

FREEDOM FROM RELIGION *foundation*

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SENT VIA U.S. MAIL AND EMAIL to: Ted.Nickel@wi.gov

Commissioner Theodore Nickel
Office of the Commissioner of Insurance
125 South Webster Street
Madison, WI 53703-3474

Re: Failure to enforce Wisconsin law requiring contraception coverage

Dear Mr. Nickel:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding reports that this office will no longer enforce Wisconsin laws requiring contraception coverage in health plans. FFRF is a national nonprofit organization with 21,000 members, including more than 1,300 in Wisconsin. We protect the constitutional separation between state and church and represent the views of American freethinkers.

According to news reports, your office has halted “enforcement of a state contraceptive mandate in cases of employers with religious objections.”¹ The reports continue:

A spokesman for the state Office of the Commissioner of Insurance said that state officials had no choice in light of the 5-4 ruling by the nation's highest court last month in the Hobby Lobby Stores case. ... As a result, the insurance commissioner's office will no longer enforce in such cases a state law requiring insurers to cover contraception as part of their overall health plans. “It's as you would expect,” agency spokesman J.P. Wieske said. “We are federally pre-empted. We don't have any decision-making.”

The alleged reason for violating Wisconsin women's rights is absurd. The *Hobby Lobby* decision was based on an overturned federal law. It has no bearing on Wisconsin law. As you know Wisconsin law, specifically Wis. Stat. Ann. § 609.805 and §632.895(17), requires insurers to provide contraceptives and services, not federal law.

Even the most cursory reading of *Burwell v. Hobby Lobby Stores, Inc.*, reveals that the decision hinges on the Religious Freedom Restoration Act (RFRA). 42 U.S.C.A. § 2000bb et seq. The Court mentions RFRA nearly 200 times. RFRA does not apply to state law and state action. “This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” 42 U.S.C.A. § 2000bb-3(a). Even if RFRA did apply to state laws executing provisions of the ACA, which it does not,

¹ Jason Stein, “Wisconsin makes exception for enforcement of contraceptive mandate,” *Milwaukee Journal Sentinel* (July 21, 2014) available at <http://www.jsonline.com/news/statepolitics/wisconsin-makes-exception-for-enforcement-of-contraceptive-mandate-b99315515z1-268019571.html>

the Wisconsin legislature mandated contraceptive coverage in June of 2009, *before* the Affordable Care Act. *See* 2009 Wisc. Act 28. The mandate cannot implement a law it predates.

RFRA was struck down by the Supreme Court in 1997 in another case, *City of Boerne v. Flores*. 521 U.S. 507 (1997). The Court held that **RFRA, as it applied to the states, violates the Constitution.** *Id.* Specifically, Justice Kennedy wrote, “[RFRA] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” *Id.* at 534.

Governor Walker agrees with this view of states' rights and limited federal power:

...for years people like me and others have complained the federal government is encroaching on state's rights — health care is a good example. If not spelled out in the Constitution in the 10th Amendment, then it's the state's rights. To me it's hard to justify arguing that the federal government takes on too many of the state's rights²

In fact, Walker views health insurance programs “instinctively as a states' rights issue.”³

It is curious, some might even say hypocritical, to claim that there is a federal preemption issue with Wisconsin's contraception mandate. Gutting mandatory contraceptive coverage is not required by the *Hobby Lobby* decision, as any staunch states' rights defender must know.

Failure to enforce this mandate has nothing to do with religious freedom and everything to do with imposing conservative religious beliefs on women. The Wisconsin Attorney General's Office has noted that not providing contraception coverage violates Wisconsin law, even amounting to sex discrimination. *See* Atty. Gen. Op. 1-04 (August 16, 2004).

In short, there is absolutely no reason for the Office of the Commissioner of Insurance to fail to enforce Wisconsin law regarding contraception coverage. We request that your office immediately rescind this misguided decision.

Sincerely,



Andrew L. Seidel
Attorney
Freedom From Religion Foundation

² Lisa Seiser, “A few minutes with gubernatorial candidate Scott Walker,” *Lake Geneva News* (May, 13, 2010) available at http://www.lakegenevanews.net/Articles-i-2010-05-13-242833.114135_A_few_minutes_with_gubernatorial_candidate_Scott_Walker.html

³ Sharif Durhams, Jason Stein, Guy Boulton, “Walker won't create health care exchange, defers to feds,” *Milwaukee Journal Sentinel*, (Nov. 6, 2012) available at <http://www.jsonline.com/news/statepolitics/walker-wont-create-health-care-exchange-defers-to-feds-3d7m2et-179663491.html>