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Round 2 on the Legal Challenges to Contraceptive Coverage: Are Nonprofits "Substantially Burdened" by the "Accommodation"?

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The Affordable Care Act (ACA) requires most private health insurance plans to provide coverage for a broad range of preventive services including Food and Drug Administration (FDA) approved prescription contraceptives and services for women. Since the implementation of the ACA contraceptive coverage requirement in 2012, over 200 corporations have filed lawsuits claiming that including coverage for contraceptives or opting for an "accommodation" from the federal government violates their religious beliefs. The legal challenges have fallen into two groups: those filed by for-profit corporations and those filed by nonprofit organizations.

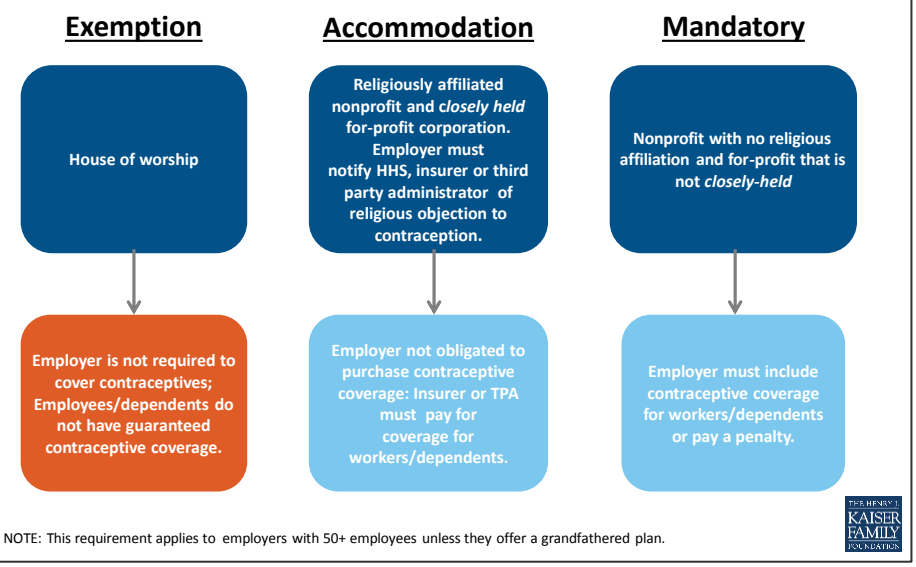
In the *Burwell v. Hobby Lobby* decision, the Supreme Court ruled that "closely held" for-profit corporations may be exempted from the requirement. This ruling, however, only settled part of the legal questions raised by the contraceptive coverage requirement, as there are there are other legal challenges brought by nonprofit corporations. The nonprofits are seeking an "exemption," meaning their workers would not have coverage for some or all contraceptives, rather than an "accommodation," which entitles their workers to full contraceptive coverage but releases the employer from paying for it. In 2014, the Supreme Court issued emergency orders for a religiously-affiliated nursing home, Little Sisters of the Poor[1], and a religious college, Wheaton College, that allowed these nonprofits to let the government know about its objection to the contraceptive coverage, rather than directly notifying their insurer while the litigation proceeded through the lower courts.

The lawsuits brought by nonprofits have worked their way through the federal courts. Seven federal appeals courts have ruled in favor of the Government upholding the accommodation, and one federal appeals court has ruled in favor of the nonprofits. On November 6, 2015, the Supreme Court agreed to hear seven cases that involve nonprofit corporations. These lawsuits have been filed by: David A. Zubik (the Bishop of the Roman Catholic Diocese of Pittsburgh), Priests for Life, Roman Catholic Archbishop, East Texas Baptist University, Little Sisters of the Poor, Southern Nazarene University, and Geneva College. These cases are explained in more detail below. This brief explains the legal issues raised by the nonprofit litigation and discusses the impact of the *Hobby Lobby* decision on the current litigation.

WHAT ARE THE RULES THAT EMPLOYERS WITH RELIGIOUS OBJECTIONS TO CONTRACEPTION MUST FOLLOW?

Figure 1

Employers Objecting to Contraceptive Coverage: Exemptions and Accommodations



NOTE: This requirement applies to employers with 50+ employees unless they offer a grandfathered plan.

As the contraceptive coverage rules have evolved through litigation and new regulations, there are three classes of employers with differing requirements. Houses of worship can choose to be exempt from the requirement if they have religious objections (**Figure 1**). Workers and dependents of exempt employers do not have coverage for either some or all FDA approved contraceptive methods. Religiously-affiliated nonprofits and closely held for-profit corporations can opt out of providing contraceptive coverage by electing an accommodation, but are not eligible for an exemption. Women workers and dependents that are covered by a plan sponsored by an employer electing an accommodation have contraceptive coverage, but their employer does not have to pay for it. The accommodation was originally developed to release nonprofit religiously-affiliated employers that oppose birth control from the requirement of paying for contraceptive coverage, and still assure that the employees and their dependents are able to obtain full coverage for contraceptives directly from the insurer as they are entitled to under the law. This is done by requiring the insurer to bear the costs of the employees' contraceptive coverage rather than the employer.

Closely held corporations with religious objections to contraceptive coverage were exempt as a result of the *Hobby Lobby* decision in June 2014, until the Administration issued new regulations in July 2015. The new regulations extend the accommodation available to religiously affiliated nonprofit employers to closely held[2] for profit corporations that have adopted a resolution establishing that the corporation objects to some or all contraceptive services on account of the owners' sincerely held religious beliefs.[3] Starting in the new plan year, Hobby Lobby and other closely held corporations with religious objections will be required to notify their insurer, third party administrator, or HHS so that the insurer or administrator can still provide the contraceptive coverage directly to the employees and their dependents. These regulations have the effect of restoring contraceptive coverage to workers employed by closely held corporations with religious objections.

Initially the accommodation was triggered by having the religiously-affiliated nonprofit complete an EBSA 700 form to self-certify that the organization is an eligible organization[4] and has a religious objection to providing coverage for some or all of any contraceptive services. The employer had to send the completed form to its insurer or third party administrator. The back of the form has a notice to third party administrators of self-insured plans outlining their legal responsibilities. In August 2014, the Administration issued interim final

regulations, that were finalized in July 2015, allowing religiously-affiliated nonprofit corporations that object to the contraceptive coverage an additional choice: either to notify their insurance company or notify the Department of Health and Human Services (HHS) about their objection. The regulations issued in July 2015 extend the same accommodation to closely held corporations with religious objections to contraceptive coverage. These final rules allow religiously affiliated nonprofits and closely held for profit corporations to elect an accommodation by notifying HHS their insurance carrier or their third party administrator. If the nonprofit or closely held corporation notifies HHS, they must include the contact information for their insurance company.

Many of the nonprofits that had raised initial objections still believe that the accommodation, even with ability to notify HHS, does not satisfy their concerns. These religiously-affiliated nonprofit organizations contend that when the insurer separately contracts with an employer's workers to cover contraception at no cost, it remains part of the employer's plan and is financed by the employer. They object to notifying HHS, insurance company or their third party administrator "to provide the morally objectionable coverage and allow their health plans to be used as a vehicle to bring about a morally objectionable wrong."[5] They feel that by providing notice they will "facilitate" or "trigger" the provision of insurance coverage for contraceptive services. The Government contends that it is federal law that requires the insurance issuer or the third party administrator to provide this coverage.

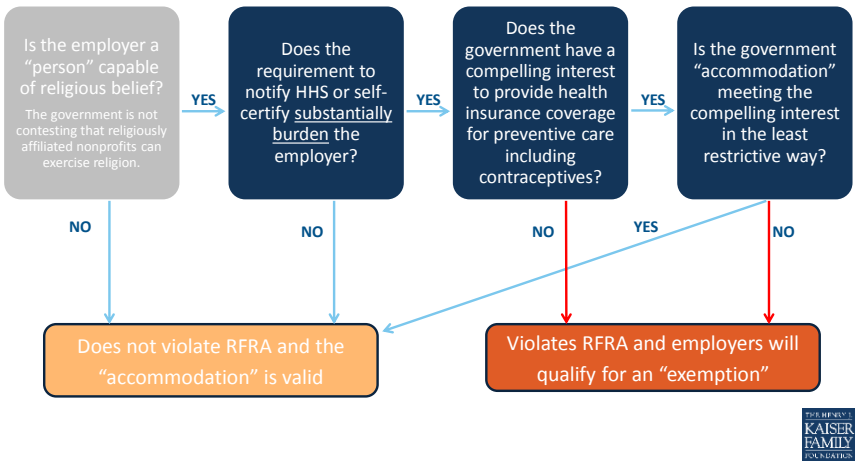
What is the basis for the challenges brought by the Religious nonprofits?

The nonprofit corporations continuing to pursue legal challenges are seeking an "exemption" from the rule, not an "accommodation." The nonprofit legal challenges involve a different question than the one raised by the for-profit challenges: Does the notice requirement to elect an "accommodation" to the contraceptive coverage requirement "substantially burden" the nonprofits' religious exercise? The employers challenging the contraceptive coverage requirement contend that they are unjustly burdened under the Religious Freedom Restoration Act (RFRA). RFRA was enacted in 1993 to protect "persons" from generally applicable laws that burden their free exercise of religion.

RFRA requires the government to show the law in question (in this case the requirement that employers notify HHS or their insurance company of their objection to including coverage for some or all contraceptive methods) furthers a "compelling interest" in the "least restrictive means" when it "substantially burdens a person's exercise of religion." The Court must consider a series of threshold questions in deciding whether the contraceptive coverage requirement is in violation of RFRA (**Figure 2**).

Figure 2

Legal Analysis of the Religious Freedom Restoration Act as It Applies to Religiously-Affiliated Nonprofits



In the *Burwell v. Hobby Lobby* case much of the attention was focused on the first question under the legal analysis: Can closely held for-profit corporations "exercise religion" under RFRA? In the nonprofit cases the focus is shifted to the second question under the RFRA analysis. The nonprofit corporations must demonstrate that the regulation, even with the accommodation, substantially burdens their exercise of religion. Just as in the cases brought by for-profit corporations, if the nonprofit corporation can show that it is substantially burdened, then the government will then need to prove that the contraceptive coverage requirement is a "compelling interest" that is met in the "least restrictive means."

In the Court's *Hobby Lobby* ruling, Justice Alito, wrote about the accommodation as a "less restrictive means," to provide contraceptive coverage. The Court, however, did not decide whether the accommodation is lawful: "We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."[6]

WHAT ARE THE PENDING CASES?

Since the Obama Administration issued the new regulations in August 2014, seven federal courts of appeals have issued decisions in nine cases denying stays to nonprofit employers, and one federal court of appeals issued stays to the nonprofits in two cases. (**Table 1**). On November 6, 2015 the Supreme Court granted review (at least in part) to seven cases.

In February 2015, the Third Circuit Court of Appeals issued a decision in the case brought by Geneva College and the Bishops of Pittsburgh (Zubik) and Eerie (Persico), and nonprofit Catholic Charities. The court ruled that the self-certification procedure is not burdensome to the nonprofits. The Bishops and Catholic Charities then filed an emergency petition with the Supreme Court asking for a stay. In May 2015, Zubik et al. filed a brief requesting that the Supreme Court review the case. On June 29, 2015, the Supreme Court denied the request for a stay, but allowed the plaintiffs to inform the government of their objection, and the government to facilitate contraceptive coverage for the workers and dependents, while the Court decided whether to take the case in the next term. Geneva College also petitioned the Supreme Court for review of their case. On November 6, 2015, the Supreme Court granted review to both Zubik and Geneva College.

In another case, in November 2014, a panel of the DC Court of Appeals issued a decision in the case brought by Priests for Life, Roman Catholic Archbishop and other Catholic nonprofit organizations. This court also found that the accommodation offered by the government does not substantially burden the plaintiffs' religious exercise, the regulations advance compelling government interests, and the regulations are the least restrictive means for advancing those interests. In December 2014, the plaintiffs petitioned for rehearing en banc, asking the full D.C. Circuit to rehear the case. On May 20, 2015, the court denied the request for the rehearing. Priests for Life and Roman Catholic Archbishop of Washington requested review by the Supreme Court, and on November 6, 2015, the Supreme Court granted review for both cases.

In addition, the Supreme Court has sent two cases, previously decided before the *Hobby Lobby* decision, back to the lower courts to be reconsidered in light of the *Hobby Lobby* ruling. In March 2015, the Supreme Court

granted the University of Notre Dame's request to order a reconsideration of its claim based on the decision in *Burwell v. Hobby Lobby*, requiring the 7th Circuit Court of Appeals to rehear of the case. On May 19, 2015 the 7th Circuit Court of Appeals issued a decision, similar to the decisions issued by the 3rd Circuit and the DC Circuit, denying Notre Dame's request for a stay. The Court again rejected Notre Dame's argument that the accommodation requires them to be "complicit" in obtaining contraceptive coverage for their students and employees. The court stated, "It is federal law rather than the religious organization's signing and mailing the form, that requires health-care insurers, along with third party administrators of self-insured health plans, to cover contraceptive services."[7] The 7th Circuit Court of Appeals has issued similar decisions for College of *Wheaton College v. Burwell*, and for *Grace Schools, et al., And Diocese Of Fort Wayne-South Bend, Inc., et al. v. Burwell*, holding that the accommodation is not a substantial burden on the nonprofits.

The Supreme Court has also ordered the 6th Circuit court of Appeals to reconsider its decision in *Michigan Catholic Charities v. Burwell* in light of *Hobby Lobby*. On August 21, 2015, the 6th Circuit Court of Appeals issued a decision, holding that the accommodation is not a substantial burden on the plaintiffs. Plaintiffs in the case include both religious employers eligible for the exemption and religiously affiliated nonprofits eligible for the accommodation. One exempt employer, Michigan Catholic Conference (MCC), sponsors a health plan that includes the religiously affiliated nonprofit plaintiffs that are not exempt. MCC's challenge is based on its desire to continue sponsoring a health plan (that does not include contraceptive coverage) for both exempt and non-exempt employers. In the same case, the nonprofit religiously affiliated organizations claim that the accommodation places a substantial burden on them. While the Court re-considered its decision in light of Hobby Lobby, the Court reached the same conclusion that the accommodation does not violate RFRA.

On June 22, 2015, the 5th Circuit Court of Appeals issued a decision for *East Texas Baptist University v. Burwell,* a consolidated case brought by religious nonprofits. Finding that the accommodation does not violate RFRA, the Court wrote, "Although the plaintiffs have identified several acts that offend their religious beliefs, the acts they are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise."[8] In July 2015, the plaintiffs appealed this case to the Supreme Court, and on November 6, 2015 the Supreme Court granted review

On July 14, 2015, the 10th Circuit Court of Appeals issued a decision denying the Little Sisters of the Poor, Southern Nazarene University and other religiously affiliated nonprofits' request for a stay. The Court found: "The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these de minimis administrative tasks do not substantially burden religious exercise for the purposes of RFRA."[9] In July 2015, the Little Sisters of the Poor and Southern Nazarene University appealed their cases to the Supreme Court, and on November 6, 2015 the Supreme Court granted review for both cases.

On August 7, 2015, the 2nd Circuit Court of Appeals issued a decision upholding the accommodation. In a case brought by two Catholic high schools, and two Catholic health care systems, the Court found: "Eligible

organizations are provided the opportunity to freely express their religious objection to such coverage as well as to extricate themselves from its provision. At the same time, insured individuals are not deprived of the benefits of contraceptive coverage."[10] The Court compared the accommodation to the notification required by religious objectors to the military draft.[11]

On September 17, 2015, the 8th Circuit Court of Appeals became the first federal court of appeals to rule that the accommodation violates RFRA. The Court ruled in two separate cases (*Sharpe Holdings Inc. et al. v. Burwell*, and *Dordt College et al. v. Burwell*) that the religiously affiliated nonprofits are substantially burdened by the accommodation to the contraceptive coverage requirement, and the accommodation is not the least restrictive means of furthering the government's interests.

Are there other types of nonprofits that are litigating?

On August 31, 2015, the DC District Court issued a decision in a case brought by March for Life, and two of its employees. March for Life was formed after the Roe v. Wade decision in 1973, and claims moral objections to many forms of contraceptives. As secular nonprofit, it is not eligible for the exemption or accommodation available to religious organizations. The employer's claim is that that the government has violated equal protection under the 5th Amendment by treating secular organizations with moral objections differently from religious organizations with religious objections. Two employees of March for Life are also challenging the contraceptive coverage requirement under RFRA claiming they have religious objections to contraceptives, and do not want contraceptive coverage included in their plan. U.S. District Court Judge Leon ruled issued a decision favorable to both March for Life and the two employees. The Administration is likely to appeal this decision to the DC Court of Appeals.

What's next?

Beginning in the new plan year, Hobby Lobby and other similar corporations will be required to notify their insurer or HHS of their objection to contraceptive coverage so that the insurer can still provide the contraceptive coverage directly to the employees and their dependents. Depending on the outcome of the consolidated case before the Supreme Court, some closely held corporations may challenge the accommodation as applied to them, contending that the accommodation still substantially burdens the corporation, in much the same way that the religiously-affiliated nonprofits have done.

In reviewing the consolidated case, *Zubik v. Burwell*, , the Supreme Court will have to decide whether the accommodation substantially burdens the religious exercise of both nonprofits, whether the government has a compelling interest, and whether there is a less restrictive way of achieving the same of goal of allowing women coverage for all FDA-approved contraceptive methods without cost-sharing. On a separate track, March for Life has challenged the contraceptive coverage requirement as a secular nonprofit under equal protection principles. This case represents a new legal approach and first time includes employees. The outcome of these cases will determine if the employees and dependents of these corporations will have access to no cost contraceptive coverage, as intended under the ACA.

Table 1: Selected Pending Nonprofit Cases as of November 6, 2015 (Shaded cases to be reviewed by Supreme Court this term)		
Lawsuit	Case History	Status
Zubik et al. v. Burwell	On February 11, 2015, a unanimous 3rd Circuit panel issued a decision that the accommodation does not impose a substantial burden on plaintiffs' religious exercise. The Third Circuit denied plaintiffs' petition for a rehearing en banc and request for a stay. Zubik et al. filed an emergency petition with the Supreme Court asking for a stay.	On April 15, 2015, Justice Alito issued a temporary stay allowing the plaintiffs to not comply with the accommodation while the Government submitted a response to the Court (submitted April 20, 2015). In May 2015, the plaintiffs filed a brief requesting that the Supreme Court review the case. On June 29, 2015, the Supreme Court denied the request for a stay, but allowed the plaintiffs to inform the government of their objection, and the government to facilitate contraceptive coverage for the workers and dependents, while the Court decided whether to take the case in the next term. On November 6, 2015 the Supreme Court granted review on the RFRA challenges but not the First Amendment challenge.
Geneva College v. Burwell	On February 11, 2015, a unanimous 3rd Circuit panel issued a decision that the accommodation does not impose a substantial burden on plaintiffs' religious exercise. The Third Circuit denied plaintiffs' petition for a rehearing en banc and request for a stay.	On May 18, 2015 the 3rd Circuit granted Geneva College (which did not join the emergency petition to the Supreme Court) a temporary stay pending a response and further orders by the Supreme Court in Persico and Zubik. In August 2015, Geneva College filed a brief requesting the Supreme Court to review the case. On November 6, 2015, the Supreme Court granted review.
Priests for Life v. HHS; *Roman Catholic Archbishop of Washington v. Burwell*	The DC Circuit Court of Appeals panel ruled that the accommodation does not impose a substantial burden on plaintiffs' religious exercise, the regulations advance compelling government interests, and the regulations are the least restrictive means. Plaintiffs petitioned for a re-hearing *en banc* asking the full D.C. Circuit to rehear the case.	On May 20, 2015 DC Circuit Court of Appeals denied the request for an en banc hearing. In June 2015, the Priests for Life and Roman Catholic Archbishop of Washington filed briefs asking the Supreme Court to review the case. The DC Circuit Court has stayed enforcement pending the Supreme Court's decision on whether to take the case. On November 6, 2015 the Supreme Court granted review for both cases.

East Texas Baptist University v. Burwell	The 5th Circuit Court of Appeals ruled that accommodation does not impose a substantial burden on plaintiff's religious exercise. RFRA does confer the right to challenge independent conduct of third parties.	The 5th Circuit Court of Appeals issued a decision on June 22, 2015. In July 2015, the plaintiffs appealed to the Supreme Court. On November 6, 2015 the Supreme Court granted review.
Southern Nazarene University et al. v. Burwell	U.S. District Court for the Western District of Oklahoma, granted plaintiffs' motion for a preliminary injunction and then stayed proceedings until March 1, 2014. The government appealed to the 10th Circuit.	The 10th Circuit issued a decision on July 14, 2015, denying Southern Nazarene University a stay. On July 24, 2015 the plaintiffs submitted a brief requesting the Supreme Court to review the case. On November 6, 2015 the Supreme Court granted review.
Little Sisters of the Poor v. Burwell	The Supreme Court granted plaintiffs' emergency application for an injunction pending appeal on the condition that they file notice with HHS that they are organizations that hold themselves out as religious and have religious objection to contraceptive coverage. Following the government's issuance of interim final rules amending the accommodation for nonprofit, the parties filed supplemental briefs addressing the impact of those rules on the case	The 10th Circuit issued a decision on July 14, 2015, denying Little Sister of the Poor a stay. On July 28, 2015, the plaintiffs submitted a brief requesting the Supreme Court to review the case. On November 6, 2015 the Supreme Court granted review, but will not consider the question about whether RFRA is violated by treated houses of worship differently than religiously affiliated nonprofits.
Wheaton College v. Burwell	Wheaton filed an emergency application for an injunction pending appeal with the Supreme Court. On July 3, 2014, the Supreme Court granted Wheaton's emergency application for an stay pending an appeal on the condition that it file notice with HHS that it is an organization that holds itself out as religious and has a religious objection to contraceptive coverage. On July 1, 2015, the 7th Circuit Court of Appeals ruled that the accommodation does not impose a substantial burden on plaintiff's religious exercise.	The 7th Circuit Court of Appeals issued a decision on July 1, 2015, denying the request for a stay.
Grace Schools, et al., And Diocese Of Fort Wayne-South Bend, Inc., et al. v. Burwell	On September 4, 2015, the 7th Circuit Court of Appeals issued a decision denying the plaintiffs request for a stay, holding the accommodation is not impose a substantial burden on the plaintiffs.	The 7th Circuit Court of Appeals issued a decision on September 4, 2015, denying the request for a stay.
University of Notre Dame v. Sebelius	The 7th Circuit Court of Appeals issued a decision on February 21, 2014, denying Notre Dame a preliminary injunction. Plaintiffs asked the Supreme Court to require the 7th Circuit Court of	The 7th Circuit Court of Appeals issued a decision on May 19, 2015, denying Notre Dame a preliminary injunction. On July 25, 2015, the 7th Circuit denied plaintiffs'

	Appeals reconsider the case in light of *Hobby Lobby*. The Supreme Court granted the request.	petition for rehearing en banc.
Michigan Catholic Conference v. Burwell/ Catholic Diocese of Nashville v. Burwell	On June 11, 2014 a unanimous 6th Circuit panel denied plaintiffs a preliminary injunction, holding that the accommodation did not impose a substantial burden. On December 18, 2014, Plaintiffs filed a petition asking the Supreme Court to consider the case. The Supreme Court sent the case back to the 6th Circuit to re-consider in light of *Hobby Lobby*.	On August 21, 2015, the 6th Circuit Court of Appeals issued its decision denying the plaintiffs request for a stay.
Catholic Health Care System et al. v. Burwell	The 2nd Circuit Court of Appeals ruled that the accommodation does not impose a substantial burden on plaintiff's religious exercise.	The 2nd Circuit Court of Appeals issued a decision on August 7, 2015, upholding the accommodation.
Sharpe Holdings, Inc. et al. v. Burwell	On December 20, 2013, the United States District Court for the Eastern District of Missouri issued a stay to the plaintiffs.	On Sept 17, 2015, the 8th Circuit Court of Appeals issued a decision upholding the stay for the nonprofits, and ruling that the accommodation is a substantial burden to the plaintiffs, and the government has less restrictive means.
Dordt College et al. v. Burwell	On May 21, 2014, the United States District Court for the Northern District of Iowa issued a stay to the plaintiffs.	On Sept 17, 2015, the 8th Circuit Court of Appeals issued a decision upholding the stay for the nonprofits, and ruling that the accommodation is a substantial burden to the plaintiffs, and the government has less restrictive means.

ENDNOTES

[1] The case of Little Sisters of the Poor raises a new twist in the legal framework surrounding the contraception coverage requirement under the ACA. Little Sisters, a religiously affiliated nonprofit employer eligible for an accommodation, has a self-funded church plan. A church plan is a special designation under federal law that is exempt from ERISA. In the litigation, the Government has stated that it has no authority to require a third party administrator for a self-funded church plan to comply with the federal regulations. Therefore, the workers and dependents of employers with self-funded church plans that object to the coverage will not receive coverage for some or all contraceptives unless the third party administrator voluntarily decides to offer the contraceptive coverage.

[2] The Administration defines closely held corporation as an entity that 1) is not a nonprofit, 2) has no publicly traded ownership interests, and 3) has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals. 45 CFR §147.131 (b)(4)

[3] 45 CFR §147.131 (b)(2)(ii)

[4] This "accommodation" was originally available to "eligible organizations" meeting the criteria: 1) opposes providing for some or all of any contraceptive coverage on account of religious objections; 2) has nonprofit status; 3) holds itself out as a religious organization; and 4) self-certifies that it meets the first three criteria. 26 CFR § 54.9815-2713A; 29 CFR § 2590-2713A; 45 CFR § 147.31

[5] Zubik et al. v. Burwell, Emergency Application to Recall and Stay Mandate or Issue Injunction Pending Resolution of Certiorari Petition, April 15, 2015, page 17

[6] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, at 2775-76 (2014)

[7] Seventh Circuit Court of Appeals decision issued May 19, 2015, *University of Notre Dame, Plaintiff-Appellant, v. Sylvia Mathews Burwell, Secretary of U.S. Department of Health & Human Services, et al., Defendants-Appellees, and Jane Doe 3*, pages 15-16.

[8] Fifth Circuit Court of Appeals decision issued June 22, 2015, *East Texas Baptist University v. Burwell*, pages 15- 16

[9] Tenth Circuit Court of Appeals decision issued July 14, 2015, *Little Sisters of Poor v. Burwell*, page 32.

[10] Second Circuit Court of Appeals decision issued August 7, 2015, Catholic Health Care System, et al. v, Burwell, page 27

[11] Ibid, Page 31