

Written Submission for 12866 Meeting – Aug 19, 2022

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RIN 0938-AU94: Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9903)

- 1) **Need for the Rule:** Many religious organizations have injunctions, and can join groups like Christian Employers Alliance and Catholic Benefits Associations that have an injunction protecting future members.

What is the need to change the Religious Exemption if doing so will not give coverage to women at groups that can simply be protected by injunctions? The RIA should not estimate that women will get coverage because of these rules, if these rules cannot change those injunctions.

- 2) **Regulatory Impact Analysis:**

Is there data showing how many women do not have coverage because of the religious and moral exemptions? Agencies made quite a few calculations in 2019 but said it was not confident in them. The injunctions suggest these rules might not return coverage to women.

In the broadest estimate from 2019, the agencies assumed that prior to 2010, plans not covering contraception were not covering it due to religious or moral objections. But there was and is no evidence to support that assumption. For that reason, the agencies said they did not believe that assumption was accurate. In fact many companies may not have covered contraception before the ACA because it was not universal in the industry at the time. Therefore they may not have used the exemptions created in 2019 because they did not disappoint their employees.

If the agencies estimate these rules will return coverage to women they need to provide an evidentiary basis for that estimate without relying on the unsupported assumption about what companies were doing before 2010.

- 3) **If there were women who lost coverage because of the exemptions, where is that data?**

In 2019 the agencies offered hypothetical estimates about how many women might lose coverage because of the exemptions. But the exemptions have been in place for two years now since the Supreme Court upheld them in the last *Little Sisters of the Poor* ruling in July 2020.

But if the 2019 exemptions caused women to lose coverage, where is the data on those actual instances? It is not sufficient for the agencies to merely rely on hypothetical estimates made before the exemptions now that we are two years into the actual exemptions being in effect.

Likewise if the 2019 exemptions were harmful, there should be two years of data showing that harm, not speculation. If the agencies say there is a need for this rule or a benefit from it, it should support that with actual data from the effects of the exemptions over the last two years.

4) **Moral Exemptions:**

In 2019 the agencies pointed out that as to a non-profit organization that adopts a moral view against some or all contraceptives, and only hires people who agree with its mission and do not want the organization to have to violate its principles, there is no governmental interest in forcing that group to cover contraceptives.

A mandate on that kind of organization achieves nothing because the women who work there do not want the contraceptives the organization is not providing, and they have chosen to work for such an organization. Even when the government only needs to show a “rational basis” for its actions, there would be no rational basis to force such an organization to cover contraceptives, because it would not achieve the goal of giving contraceptive coverage to women who want it.

Those organizations have a First Amendment right to speech and association to only hire people who agree with their views and who do not wish to force the group to violate its views. The mandate on them would likely be subject to a higher level of scrutiny. For this reason March for Life won a permanent injunction against the contraceptive mandate before the moral exemption was put in place.

New organizations can be formed around different beliefs all the time, so without the moral exemption, organizations that oppose contraception will have their beliefs suppressed before they even organize.

5) **Religious Liberty:**

The Religious Freedom Restoration Act will be used to strike down any repeal or rollback of the exemptions, or attempt to impose the “accommodation.” The pro-mandate side has lost at the Supreme Court in each appeal, and the justices on the Supreme Court are now even more favorable to religious liberty since the last *Little Sisters* case. Any scaling back of the religious exemptions will cause the agencies to lose at the Supreme Court again.

6) **HRSA Guidelines Violate the APA.**

On Friday August 12, 2022, the U.S. District Court for the Eastern District of Texas ruled that HRSA violated the Administrative Procedure Act in using notice and comment rulemaking to promulgate the women’s preventive services guidelines. *Tice-Harouff v Johnson*, Case No. 22-CV-201. See <https://adfmmedialegalfiles.blob.core.windows.net/files/Tice-HarouffOrder.pdf> HRSA is represented by DOJ. (Why isn’t HRSA listed as an agency on this rule 0938-AU94?)

Repealing or rolling back exemptions will require coverage under Guidelines that themselves were illegally promulgated under the APA. This is not cured by using notice-and-comment for the exemptions rules, because HRSA skipped notice-and-comment for the Guidelines. Repealing exemptions to an illegal mandate creates even more liability for the agencies.