

Contraception Coverage Mandate Accommodations Remain Troublesome for Religious Organizations

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Executive Summary

As the anniversary of the Supreme Court's 5-4 ruling in [Burwell v. Hobby Lobby](#) edges closer, there is still a considerable amount of confusion over which direction the debate over the contraceptive coverage mandate is headed. In [Hobby Lobby](#), the Court ruled that HHS regulations issued to enforce the Patient Protection and Affordable Care Act's (ACA) ([P.L. 111-148](#)) requirement that employer-sponsored health plans include all FDA-approved contraceptives among the preventive services covered without cost sharing could not be applied to for-profit corporations with religious objections to some of the contraceptive methods. The Court ruled that the regulations violate the Religious Freedom Restoration Act (RFRA), which mandates that federal government requirements that substantially burden religious freedom serve a compelling interest and be the least restrictive means of furthering that interest.

The decision, however, left an unresolved policy problem in need of a solution: employees at "closely held" companies run by religious conservatives still need access to birth control if that objective of the ACA is to be met. In response, the Obama administration unveiled a new set of rules and revised the [EBSA 700](#) form in an attempt to accommodate employers and to guarantee access for affected workers.

The EBSA Form 700 and its surrounding regulations have quickly become a frequently litigated issue, as over 100 lawsuits have been filed in federal court challenging the ACA's contraceptive coverage mandate. The majority of the lawsuits maintain that the accommodation continues to be a violation of religious liberty.

On March 9, 2015, the Supreme Court vacated the Seventh Circuit's decision denying the University's plea for relief from the ACA's contraceptive coverage mandate in [Notre Dame v. Burwell](#) and said the university's request for an exemption should be reconsidered "in light of [Burwell v. Hobby Lobby Stores, Inc.](#)"

That one sentence directive now leaves us guessing. What will be the next step? This White Paper will provide insight into where things stand at this moment in time. The [Hobby Lobby](#) decision will be reviewed and insight will be provided as to why the court ruled the way it did. The regulations surrounding the contraceptive coverage mandate will be examined, both pre- and post-[Hobby Lobby](#) decision, including the controversial EBSA Form 700. This White Paper will also examine the positioning of the Appellate courts and whether they've chosen to release an opinion based on the new regulations and on [Hobby Lobby](#).

Introduction

In *Burwell v. Hobby Lobby*, a private, for-profit corporation sought an exemption from the Patient Protection and Affordable Care Act's (ACA) (P.L. 111-148) contraception policy, and the majority of justices agreed. The Court ruled that HHS regulations issued to enforce the ACA's requirement that employer-sponsored health plans include all FDA-approved contraceptives among the preventive services covered without cost sharing could not be applied to for-profit corporations with religious objections to some of the contraceptive methods. The Court ruled that the regulations violate the Religious Freedom Restoration Act (RFRA), which mandates that federal government requirements that substantially burden religious freedom serve a compelling interest and be the least restrictive means of furthering that interest. The Court rejected the government's arguments that the corporate employers were separate from their owners and that for-profit organizations do not "exercise religion."

The decision, however, left an unresolved policy problem: employees at "closely held" companies run by religious conservatives still need access to birth control if that objective of the ACA is to be met. In response, the Obama administration unveiled a new set of rules and revised the [EBSA Form 700](#) to guarantee access for these affected workers.

The EBSA Form 700 and its surrounding regulations have quickly become a frequently litigated issue, as over 100 lawsuits have been filed in federal court challenging the ACA's contraceptive coverage mandate. The majority of the lawsuits maintain that the accommodation continues to be a violation of religious liberty.

In its February 20, 2015 conference, the Supreme Court reviewed a petition from one of these cases. The University of Notre Dame, unlike many other Catholic schools and colleges which had challenged the contraceptive coverage mandate, did not win a temporary exemption when it initially challenged the mandate. The University was told by the Seventh Circuit Court of Appeals that it needed to comply with the administration policy while the appeals went forward. On March 9, 2015, the Supreme Court stirred up the controversy again and vacated the Seventh Circuit's decision in *Notre Dame v. Burwell* and said the university's request for an exemption should be reconsidered "in light of *Burwell v. Hobby Lobby Stores, Inc.*"

That one sentence directive now leaves us guessing. What will be the next step? The Seventh Circuit will soon revisit its decision in *Notre Dame*, but it will also need to balance the new accommodations provided in

the interim final rule post-*Hobby Lobby*. The Seventh Circuit aside, there is a split amongst the remaining circuits. It is highly possible that the Supreme Court could agree this year to resolve the dispute.

Initial regulations and EBSA Form 700

The ACA amended sec. 2713 of the Public Health Service Act to require health insurance plans to cover specific preventive services. Generally, covered preventive services are those rated A or B by the U.S. Preventative Services Task Force (USPSTF). Preventive care requirements for adults and children were announced in the summer of 2010, with more specific requirements for women released in August of 2011. The requirements went through various stages of rulemaking. On February 15, 2012, HHS released its first Final rule ([77 FR 8725](#)) covering preventive health services for women. The Final rule acknowledged that HHS received over 200,000 comments on the amended Interim final regulations ([75 FR 41726](#), July 19, 2010). Then, on March 21, 2012, HHS, along with the Departments of Labor and Treasury released an Advanced notice of proposed rulemaking ([77 FR 16501](#), March 21, 2012) asking for comments on potential means of accommodating religious organizations "while ensuring contraceptive coverage for plan participants and beneficiaries covered under their plans. The Advanced notice was followed almost a year later by a Proposed rule ([78 FR 7348](#), February 1, 2013).

On June 28, 2013, the government issued a Final rule ([78 FR 39869](#), July 2, 2013) and an accompanying [fact sheet](#) on implementing the contraceptive coverage mandate. Per the initial Final rule, certain "religious employers," primarily houses of worship, could exclude contraceptive coverage from their health plans for their employees and their dependents. A limited accommodation was also provided to certain religiously affiliated non-profit organizations, but the rule did not extend the religious exemption more broadly to private employers who claim that purchasing insurance that covers contraception would violate their religious beliefs. An eligible organization was categorized as one that: (1) on account of religious objections, opposes providing coverage for some or all of any contraceptive services otherwise required to be covered; (2) is organized and operates as a non-profit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it meets these criteria in accordance with the provisions of the final regulations.

There was no requirement for an eligible organization to contract, arrange, pay or refer for contraceptive coverage. Insured health plans, including student health plans, only needed to provide a copy of its self-certification to its health insurance issuer. These issuers were then to provide separate payments for contraceptive services for the women in the health plan of the organization, at no cost to the women or to the organization.

For self-insured health plans, to be eligible for the accommodation, the eligible organization was required to provide a copy of its self-certification to its third party administrator (TPA). The TPA was then required to provide or arrange for separate payments for contraceptive services for the women in the health plan of the organization, at no cost to the women or to the organization. The costs of these payments were to be offset by adjustments in Federally-facilitated Marketplace user fees paid by a health insurance issuer with which the TPA had an arrangement. Non-profit religious organizations would then provide to their insurer or third-party administrator the EBSA Form 700, certifying that the organization qualified for an accommodation. The certification forms were posted and are still available on the government's [website](#).

Religious leaders throughout the United States immediately responded to the regulations. The U.S. Conference of Catholic Bishops, a leading critic of the contraceptive mandate, [charged](#) that the accommodation for religious non-profits was insufficient. Also on July 2, 2013, a group of national religious leaders, including Archbishop William E. Lori of Baltimore and Russell D. Moore of the Ethical and Religious Liberty Commission of the Southern Baptist Convention, released an [open letter](#) calling on HHS to “at a minimum, expand conscience protections under the mandate to cover any organization or individual that has religious or moral objections to covering, providing or enabling access to the mandated drugs and services.” The letter also asked Congress to take measures “to prevent future breaches of religious freedom.”

While some religious leaders were writing letters, those with cases pending in various courts were seeking answers. Therefore, the Solicitor General filed a [petition for writ of certiorari](#) with the Supreme Court of the United States, asking the court to determine if the RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners. The Court granted the petition on November 26, 2013, oral arguments were held, and on June 30,

2014, the Supreme Court released its decision, calling into question the federal regulations.

Burwell v. Hobby Lobby recap

The ACA amended Public Health Service Act sec. 2713 to require employer-sponsored health insurance plans to cover the preventive services rated A or B by the USPSTF and any additional preventive services for women recommended in comprehensive guidelines issued by the Health Resources and Services Administration (HRSA). As Wolters Kluwer has [reported](#), HRSA

Religious leaders throughout the country charged that the EBSA Form 700 accommodation was insufficient.

added all FDA-approved contraceptives to the list based upon the recommendations in a report by the Institute of Medicine. HHS adopted the HRSA list in a Final rule in [August 2011](#).

Hobby Lobby and Conestoga are closely-held corporations. Hobby Lobby, Inc. owns a national craft store chain. The Greens, owners of Hobby Lobby and a chain of Christian bookstores called Mardel, are Christians who believe that both emergency contraception and two intrauterine devices (IUDs) cause abortion, so that coverage violates their beliefs. Conestoga Wood Specialties, Inc. (Conestoga) is a for-profit business manufacturing wood parts that are incorporated into the products of others. The Hahns, owners of Conestoga, believed that two forms of emergency contraception approved by the FDA cause abortion, so that coverage violates their Mennonite beliefs. The corporations and their individual shareholders sought injunctions against the enforcement of the contraceptive coverage mandate against them.

In both cases, the government argued that the rights of the individuals to free exercise of religion were not violated because the mandate applied to the corporations, not to them as individuals, and a fundamental principle of the law of corporations is that they are legal “persons” separate and apart from their owners. Further, the government argued, for-profit corporations do not

exercise religion; they do not pray, perform sacraments, or have religious beliefs. Therefore, the corporations must be bound by the law just like any other employer of their size.

Initially, the district court in Oklahoma denied Hobby Lobby's request for an injunction, and the district court in Pennsylvania denied Conestoga's request. Both courts accepted the government's argument that for-profit corporations do not exercise religion. Therefore, neither court found that the plaintiffs were likely to succeed on the merits. On appeal, the Tenth Circuit reversed and directed the district court to enter the injunction in favor of Hobby Lobby. The Third Circuit upheld the denial of the injunction requested by Conestoga.

At this point, the Solicitor General filed its *petition for writ of certiorari* for the Hobby Lobby case. Conestoga also sought review in the Supreme Court, and the cases were consolidated.

The majority opinion rejected the government's argument that closely held corporations' legal obligations were separate from those of the owners. It framed the government's position as forcing the owners of family businesses to choose between protection of their right to practice their faith in the operation of their business and the advantages of incorporation. The court reasoned that the corporate form exists to protect the human beings who create them and the corporation acts only through those human beings.

The Court found that the language of the RFRA referred to "persons" but did not define the term. Therefore, the Court determined that the definition in the Dictionary Act in the U.S. Code applied "unless the context suggests otherwise." That definition included corporations as well as partnerships, individuals, and other entities, and it did not distinguish between for-profit and other corporations.

HHS argued that the RFRA was intended to restore the state of the law as it existed before *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). It relied on the findings in RFRA, which cited specifically to two Supreme Court decisions. *Wisconsin v. Yoder* (406 U. S. 205 (1972)) had upheld the right of Amish parents to keep their children out of public school, and *Sherbert v. Werner* (374 U. S. 398 (1963)) held that the state could not deny unemployment compensation to a former employee who was terminated because she would not work on the Sabbath. Both of these cases involved religious practices of individuals.

All parties agreed that the RFRA had been properly applied to churches organized as non-profit corpora-

tions. The majority referred to them as non-profit corporations and held that there was no basis for distinguishing among non-profits or between non-profits and for-profit corporations.

The RFRA requires that the federal law serve a compelling interest and provide for the least restrictive means of accomplishing that interest. The Court declined to rule on whether the government's interest was in fact compelling, because it found that the government did not use the least restrictive means to accomplish its goal. The government created an exemption for religious institutions, as defined in the tax code, and it had created an "accommodation" for certain related non-profit entities, whereby the insurer administered the contraceptive benefit separately (76 FR 46621, August 3, 2011). The majority saw no reason why a similar accommodation could not be made for the for-profit plaintiffs.

"The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero," Alito wrote. "Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost-sharing."

Justice Kennedy's concurring opinion further stressed that the majority was ruling only on the contraceptive coverage mandate and that the logic of the case should not be extended to other medical procedures to which employers might object, such as blood transfusions. In addition, the RFRA could not be used as a back-door means to evade antidiscrimination laws.

Justices Ginsburg, Sotomayor, Breyer, and Kagan dissented, guided largely by their concern for women's health issues, as embodied in the Women's Health Amendment to the ACA, which required coverage of preventive services specific to women. The dissent, written by Justice Ginsburg, accused the majority of stepping into a "minefield ... by its immoderate reading of RFRA" and characterized the majority's decision, one of "startling breadth," as allowing commercial enterprises to "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."

The dissent concluded that any Free Exercise Clause claim the plaintiffs assert is foreclosed by the Supreme Court's decision in *Smith*. In *Smith*, two members of the Native American Church were fired from their jobs after ingesting peyote at a religious ceremony. The Court in that case held that no First Amendment violation occurs when prohibiting the exercise of religion is an incidental effect of a generally applicable and otherwise valid regulation. Justice Ginsburg asserted that the ACA's contraceptive coverage requirement applies generally, is

“otherwise valid,” and “trains on women’s well-being,” not on the exercise of religion, such that the effect it has on such exercise is incidental.

Justice Ginsburg also cited the rule that accommodations as to religious beliefs must not significantly impinge on the interests of third parties. According to the dissent, the exemption sought by the plaintiffs would override the “significant interests” of the corporations’ employees and dependents and “deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.”

The dissent criticized the majority’s view of the RFRA. Justice Ginsburg reasoned that the RFRA reinstated the law as it was before *Smith*; however, the majority saw the RFRA as setting a new course departing from pre-*Smith* jurisprudence. The RFRA applies to government actions that “substantially burden a person’s exercise of religion.” Justice Ginsburg contended, however, that there is no support for the idea that free exercise rights apply to a for-profit corporation. While religious organizations exist to serve a community of believers, no religion-based criterion can restrict the work force of for-profit corporations, which use labor to make a profit, not perpetuate religious values. For this same reason, Justice Ginsburg disagreed with the majority’s suggestion that the accommodation afforded to non-profit religious-based organizations be extended to commercial enterprises.

Justice Ginsburg further found that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to be considered “substantial,” as required by the RFRA.

Justices Breyer and Kagan agreed with the dissent’s conclusion that the challenge to the contraceptive coverage requirement failed on the merits but asserted that it was unnecessary to decide whether for-profit organizations may bring claims under the RFRA.

Wheaton College

In the wake of the Supreme Court’s decision in *Burwell v. Hobby Lobby*, the Supreme Court also granted Wheaton College an injunction from completing and filing EBSA Form 700. Wheaton College, a Christian liberal arts college and religious employer, alleged that the form requirements violated the First Amendment and the RFRA. The Northern District of Illinois denied the college an injunction just two weeks prior to the decision in *Hobby Lobby* (see [Unconvinced court makes Wheaton College wait: Contraceptive coverage requirement stands](#), June 24, 2014).

In [granting the injunction](#), the court noted there was a circuit split regarding the enjoinder of the requirement of religious non-profits’ use of EBSA Form 700. The court found that “[n]othing in this interim order affects the ability of the applicant’s employees and students to obtain, without cost, the full range of FDA approved contraceptives.” This is because, regardless of the form, the third party administrators must still bear the cost of coverage, and Wheaton College had already notified the government it met the requirements for exemption from the mandate. Because notification had already taken place, there was no need for Wheaton College to use the form. The order did not discuss the RFRA.

The U.S. Supreme Court said that its Wheaton order did not affect “the ability of employees and students to obtain, without cost, the full range of FDA approved contraceptives.”

Justice Sotomayor dissented from the order and was joined by Justices Ginsburg and Kagan. The dissent argued that even if Wheaton College stated a viable claim under the RFRA, the form is permissible because it is the least restrictive means necessary to further “the Government’s compelling interests of public health and women’s well-being.” Relying on language in the *Hobby Lobby* opinion, the Justices described the accommodation for religious employers as a “system that seeks to respect the religious liberty of religious non-profit corporations while ensuring that the employees of these entities have precisely the same access to all [Food and Drug Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objection to providing such coverage.”

Justice Sotomayor categorized the ruling for Wheaton College as being in conflict with the language in *Hobby Lobby*, stating “that action evinces disregard for even the newest of this Court’s precedents and undermines confidence in this institution.” Justice Sotomayor went on to categorize Wheaton College’s injunction as rare and extreme, and argued that the court was not

presented with a writ of certiorari, and absent that, a decision due to a division of authority (the circuit split) is not a reason to grant Wheaton College relief. Justice Sotomayor declined to find that Wheaton College was substantially burdened by the filing of EBSA Form 700.

So what do we take from these two decisions on the contraceptive coverage mandate? The Supreme Court ruled that the ACA cannot force closely held companies to cover contraceptives in employee insurance plans if the corporation owners have religious objections to birth control. It also held that the EBSA Form 700 (as it stood in June of 2014) was unnecessary because the government had already been notified of the religious beliefs of the company. Given that key indicator from the Supreme Court, the government went back to work redrafting the initial EBSA 700 to craft a new form which would meet the needs of the religious companies.

Revised regulations

It did not take long for the government to respond to the *Hobby Lobby* and *Wheaton College* decisions with new and revised regulations. The federal government took the initial regulations and altered them to align more directly with the *Hobby Lobby* decision and analysis.

Revised regulations. On August 22, 2014, the government released an [Interim final rule](#) that established another option for eligible organizations meeting the requirements of [26 C.F.R. sec. 54.9815-2713A\(a\)](#) to use the religious accommodation to provide contraceptive coverage, and a [Proposed rule](#) that would extend to some for-profit companies the ability to use the same accommodation that had already been extended to non-profits. That is, some for-profits would have the ability to opt out of the contraception requirement on religious grounds, and allow the insurer or administrator of the health plan to cover birth-control costs.

Interim final rule. Non-profit religious organizations that object to covering birth control for their employees now have another accommodation available separate from the [EBSA Form 700](#). They can notify the government—instead of their insurance company—that providing birth control violates their religious beliefs via a special [notice](#). This new accommodation is in response to the Supreme Court’s [interim order](#) in *Wheaton* (see [Supreme Court: religious college doesn’t have to file contraception mandate opt-out form](#), July 9, 2014).

The new accommodation works similarly to the previous accommodation, by allowing an eligible organization to notify HHS in writing of its religious objection to providing contraception coverage. HHS will then notify the insurer

for an insured health plan, or the Department of Labor will notify the third party administrator (TPA) for a self-insured plan, of the objection. The non-profit’s insurer or TPA is then responsible for providing enrollees in the health plan with separate, no-cost payments for contraceptive services as long as they remain enrolled in the health plan. TPAs would then be reimbursed for their costs through adjustments issued via the [HealthCare.gov](#) Marketplace.

Regardless of whether the eligible organization self-certifies in accordance with the [July 2013 Final rules](#), or provides notice to HHS in accordance with the August 2014 Interim final rules, the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same, as discussed in a [Fact Sheet](#).

Proposed rule. HHS also began soliciting comments on how the government might extend to certain closely held for-profit companies the same accommodation that is available to non-profit religious organizations. This Proposed rule represents the government’s response to the Supreme Court’s decision in *Burwell v. Hobby Lobby*. Under the Proposed rule, closely held for-profit companies with religious objections to the ACA mandate would not have to contract, arrange, pay, or refer employees for contraceptive coverage.

HHS was seeking comment on how to better define “closely held for-profit company” and whether other steps might be appropriate to implement this policy. Two alternative approaches were suggested. Under the first approach, the entity could not be publicly traded, and ownership of the entity would be limited to a certain number of owners. Another approach provides that the entity could not be publicly traded, and a minimum percentage of ownership would be concentrated among a certain number of owners, although the number and concentration is not specified.

With the regulations came more discontent. After the Supreme Court’s decision in *Hobby Lobby*, non-profit organizations began specifically objecting to the accommodations to the ACA. To date, four circuit courts of appeal have rejected the RFRA claims of the non-profits, finding that the accommodation did not impose a substantial burden on their religious exercise: the Third Circuit in *Geneva College* (February 11, 2015), the D.C. Circuit in *Priests for Life/Archbishop of Washington* (November 14, 2014); the Sixth Circuit in *Michigan Catholic Conference* (June 11, 2014), and the Seventh Circuit in *University of Notre Dame* (February 21, 2014), which has since been vacated by the Supreme Court as noted previously (see below for review of these decisions).

In summary, the initial 2013 regulations established mechanisms for separately funding the coverage for

insured and self-insured plans to assure that coverage was provided to the covered plan members even with the employer's objection. Under the new 2014 regulations, upon receipt of the notice from the plan sponsor, the government notifies the TPA or insurer of the plan sponsor's objection and advises it of its obligation to provide or arrange for the payment for contraceptive services to the plan member and covered beneficiaries without cost-sharing or imposing a fee or charge upon the plan member or the plan sponsor as set forth in the regulations. An eligible organization may still use the EBSA Form 700 and notify the TPA or insurer of its objection directly.

Circuit court determinations

Currently, there are three circuit courts, the D.C. Circuit Court of Appeals, and the Third and Sixth Circuits, who have determined that the new EBSA Form 700 and regulations truly are not a substantial burden on the Christian corporations. The Seventh Circuit Court of Appeals also ruled the same way, but was told by the Supreme Court that it needed to revisit its determination based on the Supreme Court's holding in *Hobby Lobby*. The Eleventh Circuit stands alone in weighing in favor of religious corporations.

D.C. Circuit Court

Priests for Life. Religious non-profits can “express what they believe and seek what they want” by writing a letter or filling out a two-page EBSA Form 700 to opt out and allow a third-party to cover contraceptive products and services they feel violate their religious beliefs, according to the District of Columbia Circuit Court in *Priests for Life v. HHS*. Just a few months after the *Hobby Lobby* decision, the court ruled against this legal challenge filed by Priests for Life and several allied Catholic organizations after the organizations contested the religious accommodation provided under the ACA's contraceptive mandate. The court found that the paperwork did not create a substantial burden on the organizations.

According to Priests for Life, although religious non-profits are technically able to opt out of providing contraceptive coverage for their employees by submitting the [EBSA Form 700](#) to the federal government, it is the actual submission of that form causing the problem. This action “triggers” insurance providers to offer separate contraceptive coverage to employees, and, in turn, implicates the employers in practices that violate their religious views.

The court was not convinced that the submission of this form truly imposed a significant burden on the religious non-profits. According to the court, “That bit of paperwork is more straightforward and minimal than many that are staples of non-profit organizations' compliance with law in the modern administrative state. Religious non-profits that opt out are excused from playing any role in the provision of contraception services, and they remain free to condemn contraception in the clearest terms.” Therefore, the requirement was upheld.

Other decisions. Currently pending before the D.C. Circuit Court is *Roman Catholic Archbishop of*

Three circuit courts have determined that EBSA Form 700 does not impose a substantial burden on Christian corporations.

Washington v. Sebelius. Although the Supreme Court denied review of the case, the D.C. Circuit heard oral arguments on May 8, 2014. The arguments were presented prior to the *Hobby Lobby* decision, and no new determination has been filed (see *Contraceptive coverage challenge goes to argument before Court of Appeals*, May 14, 2014 and *Supreme Court declines review of contraceptive mandate cases in advance of appellate court decision*, April 2, 2014).

Third Circuit

Geneva College. Unable to convince the court that it was substantially burdened by completing a form, a Christian college and several non-profit Catholic groups were overruled in their objection to compliance with the contraceptive coverage provision of the ACA in *Geneva College v. Burwell*. The groups challenged the ACA provision requiring religious non-profits to complete a form to self-certify their religious objection to providing contraceptive coverage, and instead allowing third-party insurers to provide coverage for those services. Finding that the provision places “no substantial burden” on the organizations, the Third Circuit Court of Appeals overturned the prior decisions of a lower-court judge in February, 2015.

Catholic non-profit groups and Geneva College in Beaver Falls, Pennsylvania argued that the accommodation forces them to trigger the provision of insurance coverage for contraceptive services to which it is opposed on religious grounds. They contended that the very act of notifying its insurer through a self-certification form requires the college to be “complicit” in sin, according to court papers.

The appeals court disagreed. The law provides an “opt-out mechanism” that shifts to third parties the obligation to provide contraceptive coverage allowing religious groups to wash their hands of any involvement, the court ruled. It declined to judge the reasonableness of the Catholic non-profits religious beliefs and instead focused whether the form burdened the exercise of their religion. The act of filling out the form meant only that the eligible organization is not providing the coverage, and, once the form is completed, the organizations are totally removed from the provision of services. “The submission of the form has no real effect on the plan participants and beneficiaries. They still have access to contraception, without cost sharing, through alternate mechanisms in the regulations,” the court held.

Further, the court disagreed that the different treatment afforded to the Catholic Church as a house of worship versus the Catholic non-profit organizations imposed a substantial burden. Religious employers are defined by using long established tax codes. Because there is a “bright line already statutorily codified and frequently applied,” the court was not convinced any special burden was imposed.

The court ruling reversed two preliminary injunctions a federal judge granted Geneva College and other entities while they pursue their claims under the RFRA (see *Secular corporation may challenge contraceptive coverage mandate*, March 7, 2013; *Issues narrowed, but religious college challenge to contraceptive coverage requirement to proceed*, May 10, 2013; and *Court grants preliminary injunction against contraception mandate to religious college*, June 19, 2013). It also reversed a preliminary and a permanent injunction in favor of the Catholic dioceses of Pittsburgh and Erie, Pennsylvania (see *Catholic dioceses granted preliminary injunction*, November 26, 2013).

Sixth Circuit

Michigan Catholic Conference. Similar issues were raised in front of the Sixth Circuit, which, like the Third, Seventh and D.C. Circuit courts, rejected the arguments of religious non-profit organizations. The Sixth Circuit court, taking into account the Supreme Court’s

decision in *Hobby Lobby* affirmed the lower courts’ decisions to deny religious employers’ motions for preliminary injunctions in two contraceptive mandate challenges. The court in *Michigan Catholic Conference v. Burwell* found that the employers did not demonstrate a strong likelihood of success on the merits of their claims under the RFRA, several clauses of the First Amendment, and the [Administrative Procedure Act](#).

Michigan Catholic Conference (MCC); Catholic Charities of Kalamazoo (CCK); Catholic Diocese of Nashville (CDN); Catholic Charities of Tennessee, Inc. (CCT); Camp Marymount, Inc. (Marymount); Mary, Queen of Angels, Inc.; St. Mary Villa, Inc.; Aquinas College (AC); and Dominican Sisters of St. Cecilia Congregation (St. Cecilia) filed suit in the Middle District of Tennessee and the Western District of Michigan alleging that the contraceptive mandate under the ACA violates the RFRA, the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the Administrative Procedure Act. All alleged to be Catholic entities providing “spiritual, educational, social, and financial services to their communities,” the employers provide health plans to their employees. MCC, CDN, and St. Cecilia alleged they were eligible for a total exemption from the mandate, and the remaining employers alleged they were eligible for the accommodation

The court stated that because the employers all concede their eligibility for the exemption or the accommodation, the employers do not need to participate in the contraceptive coverage requirement. However, the employers argued that neither the exemption nor the accommodation lessen the burden, as it forces them “to play an integral role in the delivery of objectionable products and services to their employees.”

The court responded that the government’s imposition of an independent obligation on a third party, as well as the inability of the employers to restrain the behavior of a third party that conflicts with their religious beliefs, do not impose a substantial burden on the employers’ exercise of religion. Furthermore, the submission of a self-certification form does not trigger the contraceptive coverage, the court stated—federal law does. Thus, the court held that the employers did not demonstrate a strong likelihood of success on the merits of their RFRA claim.

The court further held that the contraceptive mandate does not violate the Free Speech Clause of the First Amendment by requiring the coverage of contraceptive counseling, as the employers are not compelled to provide such counseling themselves. In addition, the self-certification form does not compel any speech from the employers triggering the provision of objectionable

products or services, as discussed by the court in the RFRA argument, as self-certification has no triggering function. Finally, the court noted that the employers did not identify any protected speech chilled by the mandate that would constitute an unconstitutional gag order. Thus, the court held the employers did not demonstrate a strong likelihood of success on the merits of its Free Speech claim. The court was similarly unpersuaded by the MCC's arguments claiming violations of the Establishment clause, Administrative Procedure Act, and the Free Exercise clause.

The Michigan Catholic Conference and other nonprofit religious organizations also asked the Supreme Court to take up the question left unanswered in the *Hobby Lobby* case—whether the federal government can make these nonprofit organizations provide their employees with health care coverage for abortion-inducing products, contraception and sterilization, all of which offend their religious sensibilities.

The *petition for cert* claimed that the Sixth Circuit's prior decision is inconsistent with the Court's *Hobby Lobby* decision and was in conflict with other circuit courts that have addressed the same questions. Among other things, the religious organizations asserted that while *Hobby Lobby* shows that the "RFRA requires courts to assess the 'consequences' of noncompliance when analyzing substantial burden" (the pressure on plaintiffs to violate their beliefs), the Sixth Circuit instead focused on "the nature of the actions the Petitioners are compelled to take." Moreover, *Hobby Lobby* left it to the plaintiffs to decide whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." The Sixth Circuit, however, "confidently assured" the petitioners that the actions at issue (e.g., maintaining a contractual relationship with a company authorized to provide contraceptive coverage to employees enrolled in a health plan) "would not facilitate[e] access to contraceptive coverage" in violation of their religious beliefs."

Specifically, the petitioners asked the Justices to decide "Whether, consistent with the [RFRA], the Government can compel a nonprofit religious organization to act in violation of its sincerely held religious beliefs by participating in a regulatory scheme to provide its employees with coverage for abortion-inducing products, contraceptives, and sterilization?" The Supreme Court has yet to address this petition.

Eleventh Circuit

Eternal Word Television Network, Inc. Tipping the scales in the opposite direction post-*Hobby Lobby*, the Eleventh Circuit Court of Appeals in *Eternal Word Television Network, Inc. v. Burwell* granted an injunction pending

appeal to a non-profit Catholic media network, excusing the network from filing EBSA Form 700 with the third party administrator (TPA) of its health insurance plan. The three-judge panel found that the broadcaster was likely to succeed on its claims under the *RFRA* based on the Supreme Court's decision in *Burwell v. Hobby Lobby, Inc.*

Eternal Word Television Network, Inc. (Eternal Word) was founded by a nun in 1981. It is not formally affiliated with the Catholic Church or any diocese, but its mission is to broadcast Church teachings. Its television network and two radio stations broadcast "religious and family programming," including daily mass, prayers, and

In EWTN v. Burwell, the court reasoned that it could not question the validity of the employer's religious beliefs, including the beliefs about the consequences of execution of Form 700.

spiritual devotions. Eternal Word employs 350 people; its insurance plan has never covered contraception.

The network was eligible for a religious accommodation under the regulations implementing the ACA, but it claimed that execution of EBSA Form 700 would violate church teachings as a cooperation in or facilitation of sin. The language of the form designates the TPA as the employer's agent and the administrator of the health plan for purposes of the contraceptive coverage benefit and states that the employer must provide a copy of the form to the TPA in order to accommodate the employees' rights of coverage of the services.

Relying on *Hobby Lobby* and the cases discussed in that decision, the court reasoned that it could not question the validity of the employer's religious beliefs, including the beliefs about the consequences of execution of the form. The court also noted that there were other, less restrictive means available for the government to accomplish its goals, such as regulations that could require the employer simply to notify the government that it would not provide the benefits for religious reasons without any language designating another party to administer the

benefits or mentioning accommodation of the employees' rights, as Justice [Sotomayor](#) had ordered in another case.

The Eleventh Circuit decided prior to the implementation of the new accommodation, within days after the *Hobby Lobby* decision was reached. Given the analysis in this case, it is reasonable to pose that the court may determine the new accommodations as acceptable, less restrictive ways of notifying the government that the organization needed to opt out of providing coverage.

Circuits courts with pending decisions

Second Circuit

The Second Circuit Court of Appeals has just one case pending before it. A motion for summary judgment was granted to both diocesan and non-diocesan plaintiffs in the case of *The Roman Catholic Archdiocese of New York v. Sebelius* in the Eastern District of New York and an appeal is pending before the Second Circuit Court of Appeals (see *Religious groups win challenge to birth control mandate*, December 18, 2013).

Third Circuit

Catholic Charities of the Archdiocese of Philadelphia.

The Eastern District of Pennsylvania in *Catholic Charities of the Archdiocese of Philadelphia v. Burwell* declined to grant a motion for preliminary injunction by the Catholic Charities of the Archdiocese of Philadelphia (the Archdiocese), holding that the Archdiocese failed to show a likelihood of success on the merits as to its claims under the RFRA and the Free Exercise and Free Speech clauses of the First Amendment.

The Archdiocese provides a self-insured "church plan," to more than 4,000 employees, which "does not offer coverage for contraceptives, with the exception of prescription and use of contraceptive medications for non-contraceptive, medical purposes." The plan is exempted from the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). The Archdiocese filed suit against the government, alleging a violation of the RFRA and violations of the Free Exercise Clause and the Free Speech Clause of the First Amendment. Simultaneously, the Archdiocese moved for a preliminary injunction enjoining the government from requiring the provision of contraceptive coverage, requiring the signing of the accommodation form, requiring the facilitation of contraceptive coverage, or

assessing any fine, penalty, or tax for failing to execute or deliver the accommodation form.

The court held that the Archdiocese did not meet the burden of making a prima facie showing of a substantial burden in its argument that executing and delivering the accommodation form to its third-party plan administrator would "create a vital link in the chain toward the provision of contraceptive services." The court first noted that it is uncertain whether the government may, under ERISA, compel third-party administrators to provide contraceptive coverage to participants in the church plan. Second, the court stated that, in accordance with *Univ. of Notre Dame v. Sebelius*, even assuming that ERISA does apply to the church plan for the purposes of the contraceptive coverage mandate, federal law, and not the accommodation form, is the "vital link toward the provision of contraceptive services."

Because the contraceptive coverage mandate "is pursued uniformly against all business that are not grandfathered and have more than fifty employees," the court stated that the mandate is neutral and generally applicable, requiring only rational basis review, which the mandate easily passes. Thus, the Archdiocese's Free Exercise claim did not warrant a preliminary injunction. Furthermore, the court held that the Archdiocese did not show that the requirement to provide contraceptive counseling, nor the requirement of the completion of the accommodation form, compelled or prevented any speech by the Archdiocese. "[I]f the Government has compelled any speech here," stated the court, "it is only compelling Plaintiff to make a statement with which they agree, i.e., that they oppose coverage for contraceptives." An appeal in this case is currently before the Third Circuit Court of Appeals.

Fifth Circuit

Catholic Diocese of Beaumont. A federal court in Texas enjoined HHS from enforcing the requirement that "eligible organizations" certify that their religious beliefs prohibit them from supporting the coverage of contraception on the ground that the requirement burdens their rights under the RFRA and the Free Exercise Clause of the [First Amendment](#) to the United States Constitution in *Catholic Diocese of Beaumont v. Sebelius*. The government sought to apply the requirement to Catholic Charities, whose 17 employees were insured under the self-insured plan funded by the diocese and administered by a third party administrator (TPA). The court rejected the government's argument that the regulations furthered compelling interests of public health and equal access to health care for women. It stated that the interests were

not compelling because the government conceded that the requirement could not be applied to the church itself. Further, the government had not established that the regulation was the least restrictive means to achieve its purpose and the government granted an injunction. An appeal in this case is pending before the Fifth Circuit.

Another decision pending before the Fifth Circuit Court of Appeals is *Roman Catholic Diocese of Fort Worth v. Sebelius* (preliminary injunction granted by the Northern District of Texas). In that case, a motion for a preliminary injunction was granted to the Diocese.

Sixth Circuit

Ave Maria Foundation. Five Catholic, non-profit organizations challenged the contraceptive coverage requirement before the Eastern District of Michigan in *The Ave Maria Foundation v. Sebelius*. According to the court, the organizations could have avoided these requirements by executing a self-certification that would oblige their health care insurer to provide the objectionable services. However, in their view, this self-certification process would involve indirect support for these services, also in violation of their religious convictions. The court found that because the organizations demonstrated that the challenged regulations may substantially burden their religious exercise, the government must show, under 42 U.S.C. sec. 2000bb-1(b)(2), that the applicable regulations are the least restrictive means of further a compelling governmental interest. Without quantifying this burden or the loss of government effectiveness, the court found that the government did not show that the mandate is the least restrictive means and granted the preliminary injunction.

Also pending in the Sixth Circuit are the following cases: *East Texas Baptist University v. Sebelius* and *Sharpe Holdings v. Sebelius* (see *Court grants stay in two more contraceptive cases*, January 8, 2014); *Legatus v. Sebelius* (see *Catholic organization granted contraception mandate preliminary injunction*, December 31, 2013). In each case, a preliminary injunction was granted to the religious companies.

Seventh Circuit

Grace Schools and the Diocese of Fort Wayne. The Northern District of Indiana court granted preliminary injunctions in two joined cases against the government, barring enforcement of the “contraception mandate” in *Grace Schools v. Sebelius* and *Diocese of Fort Wayne-South Bend, Inc. v. Sebelius*.

Grace College and Seminary in Indiana and Biola University in Southern California are independent evangelical Christian colleges. The schools’ lawsuit argued that the HHS mandate violates their right to freely exercise their religion guaranteed by the First Amendment and the RFRA; their right to free speech guaranteed by the First Amendment; and their right to due process under the Fifth Amendment. The schools also alleged that the government violated the Administrative Procedure Act in promulgating the mandate without proper public comment.

Religious institutions “will be irreparably harmed if forced to forego their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines.” — 7th Cir.

The diocese challenged the accommodation put into place by the government that creates a buffer for religiously affiliated hospitals, universities and social service groups that oppose birth control. The diocese and Grace College argued that, even with the accommodation, the law violates its rights under the RFRA.

According to the court, the religious institutions met the requirements for the court to grant the injunction, including a likelihood of success on the restrictive means necessary to accomplish its objective. They were granted a preliminary injunction because, as the court noted, the institutions “will be irreparably harmed if forced to forego their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the plaintiffs’ claims with the relief of a preliminary injunction.”

Eighth Circuit

Archdiocese of St. Louis. Before the Eighth Circuit Court of Appeals is a decision by the Eastern District of Missouri in *Archdiocese of St. Louis v. Burwell*, granting a preliminary injunction and preventing the enforcement of the contraceptive mandate upon a religious employer

for providing a self-insured health plan to employees of a religious non-profit organization. In its decision, the lower court held that the religious employer and religious non-profit had shown a strong likelihood of success in proving that the mandate and the accommodation constituted a substantial burden on their religious exercise and that the mandate was not the least restrictive means of furthering the government's compelling interests.

The Archdiocese of St. Louis (Archdiocese) and Catholic Charities of St. Louis (CCSL) are Catholic entities “that provide a wide range of spiritual, educational, and social services to members of the greater St. Louis community, Catholic and non-Catholic alike.” The Archdiocese operates a self-insured health plan for its direct employees and employees of affiliated Catholic organizations, including CCSL. The plan does not cover abortion-inducing drugs, sterilization, or contraceptives. The Archdiocese is exempt from the contraceptive mandate, as it is a religious employer, and CCSL is eligible for the accommodation. The Archdiocese and CCSL filed suit against the government, alleging that the mandate violates their rights under the RFRA, and moved for a preliminary injunction preventing the enforcement of the contraceptive mandate against them.

In response to arguments by the government that the mandate does not violate the RFRA because it does not impose a substantial burden on the organizations' exercise of religion—as self-certification constitutes only a minimal burden—the court cited decisions in which “the vast majority of courts faced with similar challenges have enjoined enforcement of the contraceptive mandate, holding that religious entities in similar challenges have shown a likelihood of success on their RFRA claims.” The court found that by requiring the organizations to choose between providing contraceptive coverage or paying substantial financial penalties, “the mandate applies substantial pressure on Plaintiffs to engage in conduct contrary to their religious beliefs.”

The court determined that the government's interests “in promoting public health and gender equality are compelling within the meaning of RFRA and that the contraceptive mandate furthers those interests,” but it did not find the mandate to meet the “exceptionally demanding” least-restrictive-means requirement. In support, the court cited several alternative means of providing contraceptive services—such as grants and tax credits. Finding that the RFRA violation constitutes irreparable harm that would outweigh any harm to the government's interests in carrying out the mandate, the court determined that a preliminary injunction was appropriate. The decision is currently pending appeal in the Eighth Circuit Court.

Another decision pending before the Eighth Circuit Court of Appeals is *Dordt College v. Sebelius*, where the court granted a preliminary injunction.

Tenth Circuit

The Tenth Circuit Court of Appeals has before it a split between the lower court decisions. This is unique, in that it is the only Circuit Court of Appeals with decisions that oppose each other.

Catholic Benefits Association LCA. Relying on an Eleventh Circuit decision holding that the contraceptive mandate did impose a substantial burden on employers' religious exercise by requiring them to play a pivotal role in the accommodation process, the Western District of Oklahoma in *The Catholic Benefits Association LCA v. Burwell* granted a motion for preliminary injunction by the Catholic Benefits Association LCA and the Catholic Insurance Company (CBA, collectively) seeking protection from the ACA's contraceptive coverage mandate in light of the interim final rule issued on August 27, 2014. Though the court previously granted a preliminary injunction, the CBA sought to further protect new members who were not protected by the previous injunction.

The CBA is an Oklahoma-based non-profit limited cooperative association that assists Catholic employers in providing health benefits to their employees. Members of the CBA “adhere in belief and practice to the teachings of the Catholic Church on contraception, abortion, sterilization, and related counseling.” The organization brought suit against HHS and other government officials and agencies pursuing constitutional and statutory challenges to the ACA's contraceptive mandate.

On June 4, 2014, the court enjoined HHS from applying or enforcing the contraceptive mandate as to certain members of the CBA. The CBA filed a motion for preliminary injunction (1) to protect Catholic employers who joined or will join the CBA after June 4, 2014, who are not covered by the original order; and (2) to protect all CBA members from interim final regulations issued by HHS, the Department of Labor, and the Department of the Treasury (79 FR 51092, August 27, 2014) (see *Employees still protected, Feds provide birth control*, August 27, 2014). The motion is supported by arguments based on the RFRA, the Establishment Clause, and the Administrative Procedure Act (APA).

The court cited the Eleventh Circuit's holding in *Eternal World Television Network, Inc. v. HHS* [see above], finding that the contraceptive mandate accommodation still requires the CBA to participate in the contraceptive mandate scheme by requiring it to sign

the accommodation form and deliver it to its third-party health plan administrator. The court determined that the Eleventh Circuit applied equally to the August 2014 interim final rules. Under the challenged regulations, the court stated that CBA members have five options to choose from: “(1) directly provide contraceptive coverage to their employees; (2) refuse to provide the coverage and face severe monetary penalties; (3) completely drop their employees’ health plans and face monetary penalties for doing so; (4) self-certify that they qualify for the accommodation . . . ; or (5) notify HHS that they qualify for the accommodation and provide the required information.” According to the court, options (1), (4), and (5) violate their religious beliefs, leaving them to choose between (2) and (3)—“a Hobson’s choice for CBA members.”

The court further found that the contraceptive mandate did not satisfy the compelling interest test. Thus, the CBA was successful showing a likelihood of success on the merits on their RFRA claim, and the court found it unnecessary to address arguments as to the CBA’s Establishment Clause and APA claims. An appeal is now pending before the Tenth Circuit Court of Appeals.

Colorado Christian University. Similarly, Colorado Christian University (CCU) will remain penalty-free from any application or enforcement action by the government for its refusal to comply with the required insurance coverage as mandated by the ACA until further review by the Tenth Circuit Court of Appeals. Granting CCU a preliminary injunction against government enforcement, the court in *Colorado Christian University v. Sebelius* reasoned that a significant portion of the asserted interest of the government “remains largely realized while coexisting with the religious objections of CCU.”

CCU challenged the ACA requirements and the self-certification process, contending that providing this coverage puts a substantial burden on the exercise of the University’s religious beliefs and violates its First Amendment rights under the Constitution and under the RFRA. William L. Armstrong, CCU’s President declared that, “(A)s part of its commitment to a Christian education, CCU believes and actively teaches that each human being bears the image of God, and that all human life is sacred from the moment of conception. Promoting the sanctity of life is one of CCU’s Strategic Objectives.”

CCU objected only to a portion of the contraceptive coverage requirement. It made this distinction among contraceptive coverage, Armstrong claimed, “because their ability to prevent an embryo from implanting in

the uterus ends an innocent human life. It would be a violation of CCU’s religious beliefs concerning the sanctity of life . . . to deliberately arrange insurance coverage that facilitates access to abortion-inducing drugs and devices or related educational counseling services.” The current CCU employee and student health plan excludes any coverage for services, drugs, and devices that could terminate human life from the moment of conception, including medical abortions, emergency contraceptives like Plan B and Ella, and IUDs. Other contraceptives, however, are covered.

The contraception mandate did not satisfy the compelling interest test. — 10th Cir.

As CCU’s insurance renewal period neared, it requested a preliminary injunction so that it could avoid making the difficult choice between complying with government regulations and staying true to its beliefs. CCU met the four requirements used to determine whether a preliminary injunction is appropriate by showing that it: (1) has a likelihood of success on the merits; (2) will be irreparably injured by a denial of the injunction; (3) will experience greater harm if the injunction is granted; and (4) is making a request that serves the public interest. Finding the case directly analogous to *Hobby Lobby*, the court granted CCU a preliminary injunction noting that a balancing of the equities tips in favor of CCU and the public interest is served by enjoining the enforcement of a law that likely violates the Constitution. The decision has yet to be reconsidered in light of the finding in *Hobby Lobby*.

Catholic Diocese of Beaumont. The Eastern District of Texas court in *Catholic Diocese of Beaumont v. Sebelius* enjoined HHS from enforcing the requirement that eligible organizations certify that their religious beliefs prohibit them from supporting the coverage of contraception on the ground that the requirement burdens their rights under the RFRA and the Free Exercise Clause of the First Amendment to the United States Constitution. The government sought to apply the requirement to Catholic Charities, whose 17 employees were insured under the self-insured plan funded by the diocese and administered by a TPA.

The court ruled that the burden was substantial because although EBSA Form 700 itself only required a statement of the religious objections to contraception and a claim that the entity qualifies as an eligible organization, the regulations also provided that execution of the form “will be treated as a designation” of the TPA as the administrator of the contraceptive coverage benefit. The court accepted the plaintiffs’ argument that the form authorized the objectionable conduct. It also rejected the government’s argument that the regulations furthered the compelling interests in public health and equal access to health care for women. The interests were not compelling, the court found, because the government conceded that the requirement could not be applied to the church itself. Further, the government had not established that the regulation was the least restrictive means to achieve its purpose. The APA claims were also dismissed.

Diocese of Cheyenne. Faced with similar arguments, the District Court of Wyoming determined the opposite in the *Diocese of Cheyenne v. Sebelius*. In its decision, the court held that the religious organizations did not sufficiently show a likelihood of success on the merits, as required for a preliminary injunction, because the self-certification accommodation available under the ACA is not a substantial burden on their religious exercise. Specifically, the court noted that the self-certification allows the organizations “to refuse to be complicit” in what they believe to be a “grave moral wrong.”

The Diocese of Cheyenne, the Catholic Charities of Wyoming, St. Joseph’s Children’s Home, St. Anthony Tri-Parish Catholic School, John Paul II Catholic School at St. Mathews, and Wyoming Catholic College filed suit against HHS and other federal government departments arguing, according to the complaint, “they are prohibited by Catholic belief from providing, paying for, or facilitating access to products or services that limit a woman’s natural reproductive capacity,” as well as related education and counseling. Because of these beliefs, the religious organizations argued that the contraceptive coverage requirements under the ACA violate the RFRA by forcing them to “offer health plans that serve as a conduit for the delivery of the objectionable products and services.”

The self-certification, the court noted, does not require the religious organizations to amend their health plan documents to designate a third party to provide the coverage, as it is the ACA that “authorizes and obligates the TPA to arrange such coverage.” Furthermore, the court held that the self-certification process itself “permits Plaintiffs to refuse to be complicit.” The court further

stated that, despite the religious organizations’ reliance on *Hobby Lobby v. Sebelius*, the employers in *Hobby Lobby* were not eligible for the accommodations. Thus, *Hobby Lobby* is not controlling of the outcome of this case.

Little Sisters of the Poor. The Little Sisters of the Poor Home for the Aged, Denver, Colorado (Little Sisters) is continuing its challenge to the contraception mandate, *arguing* that the August 27, 2014, interim final rule does not address its objections to the mandate. According to the [government brief](#), the rule provides another avenue for non-profit religious organizations to avoid facilitating the provision of contraceptive coverage. The Little Sisters, however, argue that the regulations merely provide “an alternative way . . . to do what their religion forbids.”

The Little Sisters, a non-profit religious organization, filed a challenge to the contraception mandate, alleging that it violated the RFRA and the [First Amendment](#) to the U.S. Constitution. The Little Sisters objected to the EBSA Form 700 accommodation. Although their request for a preliminary injunction was denied, the U.S. Supreme Court eventually granted them an injunction pending appeal before the Tenth Circuit Court of Appeals (see [Supreme Court grants reprieve to nuns opposing contraceptive requirement, pending appeal, Jan. 29, 2014](#) and [Little Sisters of the Poor file appeal in contraceptive challenge](#), Feb. 26, 2014).

The Little Sisters maintain that the interim final rule does nothing to address their concerns, because they will still be ultimately responsible for the provision of contraception via signing Form 700. They note that even the appearance of condoning wrongdoing would “violate the Little Sisters’ public witness to the sanctity of human life and could mislead other Catholics and the public.” Furthermore, the Little Sisters maintain that the government violated the Administrative Procedure Act (APA), which requires agencies to engage in notice and comment rulemaking, absent good cause. The government maintains that the APA does not apply, since other acts authorize the Secretaries to promulgate interim final rules as appropriate; in the alternative, its actions would fall under the good cause exception, since delaying the provisions would be contrary to the public interest. An opinion in this case has not yet been filed.

There are several more cases pending before the 10th Circuit Court of Appeals. Those with a prior determination granting an injunction include: [Dobson v. Sebelius](#) (see [HHS prohibited from enforcing Contraceptive Mandate pending Hobby Lobby decision](#), May 28, 2014); [Reaching Souls International, Inc. v. Sebelius](#) (see [Government’s attempt to dismiss challenge to contraceptive](#)

mandate fails, stay issued, March 19, 2014); *Southern Nazarene University v. Sebelius*, (see *Religious institutions win challenge to contraceptive coverage mandate*, December 31, 2013).

Where to go from here... Notre Dame decision

Currently, there are over 40 religious non-profit cases relating to the contraception mandate in the lower courts. Four circuit courts have reached basically the same decision, but more than one year after the Seventh Circuit Court of Appeals denied the University of Notre Dame's plea for relief from the ACA's contraceptive coverage mandate exemption requirements, the U.S. Supreme Court told the appellate court to revisit the issue.

Despite its status as a Catholic university, Notre Dame does not meet the ACA's definition of a religious employer. In order to be exempt from the ACA's requirement to provide FDA-approved contraceptive coverage to its employees and students, the university was required to execute EBSA Form 700. Notre Dame argued to the Seventh Circuit, however, that the requirement imposed a substantial burden on its exercise of religion because completion of the form would serve as a trigger to provide contraceptive coverage, in contravention of its religious beliefs. The appellate court disagreed, referring to the form as a warning, rather than a trigger, and stating, "It enables nothing." The court denied the case (see *Notre Dame signs EBSA Form 700-Certification, not substantially burdened*, February 26, 2014).

In light of the Hobby Lobby and Wheaton College decisions, Notre Dame filed a *petition for certiorari* with the Supreme Court, asking it to vacate the Seventh Circuit decision and remand it for consideration. Notre Dame argued that the Hobby Lobby decision focused on the "consequences' of noncompliance," while the Seventh Circuit decision, "focused on the actions that Notre Dame was compelled to take." Furthermore, according to Notre Dame, the *Hobby Lobby* decision left it to plaintiffs to determine whether an act was sufficiently connected to conduct as to make it immoral. It renewed its argument that the mandate substantially burdened Notre Dame's exercise of religion, yet neither served a compelling government interest nor was the least restrictive means of doing so.

The Supreme Court **granted** the petition, vacating the Seventh Circuit's decision and remanding the case to

the appellate court. Mark Rienzi, Senior Counsel at the Becket Fund for Religious Liberty, which filed an amicus brief in the case, referred to the grant as, "a strong signal that the Supreme Court will ultimately reject the government's narrow view of religious liberty."

State contraceptive coverage laws

Notwithstanding what's happening in the courts, states have enacted legislation regarding contraceptive coverage by insurance plans. Although almost all insurance plans cover prescription drugs, some still do not provide coverage for the full range of FDA-approved prescription contraceptive drugs and devices.

Currently, there are over 40 religious non-profit cases relating to the contraception mandate in the lower courts.

More than half of states require insurance policies that cover other prescription drugs to also cover all FDA-approved contraceptive drugs and devices, as well as related medical services. Some of these state policies allow employers or insurers to refuse to cover contraceptives on religious or moral grounds.

There are currently 28 states which require insurers that cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices. Out of the 28, there are 17 states that also require coverage of related outpatient services. Arkansas and North Carolina exclude emergency contraception from the required coverage and West Virginia excludes minor dependents from coverage. The 28 states include:

- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Georgia

- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Michigan
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Oregon
- Rhode Island
- Texas
- Vermont
- Virginia
- Washington

- West Virginia
- Wisconsin

Conclusion

With so many circuits preparing to rule, it is likely there may continue to be some conflict among the circuits when the decisions surface. Courts now are dealing with different regulations than they were when faced with the Supreme Court decided *Hobby Lobby*. Did the government get it right when they changed the accommodation? Will the government release another Final rule this year addressing what it hopes is the proper balance between religious freedom and protecting the government's interest in the health and welfare of its citizens. Only time will tell. In the meantime, we will continue to keep an eye on which direction the cases are breaking. But even if no split develops, the Supreme Court may still choose to step in and address the issue on its own, like it did in *King v. Burwell* (this term's challenge to ACA subsidies), even though there was no conflict at the time.

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