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## When accommodating becomes establishing

By Joshua Matz and Jonathan Patchen

The United States has a long, honorable tradition of religious accommodation. When our law burdens the free exercise of religion, the government often allows targeted exemptions out of respect for liberty of conscience. These policies and practices have allowed adherents of many faiths to participate more fully in American public life.

But there are important limits on such accommodations. Under the establishment clause of the U.S. Constitution, the government may not craft them in ways that have the purpose of promoting religion above all other interests, or that shift substantial hardship to third parties as the price of accommodating someone else's religious beliefs. As the Supreme Court famously explained in *Estate of Thornton v. Caldor*, "[t]he First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform to his own religious necessities."

Last year, the Trump administration ran roughshod over this principle in announcing sweeping religious exemptions from the Affordable Care Act's contraceptive coverage requirement. A new rule promulgated by the Department of Health and Human Services entitles any nonprofit or for-profit entity, whether closely held or publicly traded, to deny contraceptive coverage based on sincerely held religious beliefs. It also grants employers discretion in deciding whether to permit a workaround that would ensure covered employees still receive contraceptive coverage.

If this rule goes into effect, tens of thousands of women across the country will be deprived of contraceptive coverage to which they are otherwise statutorily entitled. Put differently, in the name of upholding their employers' religious freedom, these women will be effectively compelled to conform with — and pay for — their employers' religious practice (or else leave their jobs).

In January, federal district courts in Pennsylvania and California entered preliminary injunctions blocking the rule. Both courts held that the Trump administration had violated the Administrative Procedure Act. Those decisions are now on appeal; it is likely that those appeals will reach the Supreme Court. In the interim, proceedings continue apace in the district courts.

Although the parties have focused primarily on the APA, their briefs are shot through with constitutional analysis. Indeed, the plaintiffs expressly included an establishment clause claim in their challenge to the rule.

**Both *Caldor* and *Cutter* rested on the premise that the establishment clause applies to religious accommodations. It does so because an obvious way for the government to violate religious neutrality is by selectively lifting regulations in ways that burden third parties or disregard their interests.**

That is not surprising. While the Trump administration's unprecedented rule offends the APA, its violation of the establishment clause is equally clear. As we explained in an amicus brief that we recently filed in the Northern District of California on behalf of leading church-state scholars, that conclusion follows from Supreme Court precedent.

To start, the rule is undoubtedly subject to the establishment clause. This is confirmed by *Caldor*, which struck down a statute that granted every employee an absolute right to be free from work on his or her Sabbath — even when doing so would substantially burden their employer or their fellow employees. It also follows from *Cutter v. Wilkinson*, which upheld the scheme of religious exemptions created by the Religious Land Use and Institutionalized Persons Act. *Cutter* emphasized that that act is permissible only because it requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."

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dations. It does so because an obvious way for the government to violate religious neutrality is by selectively lifting regulations in ways that burden third parties or disregard their interests. Doing so may favor objectors at the expense of those who adhere to different religious beliefs or none at all. Giving priority to specific religious views over all contrary interests can thus function to *prefer* and *endorse* religion, rather than merely accommodate it.

That is precisely what the Trump administration has done. Its rule is invalid for two overlapping reasons.

First, the rule is absolute and un-

qualified. The burdens it imposes are treated as wholly irrelevant. There are no exceptions, no judicial or administrative processes for case-by-case balancing of competing interests, and no alternatives for reducing harm to affected employees. Instead, the rule is a categorical mandate: If an employer chooses to take advantage of the exemption, employees and their dependents automatically lose their right to contraceptive coverage. End of story.

In the language of precedent, the rule calls for an "unyielding weighting in favor of [religious] observers over all other interests" (*Caldor*), and lacks any provision or means to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" (*Cutter*). The rule thus works a forbidden establishment by assigning an unyielding priority to the religious interests of employers over every conceivable interest held by tens of thousands of burdened employees.

Second, and relatedly, the rule will predictably shift substantial harm to a discrete class of third parties: female employees will incur financial, medical, and dignitary harm to facilitate

their employers' exercise of religion. To obtain the coverage and care the Affordable Care Act provides all others, they will be forced to bear substantial costs out of pocket that they would not incur in the absence of the Trump administration's rule. If they cannot afford such separate coverage, they will be forced to bear myriad non-monetary costs — including the risk of unplanned pregnancy. Of course, these harms are not only individual: they will also perpetuate societal gender inequality.

The Framers opposed forcing non-adherents to pay a small tax in order to support others' religious beliefs. Yet the Trump administration's rule goes much further, forcing a nationwide subset of Americans to surrender their rights to preventive health care in order to benefit another subset of Americans religiously opposed to contraception. This is the regulatory equivalent of taxing one group to support another's faith. And it is just as indefensible.

In *Lee v. Weisman*, the Supreme Court warned that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." That lesson remains vital today. The Trump administration's rule undermines rather than promotes religious freedom. It is therefore unconstitutional.

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