁵⁵ Ensuring equal benefits to men and women promotes "interests of the highest order."⁵⁶

The WHA was designed to improve women's health and redress sex discrimination in health benefits. "[T]his legislation . . . offers free preventive services to millions of women who are being discriminated against"⁵⁷ As Senator Mikulski 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"⁵⁸ In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stems from reproductive health care:

Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out

Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.⁶¹ Protecting access to reproductive health services is a compelling public interest.⁶²

Virtually all women of reproductive age have used birth control at some point.⁶³ Denial of contraceptive coverage causes some women to forgo birth control or use less expensive and less effective methods, resulting in unintended pregnancies.⁶⁴ Further, cost-sharing requirements pose substantial barriers to accessing this preventive care.⁶⁵ The contraceptive coverage requirement promotes women's interest in planning their families.⁶⁶

c. Religious Liberty

Just as those religious tenets opposing the use of contraception are entitled to respect, so too are contrary religious traditions, which hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. In our constitutional system, the government is supposed to be a neutral actor, allowing individuals to follow their own religious or moral consciences. Requiring contraceptive coverage in health plans does just that – it allows every woman to decide for herself

