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RELIGIOUS REFUSALS UNDER THE AFFORDABLE CARE ACT: CONTRACEPTION AS ESSENTIAL HEALTH CARE[±]

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Savita Halappanavar, a woman in Ireland, died because she could not obtain the pregnancy termination she needed to save her life. As the hospital representatives repeatedly refused her requests for care, they offered as their excuse, "This is a Catholic country."[1] Sister Margaret McBride, a nun in Phoenix, was excommunicated because she participated in a hospital ethics committee decision to allow physicians to perform a life-saving abortion for a young mother of four.[2] Throughout this country, hospital emergency rooms deny sexual assault survivors emergency contraception that can prevent pregnancy.[3] Ambulance drivers refuse transport to women seeking abortion care.[4] Doctors are permitted by state laws to lie to their patients if those doctors fear that knowing the truth

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1. *See* Henry McDonald & Ben Quinn, *Ireland Abortion Policy Under Scrutiny After Woman's Death*, GUARDIAN (U.K.) (Nov. 14, 2012), *at* www.guardian.co.uk/world/2012/nov/14/ireland-abortion-scrutiny-death.

2. *See, e.g.*, Dan Harris, *Nun Excommunicated After Saving a Mother's Life with Abortion*, ABC WORLD NEWS (June 1, 2010), *at* http://abcnews.go.com/WN/Media/church-excommunicates-nun-authorized-emergency-abortion-save-mothers/story?id=10799745; Michael Clancy, *Nun at St. Joseph's Hospital Rebuked over Abortion to Save Woman*, THE ARIZONA REPUBLIC (May 19, 2010), *at* http://www.azcentral.com/arizonarepublic/news/articles/2010/05/15/20100515phoenix-catholic-nun-abortion.html.

3. *See, e.g.*, Adrianna Iwasinski, *Metro Mother: Doctor Refuses to Treat Daughter Who Was Rape Victim*, NEWS9.COM (May 28, 2012), *at* http://www.news9.com/story/18640136/metro-mother-doctor-refuses-to-treat-daughter-who-was-rape-victim.

4. *See* Adamson v. Superior Ambulance Serv., No. 1:04-cv-03247 (N.D. Ill. 2007) (dismissed after settlement).

about a fetal anomaly will lead the patient to terminate her pregnancy.[5] Health care providers are permitted to refuse to prescribe contraception.[6] Pharmacies refuse to fill legal prescriptions for contraception, and, indeed, will not even permit their employees to refer a patient elsewhere or assist her in obtaining the medication she needs.[7] In Illinois, a state appellate court ruled that, in such cases, the interests of the women patients are not relevant.[8] On a daily basis, women are denied essential health care, medication, information, and referrals as a result of religious objections by their doctors, nurses, and the facilities at which they seek care.[9] In addition, employers are seeking to impose their religious beliefs on the women they employ. Throughout the country, for-profit corporations, with religiously diverse workforces, claim the right to exclude contraceptive coverage from the insurance benefits their employees earn as a part of their compensation, because corporate shareholders object to the use of contraception on religious grounds. In the past couple of years, numerous employers have filed lawsuits seeking exemption from the contraceptive coverage requirements under the Women's Health Amendment (WHA) to the Patient Protection and Affordable Care Act (ACA).[10] These challenges

5. *See* S.B. 1359, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (enacted).

6. *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (Jan. 1, 2013), *at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (Thirteen states expressly allow health care providers to refuse to provide contraceptive services.). Illinois's refusal law, the Health Care Right of Conscience Act, permits the refusal of any health care a health care personnel, facility, or insurer finds religiously objectionable. 745 ILL. COMP. STAT. 70/1–14 (2011).

7. *See* Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373 (Ill. 2008); Morr-Fitz, Inc. v. Quinn, No. 4-11-0398, 2012 WL 4320611 (Ill. App. Ct. Sept. 20, 2012); Noesen v. State Dep't of Reg. & Licensing, 51 N.W.2d 385 (Wis. Ct. App. 2008).

8. *Morr-Fitz, Inc.*, 2012 WL 4320611. This decision resolved a claim under the Illinois Health Care Right of Conscience Act, 745 ILL. COMP. STAT. 70/3–4, 9–10.

9. *See supra* notes 2–4, 7; *see also, e.g.*, Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774 (2008); ACLU Reproductive Freedom Project, *Religious Refusals and Reproductive Rights* (2002), *at* http://www.aclu.org/FilesPDFs/ACF911.pdf; Mikki Kendall, *Abortion Saved My Life: I Almost Died in an Emergency Room Because the Doctor on Call Refused to Perform a Necessary Procedure*, SALON (May 26, 2011, 1:02 PM), *at* http://www.salon.com/2011/05/26/abortion_saved_my_life/singleton/; *Health Care Refusals: Undermining Quality Care for Women*, National Health Law Program, NATIONAL HEALTH LAW PROGRAM, 7 (2010), *at* http://www.healthlaw.org/images/stories/Health_Care_Refusals_Undermining_Quality_Care_for_Women.pdf.

10. S. Amdt. 1520 to S.B. 1813, 112th Cong. (2012) (enacted as the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131 (2010) (to be codified at 42 U.S.C. § 300gg-13(a)(4))); *see, e.g.*, Hall v. Sebelius, No. 0:13-cv-00295-JRT-LIB (D. Minn. Apr. 2, 2013); Tonn & Blank Constr., LLC v. Sebelius, No. 1:12-CV-325 JD (N.D. Ind. Apr. 1, 2013); Eden Foods v. Sebelius, No. 2:13-cv-11229-DPH-MAR, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013), *aff'd*, No. 13-1677 (6th Cir. Oct. 24, 2013); Lindsay v. U.S. Dep't Health & Human Servs., No. 13 C 1210 (N.D. Ill. Mar. 20, 2013); Monaghan v. Sebelius, No. 2:12-cv-15488-LPZ-MJH, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); Geneva Coll. v. Sebelius, No. 2:12-cv-00207-JFC, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); Gilardi v. Sebelius, No. 1:13-cv-00104-EGS, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *injunction pending appeal granted*, No. 13-5069 (D.C. Cir. Mar. 29, 2013); Sioux Chief Mfg. Co. v. Sebelius, No. 4:13-cv-

present a direct assault on the compelling governmental goals of the WHA—to eradicate harmful gender-based disparities in health care and insurance coverage and thereby allow women to obtain essential medical care, necessary to advance women's health and equality.

This Article will address contraception as essential health care and the compelling interests in promoting women's health and equality advanced by the WHA. When a person takes a job, it is not the same as joining a church. To permit secular employers to impose their religious beliefs on a religiously diverse workforce distorts the concept of religious liberty and undermines the compelling objectives of the WHA.

I. CONTRACEPTION IS ESSENTIAL TO PROMOTING WOMEN'S HEALTH AND ENABLING WOMEN TO PARTICIPATE FULLY AND EQUALLY IN SOCIETY

Throughout history, women and their children have suffered from the health consequences of pregnancies that were too early, too frequent, and too closely spaced. Without contraception, the average woman could expect to become pregnant twelve to fifteen times during the approximately three fertile decades of her life.[11] Safe and effective

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00036-ODS (W.D. Mo. Feb. 28, 2013); Briscoe v. Sebelius, No. 1:13-cv-00285, 2013 WL 755413 (D. Colo. Feb. 27, 2013); Conestoga Wood Specialities Corp. v. Sebelius, No. 5:12-cv-06744-MSG, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *aff'd*, No. 13-1144 (3d Cir. July 26, 2013); Annex Med., Inc. v. Sebelius, No. 12-2804(DSD/SER), 2013 WL 101927 (D. Minn. Jan. 8, 2013), *injunction pending appeal granted*, No. 13-1118 (8th Cir. Feb. 1, 2013); Yep v. U.S. Dep't Health & Human Servs., No. 1:12-cv-06756 (N.D. Ill. Jan. 2, 2013); Sharpe Holdings Inc. v. U.S. Dep't Health & Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); Grote Indus., LLC v. Sebelius, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *injunction pending appeal granted*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *aff'd*, No. 12-2673 (6th Cir. Sept. 17, 2013); Am. Pulverizer Co. v. U.S. Dep't Health & Human Servs., No. 6:12-cv-03459-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); Korte v. U.S. Dep't of Health & Human Servs., No. 3:12-cv-01072-MJR-PMF, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012), *injunction pending appeal granted*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); Hobby Lobby Stores Inc. v. Sebelius, No. 5:12-cv-01000-HE, 870 F. Supp. 2d 1278 (W.D. Okla. Nov. 19, 2012), *application for injunction denied*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers), *rev'd*, No. 12-6294 (10th Cir. June 27, 2013) (en banc); Tyndale House Publishers, Inc. v. Sebelius, No. 1:12-cv-01635-RBW, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); O'Brien v. U.S. Dep't of Health & Human Servs., No. 4:12-CV-476-CEJ, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted*, No. 12-3357 (8th Cir. Nov. 28, 2012); Legatus v. Sebelius, No. 2:12-cv-12061-RHC-MJH, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); Newland v. Sebelius, No. 1:12-CV-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012); Infrastructure Alts., Inc. v. Sebelius, No. 1:13-cv-00031-RJJ (W.D. Mich.); Am. Family Assoc., Inc. v. Sebelius, No. 1:13-cv-00032-SA-DAS (N.D. Miss.); Armstrong v. Sebelius, No. 1:13-cv-00563 (D. Colo.).

11. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 975 (2007); *see also* Rachel Benson Gold et al., *Next Steps for America's Family Planning Program*, GUTTMACHER INSTITUTE, 6 (2009), *at* http://www.guttmacher.org/pubs/NextSteps.pdf (Without contraception, the average woman spends most of her reproductive life (approximately three-quarters) seeking to avoid unintended pregnancy.).

contraception can help to prevent unintended pregnancy, promote healthy birth spacing, and offer a host of other health benefits.[12] Contraception thus has become a critical component of basic preventive health care for women. Since 1965, when the U.S. Supreme Court first recognized a fundamental right to contraception,[13] the mortality rates among pregnant women and infants have decreased by more than 50% and nearly 75%, respectively.[14]

The inability to control reproduction can result in serious health consequences for women.[15] For all women, pregnancy carries health risks. Out of every 100,000 births in the United States, 12.7 women die as a result of pregnancy-related complications.[16] Women with chronic illnesses, such as pulmonary hypertension and certain heart diseases, have an even greater risk of serious complications and, thus, often a greater need to avoid pregnancy.[17] Repeated pregnancies, too closely spaced, also increase the risk of negative outcomes for pregnant women.[18] Short inter-pregnancy intervals are associated with increased risks of complications, such as anemia, placenta previa with hemorrhage, placental abruption, premature rupture of membrane, and puerperal endometritis.[19] In addition,

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12. *See* Office of Women's Health, *Birth Control Guide*, U.S. FOOD & DRUG ADMINISTRATION (Aug. 2012), *at* http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm356451.pdf; Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14.1 GUTTMACHER POL'Y REV. 7, 7–9 (2011), *available at* https://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf; American College of Obstetricians & Gynecologists, *Practice Bulletin No. 110: Noncontraceptive Uses of Hormonal Contraceptives*, 115 OBSTETRICS & GYNECOLOGY 206 (2010) (For example, certain hormonal contraceptives are effective in addressing severe menstrual disorders and reducing the risk of some forms of cancer.).

13. Griswold v. Connecticut, 381 U.S. 479 (1965).

14. Susanne Pichler, *Griswold v. Connecticut—The Impact of Legal Birth Control and the Challenges that Remain*, PLANNED PARENTHOOD FEDERATION OF AMERICA, 1 (Sept. 2010), *available at* http://www.plannedparenthood.org/files/PPFA/fact_griswold_2010-09.pdf (citing U.S. Census Bureau).

15. *See Women and Societies Benefit When Childbearing Is Planned*, at 1–3 (Apr. 2002), GUTTMACHER INSTITUTE, *at* http://www.guttmacher.org/pubs/ib_3-02.pdf.

16. *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU, at 85 tbl.115 (2011), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0115.pdf; U.S. Department of Health and Human Services Health Resources and Services Administration, *Women's Health USA: 2011*, HEALTH RESOURCES & SERVICES ADMINISTRATION, MATERNAL & CHILD HEALTH, at 51 (Oct. 2011), *at* http://www.mchb.hrsa.gov/whusa11/more/downloads/pdf/w11.pdf [hereinafter WOMEN'S HEALTH 2011]; *see also* William M. Callaghan et al., *Severe Maternal Morbidity Among Delivery and Postpartum Hospitalizations in the United States*, 120 OBSTETRICS & GYNECOLOGY 1029 (2012).

17. INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103–04 (2011) [hereinafter IOM REPORT]; *see* James Trussell et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AM. J. PUB. HEALTH 494, 494 (1995) ("For women who should not become pregnant because of medical problems, contraception [can] save[] lives and prevent[] morbidity.").

18. Agustin Conde-Agudelo et al., *Effects of Birth Spacing on Maternal Health: A Systematic Review*, 196 AM. J. OBSTETRICS & GYNECOLOGY 297, 299 (2007).

19. *Id.* at 299, 306. Placenta previa occurs when the placenta implants over the cervix. Placental abruption is the separation of the placenta from the uterus wall. Both can cause sudden and heavy bleeding, which can

women experiencing unintended pregnancy are at increased risk for depression, anxiety, and other mental health conditions.[20] Furthermore, unintended pregnancy increases a woman's risk of experiencing domestic violence and marital strain.[21]

Unintended pregnancies can also lead to negative outcomes for newborn children. Women who plan for pregnancy are more likely to initiate early prenatal care and behavior modifications that can lead to positive birth outcomes.[22] By contrast, infants born as a result of unintended or mistimed pregnancies are more likely to be premature or to have a low birth-weight compared to infants whose births were intended.[23]

In addition to the physical health benefits, controlling fertility through contraceptive use empowers women to take advantage of educational and employment opportunities that have long-term health, economic, and social benefits for themselves, their families, and their communities. In a survey concluded in 2012, 77% of women who used birth control reported that their use of contraceptives allowed them to better care for themselves or their families, 71% reported that their use of birth control allowed them to support themselves financially, 64% responded that birth control helped them stay in school or finish their education, and 64% stated that birth control helped them get or keep a job.[24]

Women have had the opportunity to make enormous gains in education, employment, and pay equity as a result of access to contraception.[25] When birth control became widely available in the 1970s, professional degree programs saw a sharp increase in applications from women, producing a substantial increase in the number of women participating in traditionally all-male professions like law, medicine,

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be life-threatening to the pregnant woman, and can cause fetal death, among other health consequences. F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 811–23 (22d ed. 2005). Puerperal endometritis is a postpartum uterine infection. *Id.* at 712.

20. WOMEN'S HEALTH 2011, *supra* note 16, at 48; INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 74–75 (1995) [hereinafter IOM, UNINTENDED PREGNANCY]; IOM REPORT, *supra* note 17, at 103.

21. WOMEN'S HEALTH 2011, *supra* note 16, at 48; IOM, UNINTENDED PREGNANCY, *supra* note 20, at 75; IOM REPORT, *supra* note 17, at 103.

22. Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 STUD. IN FAM. PLAN. 18, 22–23 (2008).

23. IOM REPORT, *supra* note 17, at 103; *see also* Agustin Conde-Agudelo et al., *Birth Spacing and Risk of Adverse Perinatal Outcomes: A Meta-Analysis*, 295 JAMA 1809 (2006) (finding correlation between short pregnancy intervals and birth outcomes).

24. Jennifer J. Frost & Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of U.S. Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 465, 467 (2013).

25. Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J.: APPLIED ECON. 225, 251 (2012).

dentistry, and business.[26] Today, roughly an equal number of women and men graduate from law schools, and nearly one-half of medical school graduates in training, residency, or fellowship programs are women.[27] Of all doctoral degrees awarded, women now receive more than one-half, up from only 10% in 1960.[28] And since 1960, the number of women who had completed four or more years of college increased fivefold.[29]

For many women, it is the knowledge "that they can, if they wish, control the timing of their childbearing (and society's understanding that women can do so) that expands women's economic choices and enhances their status."[30] "Uncertainty over the timing of childbearing, in contrast, inhibits women's educational and occupational decisions. . . . [W]omen facing such uncertainty will invest little in education and will accept jobs that have low wage returns and low entry and exit costs."[31]

In addition to entry into professional programs, access to effective contraception has led to durable increases in women's paid labor-force participation with women who have had early access to contraception working more hours and in long-term careers.[32] Since 1965, when *Griswold v. Connecticut* recognized the fundamental right to contraception,[33] the percent of women participating in the labor force has more than doubled.[34] Approximately 60% of all women currently work outside the home.[35] And, access to contraception has helped narrow the wage gap, with one-third of women's total wages gains since the mid-20th century attributable to access to effective birth control.[36]

Access to contraception early in a woman's life (before age 21) allows a woman to postpone motherhood until a time that she feels is optimal, which research shows leads to positive outcomes for women and

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26. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 748–49 (2002).

27. Josh Mitchell, *Women Notch Progress: Females Now Constitute One-Third of Nation's Ranks of Doctors and Lawyers*, WALL ST. J. (Dec. 4, 2012), *at* http://online.wsj.com/article/SB10001424127887323717004578159433220839020.html.

28. Pichler, *supra* note 14, at 2; U.S. CENSUS BUREAU, *supra* note 16, at 189 tbl.299, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0299.pdf.

29. Pichler, *supra* note 14, at 2; U.S. CENSUS BUREAU, *supra* note 16, at 189 tbl.299.

30. Nancy Birdsall & Lauren A. Chester, *Contraception and the Status of Women: What Is the Link?*, 19 FAM. PLAN. PERSP. 14, 17 (1987).

31. *Id.*

32. Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.J. ECON. 289, 295 (Feb. 2006), *available at* http://www-personal.umich.edu/~baileymj/Bailey_Pill_QJE.pdf.

33. 381 U.S. 479 (1965).

34. Pichler, *supra* note 14, at 2; U.S. CENSUS BUREAU, *supra* note 16, at 378 tbl.588.

35. U.S. CENSUS BUREAU, *supra* note 16, at 384 tbl.598.

36. Bailey et al., *supra* note 25, at 251–52 (2012).

children.[37] As a result of contraception, increasing numbers of children are now born to college-educated mothers.[38] Simply, control over reproductive choices serves to facilitate a woman's ability to pursue her professional and personal goals, including selection of a partner and ideal family size—or, in a word, equality. It is not surprising, therefore, that virtually all (more than 99%) of U.S. women aged 15 to 44 years who have ever had sexual intercourse have used contraception.[39]

As the Supreme Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "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."[40] Recognizing these benefits, the U.S. Centers for Disease Control and Prevention declared family planning to be one of the ten most significant U.S. public health achievements of the 20th century.[41]

II. THE WOMEN'S HEALTH AMENDMENT SOUGHT TO ADDRESS SIGNIFICANT AND HARMFUL DISPARITIES IN ACCESS TO HEALTH CARE AND INSURANCE COVERAGE FOR WOMEN

Congress added the WHA to the ACA to ensure that women receive coverage for essential preventive care, recognizing that "both existing health coverage and existing preventive services recommendations often did not adequately serve the unique health needs of women" and that

37. Elizabeth Oltmans Ananat & Daniel M. Hungerman, *The Power of the Pill for the Next Generation: Oral Contraception's Effects on Fertility, Abortion, and Maternal & Child Characteristics*, 94 REV. ECON. & STATS. 37, 42, 50 (2012) (early access to contraception has an immediate effect on the decline of low birth-weights); *see also* Jonathan Gruber et al., *Abortion Legalization and Child Living Circumstances: Who Is the "Marginal Child"?*, 114 Q.J. ECON. 263 (1992) (finding that children born to women without access to abortion are "40–60 percent more likely to live in a single-parent family, to live in poverty, to receive welfare, and to die as an infant").

38. Oltmans Ananat & Hungerman, *supra* note 37, at 46–47.

39. William D. Mosher & Jo Jones, *Use of Contraception in the United States: 1982–2008*, CENTERS FOR DISEASE CONTROL & PREVENTION, at 5 & fig.1 (2010), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf.

40. 505 U.S. 833, 856 (1992); *see also* U.S. Department of Health & Human Services, *Healthy People 2020: Leading Health Indicators—Reproductive and Sexual Health*, HEALTHYPEOPLE.GOV, *at* http://www.healthypeople.gov/2020/LHI/reproductiveHealth.aspx ("Improving reproductive and sexual health is crucial to eliminating health disparities, reducing rates of infectious diseases and infertility, and increasing educational attainment, career opportunities, and financial stability.").

41. U.S. Centers for Disease Control & Prevention, U.S. Department of Health & Human Services, *Ten Great Public Health Achievements—United States 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241 (1999), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf; U.S. Centers for Disease Control & Prevention, U.S. Department of Health & Human Services, *Achievements in Public Health, 1900–1999: Family Planning*, 48 MORBIDITY & MORTALITY WKLY. REP. 1073 (1999), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm4847.pdf.

requiring coverage for preventive services was "necessary to achieve basic health care" for women.[42] To implement the preventive care and screening provisions of the WHA, the Institute of Medicine (IOM), an independent, nonprofit organization within the National Academy of Sciences, "review[ed] what preventive services are necessary for women's health and well-being" and developed recommendations for comprehensive guidelines.[43] The IOM recommended that preventive services include: coverage for well-women visits; screenings for gestational diabetes; testing for human papillomavirus (HPV); counseling for sexually transmitted infections; counseling and screening for human immune-deficiency virus (HIV); comprehensive lactation support, counseling and reimbursement for renting breastfeeding equipment; screenings and counseling for interpersonal and domestic violence; and coverage for FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling.[44] On August 1, 2011, the Department of Health and Human Services adopted these recommendations, including the recommendation on contraceptive services.[45]

The IOM's recommendation grew out of its recognition that women face significant barriers to accessing preventive care that can lead them to delay or forego such care altogether.[46] "[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."[47] Indeed, women of childbearing age (15 to 44 years) pay 68% more in out-of-pocket health care costs annually than do men.[48]

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42. 77 Fed. Reg. 8725, 8727, 8728 (Feb. 15, 2012). 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 . . . ." 155 CONG. REC. S11988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (emphasis added).

43. IOM REPORT, *supra* note 17, at 2, 21.

44. *Id.* at 126–29 tbl.5-6; *Women's Preventive Services: Required Health Plan Coverage Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION, *at* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 14, 2012) [hereinafter HRSA, *Women's Guidelines*]; *see also* 45 C.F.R. § 147.130(a)(1)(iv) (2011).

45. *See* 45 C.F.R. § 147.130(a)(iv); HRSA, *Women's Guidelines*, *supra* note 44.

46. IOM REPORT, *supra* note 17, at 19.

47. *Id.*

48. 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 1998, 5, 5 (Aug. 1998) *available at* www.guttmacher.org/pubs/tgr/01/4/gr010405.pdf; Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 92–93 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004). The impact of this cost disparity is exacerbated by the fact that women "typically earn less than men and . . . disproportionately have low incomes." IOM REPORT, *supra* note 17, at 19.

This disparity is due in large part to the out-of-pocket costs women incur in connection with reproductive health care.[49] The cost of oral contraceptives accounts for 29% of the total out-of-pocket health care costs incurred by women who are privately insured and have prescription drug coverage, 63% of out-of-pocket health care costs for women on Medicaid, and 68% of those costs for uninsured women.[50] Indeed, contraceptive co-pays can be so high that some women pay almost as much as they would if they had no insurance coverage at all.[51] This cost disparity is significant in light of the essential nature of contraception and the fact that the vast majority of women use such medication.[52]

As the IOM recognized, access to the full-range of FDA-approved contraceptive methods and devices at no out-of-pocket expense, along with any necessary medical procedures, allows women to choose the most effective contraceptive methods in light of their needs and circumstances.[53] Because contraceptives vary in effectiveness, and because not all contraceptive methods are appropriate for all women, when access barriers are lifted, women are more likely to use contraceptives and choose the right contraceptive method for them, which ultimately results in fewer unintended pregnancies.[54]

As a result of the WHA, forty-seven million women now will have coverage for preventive services at no out-of-pocket expense under the ACA.[55] Moreover, as health plans undergo changes, thereby relinquishing their "grandfathered" status,[56] the number of women who will be in plans subject to the WHA will increase.[57] Further, under the ACA, more women

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49. IOM REPORT, *supra* note 17, at 109.

50. Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 CONTRACEPTION 528, 531 (2011).

51. *Id.*

52. *See supra* Part I.

53. IOM REPORT, *supra* note 17, at 105, 108; *see also Facts on Unintended Pregnancy in the United States*, GUTTMACHER INSTITUTE, 3–4 (Jan. 2012), *available at* http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf.

54. Jeffery Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTETRICS & GYNECOLOGY 1291 (2012); Jill L. Schwartz & Henry L. Gabelnick, *Current Contraceptive Research*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 310, 310 (2002) ("Successful prevention of unplanned pregnancies relies not only on access to available marketed products, but also on the products' acceptability and couples' willingness and ability to use them effectively.").

55. Adelle Simmons & Laura Skopec, *47 Million Women Will Have Guaranteed Access to Women's Preventive Services with Zero Cost-Sharing Under the Affordable Care Act*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING & EVALUATION, 1 (Jul. 31, 2012), *available at* http://aspe.hhs.gov/health/reports/2012/womensPreventiveServicesACA/ib.pdf.

56. A "grandfathered plan" means a plan that was in existence prior to the enactment of the ACA (March 23, 2010) and one that has not made any changes as defined by regulation. *See* 26 C.F.R. § 54.9815-1251T (2012); 29 C.F.R. § 2590.715-1251 (2012); 45 C.F.R. § 147.140 (2011).

57. *See* 75 Fed. Reg. 41,726, 41,732 (July 19, 2010) (estimating that the majority, or so, individual and

will be able to obtain no-cost preventive care under Medicaid,[58] and many more will be able to participate in health insurance plans that include coverage for zero-cost preventive services in the insurance exchanges,[59] and in plans purchased pursuant to the minimum essential coverage provision (otherwise known as the "individual mandate").[60]

The ACA also prohibits gender rating—that is, the long standing practice of charging women more than men for the same health coverage—in individual policies and small employer-provided group health plans.[61] It also prevents insurance companies from denying coverage to women because of pre-existing medical conditions or experiences unique to women, such as prior pregnancy, cesarean section, sexual assault, and rape—or, in some cases, just being a woman.[62] Although the ACA leaves much to be desired in terms of women's health care,[63] the ACA makes appreciable improvements to women's ability to access care by eradicating pernicious forms of gender discrimination.

In announcing the contraceptive coverage rule, the government recognized the ability to access contraception as being essential to women's health and their ability to participate fully in society. Indeed, as the government explained, the inability of women to access contraception

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.[64]

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group health plans will relinquish their grandfathered statuses by the end of 2013).

58. *See* 42 U.S.C.A. § 1396a (West 2011).

59. *Id.* § 18031.

60. *See* I.R.C.A § 5000A, *upheld in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

61. 42 U.S.C.A. § 300gg.

62. *Id.* § 300gg-3.

63. For example, "despite the potential health and well-being benefits to some women, abortion services" are not guaranteed by the ACA. IOM REPORT, *supra* note 17, at 22.

64. 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

As millions of women have or soon will be able to obtain contraception at no out-of-pocket expense, more women will be able to prevent unintended pregnancy and obtain healthy birth spacing, leading to healthier outcomes for women and their babies and greater opportunities for equal participation in society.

III. CURRENT CHALLENGES TO THE CONTRACEPTIVE COVERAGE RULE DISTORT THE CONCEPT OF RELIGIOUS LIBERTY

For-profit corporations claiming entitlement to an exemption from the contraceptive coverage rule seek to advance a variety of legal theories, focusing predominantly on the Constitution and the Religious Freedom Restoration Act (RFRA).[65] The Free Exercise Clause of the First Amendment provides in pertinent part, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[66] The Free Exercise Clause offers absolute protection for religious beliefs;[67] however, incidental governmental burden on conduct is constitutionally permissible when the burden is a result of a neutral law of general applicability.[68] Under RFRA, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is

65. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, is codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006). *See, e.g.*, Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 528 (N.Y. 2006), *cert. denied sub nom.* Catholic Charities of Diocese of Albany v. Dinallo, 552 U.S. 816 (2007); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 92–93 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Yep v. Ill. Dep't of Ins., No. 2012 CH 5575 (Ill. Cir. Ct., DuPage Cnty.).

66. U.S. CONST. amend. I.

67. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views." (citations omitted)); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.")

68. Emp't Div. v. Smith, 494 U.S. 872, 885 (1990). Neutrality means that a law does not have the "object or purpose" to suppress religion or religious conduct—that is, "target[] religious conduct for distinctive treatment." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 534 (1993). Non-neutrality can be seen from the face of the statute or discerned from its operation. *Id.* at 533, 535. Legislative history is also relevant to the inquiry. *Id.* at 540–42. General applicability is concerned with the "categories of selection" to be regulated by the law and the burden selective categorization has on religious conduct. *Id.* at 542. Determining general applicability includes examining the fit between the means of regulation and the end to be achieved by the law—or, whether the law is "underinclusive for those ends." *Id.* at 543. The requirements are "interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531.

in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[69]

The current challenges to the WHA's contraceptive coverage rule present a number of questions, including whether secular, for-profit corporations can discriminate against their female employees by denying them the health care benefits the government has found to be a critical means of promoting women's health and equality and of eradicating discrimination. While this controversy focuses on health insurance benefits for contraception, the fundamental question—whether religious objections can trump neutral laws designed to eradicate discrimination—is not unique to this situation. Indeed, this theory has been asserted repeatedly—and unsuccessfully—in numerous other contexts over the last five decades. For example:

In 1993, a secular, private school maintained a "Protestant-only" hiring policy based on the religious affiliation of the school's founder. Under this policy, the school refused to hire a substitute French language teacher because she was not Protestant.[70]

In the 1970s and '80s, Bob Jones University, a religiously affiliated school in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The "sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage," and it was school policy that students engaged in interracial relationships, or advocacy thereof, would be expelled.[71] Bob Jones's lesser known co-petitioner, Goldsboro Christian Schools, even opposed integration of the classroom. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races is regarded as a violation of God's command."[72]

In 1976, Roanoke Valley Christian Schools added a "head of household" supplement to its teachers' salaries—but only for married men. According to the church pastor affiliated with the school, "When 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."[73] Roanoke Valley claimed a right to an exemption from the Equal Pay Act because its "head-

69. 42 U.S.C. § 2000bb-1, *abrogated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that application of RFRA against the states exceeded Congress's authority under Section 5 of the Fourteenth Amendment).

70. EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993).

71. Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983).

72. *Id.* at 583 n.6 (citation omitted).

73. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990).

of-household practice was based on a sincerely-held belief derived from the Bible."[74]

In 1966, three African-American residents of South Carolina brought a class action suit against Piggie Park restaurants, and their owner, L. 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[led] him to oppose any integration of the races whatever."[75]

In each case, litigants invoked the mantle of religious freedom in an effort to avoid compliance with laws designed to advance equality, and, in each case, they failed. Religious liberty does not give businesses or individuals carte blanche to discriminate against others, deny others their rights, ignore important laws, or foist their religious beliefs on their employees. As the district court in South Carolina explained in rejecting Piggie Park's free exercise defense:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.[76]

As these cases make clear, religious exercise is not absolute and cannot automatically trump laws passed to further a compelling government interest, including laws intended to advance the compelling interests of equality and eradicating discrimination.[77] Moreover, while a single judicially created exemption may seem innocuous, even one instance of discrimination undermines the compelling interests sought to be advanced by the government. And as more exemptions are requested

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74. *Id.* at 1397.

75. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd in relevant 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).

76. *Id.* at 945.

77. *See, e.g.*, *Shenandoah Baptist Church*, 899 F.2d at 1398 (religious school must comply with the Equal Pay Act, which was passed to address the "serious and endemic problem of employment [gender] discrimination," which is a compelling governmental interest); *Bob Jones Univ.*, 461 U.S. at 604 (religious school could not be exempt from IRS policy that required such schools to have nondiscriminatory policies, because eradication of racial discrimination in education is a compelling governmental interest).

and carved out by courts, more women will be denied equal access to health care, entirely frustrating the government's objectives of promoting women's equality and health.[78]

IV. CONCLUSION

The challenges to the contraceptive coverage rule of the Affordable Care Act's Women's Health Amendment are an effort to resurrect the long-discredited notion that religion can be used to trump antidiscrimination or other important laws. Courts have long refused to lend credence to the position that entities have a right to refuse to comply with laws designed to eradicate discrimination by asserting religious convictions.[79] Ensuring access to a full range of reproductive health care, including contraception, serves compelling governmental interests in promoting women's equality and health and in eradicating gender discrimination. Using religion to discriminate against women in the provision of health care undermines those interests, threatening the health, dignity, and equality of women. For these reasons, the mantle of religious liberty cannot be used as a license to discriminate.

78. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004) ("Strongly enhancing the state's interest is the circumstance that any exemption from [California's Women's Contraception Equity Act] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.").

79. *See, e.g.*, *Newman*, 256 F. Supp. at 945.