

2013

## Bearing the Burden of Contraception: Why For-Profit Businesses Must Comply with the "Contraceptive Mandate"

Rochelle Swartz

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### Recommended Citation

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## **Bearing the Burden of Contraception: Why For-Profit Businesses Must Comply with the "Contraceptive Mandate"**

### **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, 2014; B.A., University of California San Diego, 2010. I would like to thank Professor David Schmudde for his helpful ideas and advice in writing this Note. I would also like to thank my friends for their encouragement and my family for their endless patience, support, and proofreading, most especially, my Uncle Ron.



# FORDHAM

JOURNAL OF  
CORPORATE & FINANCIAL LAW

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BEARING THE BURDEN OF CONTRACEPTION: WHY FOR-  
PROFIT BUSINESSES MUST COMPLY WITH THE  
“CONTRACEPTIVE MANDATE”

*Rochelle Swartz*

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## INTRODUCTION

In 1968, Yeshiva University owned a commercial building located at 55 Fifth Avenue in New York City.<sup>1</sup> When a long-term tenant of that building, American Book Company, decided to move its business to a larger site, the company sought to sublet its rented space.<sup>2</sup> Within a few months of its decision to relocate, American Book Company found a willing sublessor, Planned Parenthood.<sup>3</sup> So American Book Company contacted the managing agent of the building, Yeshiva University, requesting its consent for the sublease.<sup>4</sup> In November 1968, the University denied consent because it held religious objections to the activities of Planned Parenthood.<sup>5</sup> Soon after, American Book Company filed suit in the New York State Supreme Court.<sup>6</sup>

Claiming that irreparable harm would result if it could not complete its sublease agreement, American Book Company sought an injunction.<sup>7</sup> The company argued that the grounds upon which Yeshiva University was withholding approval were indisputably unreasonable, and therefore, the court ought to compel the University to give consent.<sup>8</sup> In a decision that has since become a staple of many Property Law courses, the court agreed with American Book Company.<sup>9</sup> The judge reasoned, “when a religious or religiously affiliated . . . institution operates a commercial enterprise or owns commercial property, it is to be held to the established standards of commercial responsibility, its acts and conduct being vested with no greater and no lesser sanctity than those of any other owner.”<sup>10</sup> Therefore, the doctrinal differences between Yeshiva University and Planned Parenthood were simply irrelevant.<sup>11</sup> It did not matter that Yeshiva University held an objection to the activities of Planned Parenthood because the “argument that there is a

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1. Am. Book Co. v. Yeshiva Univ. Dev. Found., 297 N.Y.S.2d 156, 158 (Sup. Ct. 1969).

2. *Id.* at 158.

3. *Id.*

4. *Id.*

5. *Id.* at 158, 160.

6. *Id.* at 157.

7. *Id.* at 158.

8. *Id.*

9. *Id.* at 163.

10. *Id.* at 162.

11. *Id.*

fundamental conflict in the outlook of these two groups with respect to the need and practice of birth control is a matter of theological disputation in which courts should not be immersed.”<sup>12</sup>

The principle expressed in this decision is clear. Yeshiva University, as a Jewish organization, set out to operate a commercial enterprise.<sup>13</sup> It leased space, in a commercial building, to a commercial tenant.<sup>14</sup> In so doing, the University subjected itself to the laws that govern all similar commercial relationships.<sup>15</sup> As landlord, it could not withhold consent for a sublease for any subjective reason,<sup>16</sup> and its objections to Planned Parenthood were completely and wholly subjective.<sup>17</sup> American Book Company prevailed, and Planned Parenthood was allowed to sublet the space.<sup>18</sup>

The principle that once a religious organization enters the realm of commercial activity it is bound by the laws and customs that govern that activity has again come to the forefront of the legal field. After the passage of the Patient Protection and Affordable Care Act (“ACA”),<sup>19</sup> a number of regulations were promulgated to give the Act effect.<sup>20</sup> One such regulation, which deals with women’s preventive healthcare,<sup>21</sup> has since become the source of great conflict. Taken together with other

12. *Id.* at 162.

13. *Id.*

14. The court noted that there is a distinction between this situation and one in which a religious institution uses the property for religious purposes. “Differences of creed may be taken into account when the property is owned by a religious institution and is used ‘for religious purposes.’ With this exception, there can be no quarrel.” *Id.*

15. *Id.*

16. The court asserted this point based upon a clause in the lease stating that “landlord’s consent was not to be ‘unreasonably withheld[,]’” as well as the court’s assessment that “the purported reasons for refusal of consent by a landlord fall into two broad categories—objective and subjective,” and “there is nothing inherent in the identity of [Planned Parenthood] which would render it manifestly objectionable by any . . . objective standards.” *Id.* at 159–60.

17. *Id.* at 160–61 (“The objection arises, therefore, because of who the landlord is. Can the reasonableness of refusing consent vary with the identity and activities of the landlord? If so, we are relegated . . . to wholly subjective criteria which render effective judicial review difficult, if not impossible.”).

18. *Id.* at 163.

19. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

20. See 42 U.S.C. § 300gg-13(a)(2), (3) (2012) (demonstrating that regulations are needed to define the specifics of what constitutes acceptable coverage).

21. Coverage of Preventative Health Services, 45 C.F.R. § 147.130 (2012).

portions of the ACA, the regulation provides that in the near future,<sup>22</sup> all “large employers”<sup>23</sup> will be required to provide their employees with a healthcare plan that conforms to requirements set out by the ACA,<sup>24</sup> which includes women’s preventive care, as defined by the Health Resources and Services Administration (“HRSA”).<sup>25</sup> Among other categories of women’s preventive care that must be covered,<sup>26</sup> employers will have to provide coverage for contraceptives.<sup>27</sup>

For many devout individuals, this mandate, which contains only a narrow range of exempted religious employers,<sup>28</sup> presents a serious dilemma. On one hand, the ACA imposes crippling fines for any employers who fail to comply with the Act.<sup>29</sup> On the other hand, the principles of certain religions unequivocally state that using contraceptives is a sin.<sup>30</sup> Therefore, abiding by this law would be tantamount to forfeiting observance of certain individuals’ religious ideology.<sup>31</sup>

Many employers have filed lawsuits. Organizations ranging from religiously affiliated educational institutions and hospitals, to Catholic

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22. The precise date on which the regulation will affect different categories of employers is somewhat unclear, because there have been a number of extensions and grandfathering regulations passed in order to “gradually implemen[t]” the ACA requirements. For a brief explanation of these “grandfathering rule[s],” see *Legatus v. Sebelius*, 901 F. Supp. 2d 980, at 993–94 (E.D. Mich. 2012).

23. A “large employer” is one that “with respect to a calendar year . . . employed an average of at least 50 full-time employees on business days during the preceding calendar year.” 26 U.S.C. § 4980H(c)(2)(A) (2012).

24. *Id.* § 4980H(a).

25. 42 U.S.C. § 300gg-13(a)(4).

26. See INST. OF MED., COMM. ON PREVENTIVE SERVS. FOR WOMEN, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 80 (2011) [hereinafter IOM REPORT] (recommending that screening for gestational diabetes, osteoporosis, depression, breast cancer, counseling for misuse of alcohol, and several other categories of preventive care be covered by the mandate).

27. 29 C.F.R. pt. 2590 (2013).

28. See 45 C.F.R. § 147.30(a)(1)(iv) (2012).

29. See 26 U.S.C. § 4980H(a).

30. See Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, <http://www.nytimes.com/2013/01/27/health/religious-groups-and-employers-battle-contraception-mandate.html>.

31. See *Becket Fund’s HHS Mandate Challenge*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhs/> (last visited Dec. 29, 2012) (explaining the predicament presented by the contraceptive mandate as applied to Catholic and Christian organizations).

dioceses, to general business corporations have commenced lawsuits challenging the applicability of this mandate to their organizations.<sup>32</sup> Despite the wide range of employers represented in these suits, most of the complaints have taken a similar form.<sup>33</sup> In essence, these entities have asserted that by imposing a contraceptive mandate, the Federal government is infringing on the religious freedom of the individuals that comprise the organizations.<sup>34</sup> Under both the Religious Freedom Restoration Act (“RFRA”) and the First Amendment, employers have argued, the mandate places an impermissible burden on their religious freedom as American citizens.<sup>35</sup> Therefore, the mandate ought to be struck down, and these organizations needn’t comply with its directives.<sup>36</sup>

Part I of this Note explains the boundaries of the ACA and the contraceptive mandate, as well as the legal standards and legislative history of RFRA and the First Amendment. It introduces five federal district court decisions that have already addressed the contraception predicament as applied to for-profit corporations and outlines the claims raised by these secular companies.<sup>37</sup> In light of the increasing amount of litigation over this particular regulation,<sup>38</sup> these five decisions are treated as the originators of the circuit court split that is developing in the United States.<sup>39</sup> Part II delves into the particularities of the conflict that

32. *See* *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).. *See generally* *Belmont Abbey College v. Sebelius*, 878 F. Supp. 2d 25(D.D.C. 2012); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012).

33. *See supra* note 31.

34. *See id.*

35. *Id.*

36. *Id.*

37. *See Newland*, 881 F. Supp. 2d 1287, *O’Brien*, 894 F. Supp. 2d 1149, *Legatus* 2012 WL 5359630, *Tyndale House Publishers*, 2012 WL 5817323, *Hobby Lobby Stores*, 870 F. Supp. 2d 1278.

38. “The obligation to pay for contraceptive coverage is the current hot topic in federal litigation.” *Grote v. Sebelius*, 708 F.3d 850, 866 (7th Cir. 2013) (Rovner, J., dissenting) (*citing* *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240, at \*1 n.1 (C.D. Ill. Jan. 4, 2013)).

39. At the time of publication of this Note, three circuit courts have considered appeals from the cases discussed herein and other similar cases. The Eighth Circuit, in an appeal arising from the *O’Brien* case discussed in this Note, granted an injunction pending appeal without any discussion. *See O’Brien v. U.S. Dep’t of Health & Human*



has developed between these district courts. Part III of this Note explores whether these companies ought to be granted relief against the contraceptive mandate and argues that neither RFRA nor the First Amendment can counteract the application of the ACA's contraceptive mandate to these corporations.

### I. THE ORIGINS OF RFRA AND THE CONTRACEPTIVE MANDATE

On March 23, 2010, President Obama signed the ACA into law.<sup>40</sup> Proponents of the ACA have argued that the purpose of the ACA is to provide universal healthcare to all Americans while lowering the costs of healthcare nationally.<sup>41</sup> To accomplish these ends, the ACA includes a universal mandate provision,<sup>42</sup> as well as a number of implementing regulations.<sup>43</sup> The universal mandate, which was upheld as constitutional by the United States Supreme Court in *National Federation of Businesses v. Sebelius*,<sup>44</sup> states that with limited exceptions, all individuals must obtain “minimum essential” medical insurance coverage or be subject to a monetary penalty.<sup>45</sup> The provisions of the ACA, however, do not list the particulars of what constitutes minimum essential coverage.<sup>46</sup> Consequently, regulators

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Servs., No. 12–3357 (8th Cir. filed Nov. 28, 2012) (order granting motion for stay pending appeal). The Tenth Circuit, considering a similar appeal from the *Hobby Lobby* decision, denied the injunction. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012). And the Seventh Circuit, in examining two more recent district court cases surrounding secular for-profit corporations, granted injunctions pending appeal to K & L Contractors and Grote Industries, albeit with a divided panel of circuit judges. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec 28, 2012); *Grote*, 708 F.3d 850.

40. Douglas A. Bass, Annotation, *Validity of the Minimum Essential Medical Insurance Coverage, or “Individual Mandate,” Provision of § 1501 of the Patient Protection and Affordable Care Act of 2010*, 60 A.L.R. FED. 2D 1 (2011).

41. *Id.*

42. *Id.*

43. *See generally* 45 C.F.R. § 147.130 (2011).

44. 132 S.Ct. 2566 (2012).

45. Bass, *supra* note 40.

46. 26 U.S.C. § 4980H(a) (2012) (demonstrating that at the time of publication of this Note, minimum essential coverage was not defined).

have filled in the blanks of which expenses must be covered by an acceptable healthcare plan by implementing regulations.<sup>47</sup>

One such set of regulatory fill-ins has tackled the question of what, exactly, constitutes “minimum essential” coverage for women. Under Section 300gg-13(a)(4) of the ACA, any acceptable healthcare plan must provide coverage for women’s preventive care and screenings.<sup>48</sup> The statute states that, at a minimum, healthcare plans must cover all women’s care listed in “comprehensive guidelines” from the HRSA.<sup>49</sup> To assemble these guidelines, the HRSA<sup>50</sup> commissioned the Institute of Medicine (“IOM”) to conduct a study to determine which preventive care services are necessary to women’s health.<sup>51</sup> In a report titled “Clinical Preventive Services for Women: Closing the Gaps,” the IOM recommended that the HRSA mandate coverage of several types of preventive care.<sup>52</sup> As one of many categories of women’s care,<sup>53</sup> the IOM recommended that the HRSA require coverage of “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”<sup>54</sup> That recommendation, which was adopted by the HRSA,<sup>55</sup> is the subject of the conflict in this Note.

Under the ACA, employers with more than fifty employees will be required to provide “minimum essential” health insurance plans for their employees.<sup>56</sup> The consequence for not doing so is a penalty payment “equal to the product of the applicable payment amount and the number

47. See 42 U.S.C. § 300gg-13(a)(2) (2012) (stating that group health plans must cover “immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved”); § 300gg-13(a)(3) (stating that group health plans must cover “with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration”).

48. 42 U.S.C. § 300gg-13.

49. *Id.*

50. The HRSA is an agency within the U.S. Department of Health and Human Services (HHS). *HRSA Home*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hrsa.gov/index.html>.

51. IOM REPORT, *supra* note 26, at 1 (2011); see also *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d. 1149 (E.D. Mo. 2012).

52. See IOM REPORT, *supra* note 26, at 8–12.

53. *Id.*

54. *Id.* at 10.

55. See 29 C.F.R. pt. 2590 (2013).

56. 26 U.S.C. §§ 4980H(a), (c)(2) (2012).

of individuals employed by the employer as full time employees”.<sup>57</sup> Thus, any company that meets the definition of an “applicable large employer” under Section 4980H of the ACA<sup>58</sup> will be required to provide coverage for women’s preventive services, including all FDA-approved oral contraceptives, intrauterine devices, sterilization surgeries, and other methods of birth control.<sup>59</sup> If it fails to comply with these regulations, it will face significant fines.<sup>60</sup>

The only “large employers” that will not have to comply with this requirement are those that qualify as a “religious employer” under the implementing regulation, Section 147.130.<sup>61</sup> Under Section 147.30, there are four qualities that an employer must possess to meet the definition of a “religious employer.”<sup>62</sup> The employer’s purpose must be to promote “the inculcation of religious values[;]” it must “primarily employ[] persons who share the religious tenets of the organization,” “serve[] primarily persons who share the religious tenets of the organization,” and be a nonprofit organization “as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code[.]”<sup>63</sup> Otherwise, the organization must abide by this “contraceptive mandate,” as the regulation has come to be referred to.<sup>64</sup>

This has led to a predicament for many employers. Because the definition of “religious employer” is so narrow, there are a number of organizations that consider themselves religiously affiliated, but are unable to meet the stringent requirements of the exemption.<sup>65</sup> Some of these organizations are educational institutions such as Wheaten College and Belmont Abbey College.<sup>66</sup> Others are hospitals or dioceses, such as

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57. § 4980H(a).

58. § 4980H(c)(2)(A) defines a “large employer” as “with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.”

59. OFFICE OF WOMEN’S HEALTH, U.S. FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE (2012).

60. *See supra* note 58 and accompanying text.

61. 45 C.F.R. § 147.130(a)(1)(iv)(A)–(B) (2012).

62. *Id.*

63. *Id.*

64. *Id.*

65. *See Becket Fund’s HHS Mandate Challenge*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhs/> (last visited Dec. 29, 2012).

66. *Id.*

the Roman Catholic Archdiocese of New York.<sup>67</sup> Still others are for-profit, privately held corporations engaged in secular business activities.<sup>68</sup> What all of these entities have in common, however, is a religious objection to contraceptives.<sup>69</sup> These organizations have contended that to abide by the ACA would be to violate central tenets of their religious beliefs.<sup>70</sup> Some who believe that use of contraceptives is morally wrong have argued that “it would be sinful and immoral . . . to intentionally participate in, pay for, facilitate, or otherwise support . . . contraception, or sterilization, through health insurance coverage [provided by their organization.]”<sup>71</sup> Several religiously affiliated organizations have filed lawsuits seeking injunctions against the federal government.<sup>72</sup>

Of particular relevance to this Note, however, are the for-profit corporations<sup>73</sup> engaged in secular business practices that have sought relief.<sup>74</sup> These companies have made two arguments. First, they have argued that the contraceptive mandate of the ACA constitutes a violation of their rights under the Religious Freedom Restoration Act of 1993 (hereinafter “RFRA”).<sup>75</sup> Second, they have argued that the mandate

67. *See* Roman Catholic Archdiocese of N.Y. v. Sebelius, No. 12 Civ. 2542, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012).

68. *See* Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012); O’Brien v. U.S. Dep’t of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

69. *See Becket Fund’s HHS Mandate Challenge*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhs/> (last visited Dec. 29, 2012).

70. *See supra* note 30.

71. Verified Complaint, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123), 2012 WL 1536098 at \*2.

72. *See* Bronner, *supra* note 30.

73. The term “corporations” is used broadly in this context, as both corporations and LLC’s have filed suits. Since the legal and tax-related distinctions between the entities do not change the analysis offered in this Note, the term corporations will be used to represent both types of entities.

74. Such as the Newland family’s corporation, Hercules Industries Inc., which is engaged in the “manufacture and distribution of heating, ventilation, and air conditioning (‘HVAC’) products and equipment.” *Newland*, 881 F. Supp. 2d at 1292; *see also* O’Brien v. U.S. Dep’t of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012).

75. *See Newland*, 881 F. Supp. 2d 1287; *O’Brien*, 894 F. Supp. 2d 1149, *Legatus*, 901 F. Supp. 2d 980; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106

violates their First Amendment right to religious freedom.<sup>76</sup> To date, more than five federal district courts have heard these claims.<sup>77</sup>

In one case in Colorado, a district court judge granted an injunction sought by the Newland family, who own Hercules Industries, Inc., based on the “sincerely held religious beliefs” of the Newland family and because the government’s exemption for religious employers undermined any compelling interest the government could have claimed in applying the mandate to the plaintiffs.<sup>78</sup> In another case brought by the O’Brien Industrial Holdings Company and its owners, a judge in the Eastern District of Missouri reached the opposite conclusion, and dismissed the case.<sup>79</sup> That court held that because there was no substantial burden imposed on the religious exercise of either the corporation or its owners, the plaintiffs failed to state a claim under RFRA.<sup>80</sup>

In *Legatus v. Sebelius*, owners of the Weingartz Supply Company secured a preliminary injunction from a judge in the Eastern District of Michigan, although the court noted that the government’s stated interests may be persuasive, and neither the plaintiffs nor the government showed “a strong likelihood of success on the merits.”<sup>81</sup> Tyndale House Publishers, before a district court in the District of Columbia, also secured a preliminary injunction, but in its decision, the court skirted the issue of whether a for-profit corporation could assert the right to exercise religion under RFRA and the First Amendment.<sup>82</sup> Instead, the judge found that the corporation had standing in the case to assert the free exercise rights of its owners, and the plaintiffs faced

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(D.D.C. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

76. Plaintiffs in some of these cases have also asserted a claim under the Administrative Procedure Act, but the courts that have examined such claims have generally agreed that a federal district court lacks jurisdiction over them. *See O’Brien*, 894 F. Supp. 2d at 1154.

77. *See* sources cited *supra* note 75. At the time of publication of this Note, several similar cases are pending in district courts across the nation. Since the cases discussed herein offer a wide variety of perspectives on this conflict, they will be addressed as the originators of the conflict.

78. *Newland*, 881 F. Supp. 2d at 1292.

79. *O’Brien*, 894 F. Supp. 2d 1154.

80. *Id.* at 1169.

81. *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 997 (E.D. Mich. 2012).

82. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012).

“unmistakable” pressure to violate their religious beliefs by covering contraceptives.<sup>83</sup>

Finally, in *Hobby Lobby Stores, Inc. v. Sebelius*, an Oklahoma district court judge stated in no uncertain terms that though the predicament presented by the case was “‘serious, substantial, difficult, and doubtful,’” for-profit corporations lack constitutional free exercise rights, and they are clearly not “person[s]” within the meaning of RFRA.<sup>84</sup> Furthermore, the court found that while the meaning of the term “substantial burden” in the context of a corporate RFRA claim is “considerably less than crystal clear,” the phrase suggests that the burden imposed must be more “direct” and “personal” than it is in the case of the corporation’s owners and their management of large general business corporations.<sup>85</sup>

Thus, what has effectively determined the outcomes in each of these cases is the disposition of the RFRA claims. RFRA, which was adopted by Congress in 1993, was enacted to restore the compelling interest test of religious freedom under the Free Exercise Clause of the First Amendment, as set out by the Supreme Court in *Sherbert v. Verner*<sup>86</sup> and *Wisconsin v. Yoder*.<sup>87</sup> In *Employment Division v. Smith*,<sup>88</sup> the Supreme Court essentially abolished the requirement that government justify burdens on religious exercise that are imposed by laws neutral toward religion.<sup>89</sup> Whereas under *Sherbert* and *Yoder* the Court required the government to establish it held a compelling interest in a law that was neutral toward religion, in *Smith*, the Court abandoned that requirement.<sup>90</sup> The *Smith* Court held that laws that were not “aimed at the promotion or restriction of religious beliefs” were not subject to the compelling interest test, and were instead subject to rational basis review.<sup>91</sup> In deciding *Smith*, the court effectively eviscerated the

83. *Id.*

84. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1286–88 (W.D. Okla. 2012).

85. *Id.* at 1296.

86. 374 U.S. 398 (1963).

87. 406 U.S. 205 (1972); see Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996); see also *City of Boerne v. Flores*, 521 U.S. 507, 507 (1996).

88. 494 U.S. 872 (1990).

89. See Topliff, *supra* note 87.

90. *Id.*

91. *Smith*, 494 U.S. at 879.

framework under which First Amendment cases had been examined for nearly three decades.<sup>92</sup>

Congress, responding to the “widespread disbelief and outrage” that followed *Smith*, passed RFRA to restore the higher test of scrutiny.<sup>93</sup> RFRA reinstated the compelling interest standard and provided a claim to persons whose religious exercise is substantially burdened by a law or regulation.<sup>94</sup> Although the application of RFRA to state and local governments was found to be an unconstitutional assertion of Congressional power over state sovereignty in *City of Boerne v. P.F. Flores*,<sup>95</sup> the Act remains constitutional as applied to the federal government.<sup>96</sup> Therefore, the standards set out by RFRA’s provisions have dictated the disposition of these contraception cases.<sup>97</sup>

To state a successful claim under RFRA, a plaintiff must meet a number of requirements. The Act provides that “[g]overnment shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability . . . [unless it] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>98</sup> Consequently, in the aforementioned challenges to the ACA, the following standards apply. First, the corporation that has brought suit must establish that it is a “person” under the Act, such that RFRA’s provisions do in fact protect the religious freedom of the corporation.<sup>99</sup> Second, the corporation must establish that the regulation being challenged imposes a “substantial burden” on its “exercise of religion.”<sup>100</sup> Then, if the corporation is able to establish that “substantial

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92. Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 *ECOLOGY L.Q.* 259, 262 (2009).

93. Sara Lunsford Kohen, *Religious Freedom In Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 *CARDOZO PUB. L. POL’Y & ETHICS J.* 43, 48 (2011).

94. *Id.*

95. 521 U.S. 507 (1997).

96. *See* Topliff, *supra* note 87.

97. Given that the Supreme Court has lowered the standard of review for similar claims filed under the First Amendment, *see* *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), RFRA currently represents the most stringent test that the federal government must pass in order to justify the application of the contraceptive mandate to these entities.

98. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a)–(b) (2012).

99. *Id.*

100. *Id.*

burden” element, the burden of proof shifts to the government.<sup>101</sup> To save the mandate, the government must demonstrate that the regulation serves a “compelling government interest,” and that it is the “least restrictive means” of furthering that interest.<sup>102</sup>

Courts and legal scholars have offered numerous interpretations for each of these standards. For example, on the question of whether a corporation may be considered a “person” under RFRA, the Supreme Court’s decision in *Citizens United*<sup>103</sup> may or may not be dispositive. In that case, the Court held that the government could not suppress political speech on the basis of the speaker’s corporate identity, which effectively awarded First Amendment protection to corporate “supercitizens.”<sup>104</sup> Yet in light of 1 U.S.C. § 1, which states that “[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . the words ‘person’ and ‘whoever’ include corporations,”<sup>105</sup> it is possible to argue that the context of RFRA cannot possibly include religious freedom for for-profit businesses, because secular corporations do not “exercise” religion.<sup>106</sup> Consequently, whether a for-profit corporation can hold enough ‘personhood’ to claim RFRA protection is unclear.

Similarly, what constitutes a “substantial burden” under RFRA is a hotly contested question because the demonstration of a “substantial burden” is often dispositive in a RFRA case.<sup>107</sup> The term itself is facially broad, and might be interpreted to encompass any government action that creates any obstacle to any exercise of religion,<sup>108</sup> however, Supreme Court jurisprudence may suggest a narrower reading, under which a plaintiff must demonstrate more than just a remote impediment to the practice of his or her religion<sup>109</sup> and concepts such as “directness”

101. *Id.*

102. *Id.*

103. *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

104. Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life Into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 508, 510 (2012).

105. 1 U.S.C. § 1 (2012) (emphasis added).

106. *See* *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) (citing 1 U.S.C. § 1).

107. 42 U.S.C. § 2000bb-1 (2012).

108. *See generally* Zackeree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA’s Definition of “Substantial Burden” in the Ninth Circuit – The Vestiges of Lying v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al.*, 55 S.D. L. REV. 426 (2010).

109. *See* *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).



may be highly relevant.<sup>110</sup> Since the legislative history is unclear as to what constitutes a “substantial burden” there is no clear consensus as to the appropriate standard.<sup>111</sup>

As a result, how each judge has interpreted the ambiguous standards of RFRA has effectively determined whether the corporations are successful in gaining injunctive relief.<sup>112</sup> Perhaps because of this, the plaintiff corporations have also raised First Amendment objections to the legality of the ACA’s contraceptive requirement.<sup>113</sup> They have argued that requiring their businesses’ healthcare plans to cover contraceptives for female employees constitutes a violation of the Free Exercise Clause of the First Amendment.<sup>114</sup> Given the Supreme Court’s decision in *Smith*, as discussed above, this means that the primary question in assessing these claims is whether the contraceptive mandate has “general applicability” and is effectively “neutral” toward religion.<sup>115</sup> If the answer is affirmative, then the law need only be rationally related to a legitimate government interest in order to be upheld.<sup>116</sup> If the answer is negative, and the contraceptive mandate is found to be non-neutral or not generally applicable, then strict scrutiny applies, which is effectively the same as the test presented by RFRA.<sup>117</sup> For these reasons, plaintiffs’ RFRA claims will be more closely scrutinized than their First Amendment claims.<sup>118</sup> Therefore, this Note will focus on analyzing the application of RFRA standards to these cases.

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110. See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

111. See *Knapp*, *supra* note 92, at 280–81.

112. See *supra* notes 78–85.

113. See *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

114. See sources cited *supra* note 75. One plaintiff has also raised objections to the law under the Free Speech and Establishment Clauses of the First Amendment, see *O’Brien*, 894 F. Supp. 2d at 1162–67, but because those clauses exceed the scope of this topic, this Note will not address them.

115. See *id.*

116. *Id.*; see also *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

117. See *O’Brien*, 894 F. Supp. 2d at 1161.

118. See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290 (W.D. Okla. 2012) (noting that in comparison to their First Amendment claims, “[p]laintiffs’ claims under the Religious Freedom Restoration Act of 1993 present a closer question.”).

## II. THE CONFLICT BETWEEN COURTS OVER HOW TO ASSESS THE CONTRACEPTIVE MANDATE AS APPLIED TO SECULAR, FOR-PROFIT COMPANIES

More than five district courts have navigated the “largely uncharted waters” of examining claims brought by for-profit corporations challenging the applicability of the Contraceptive Mandate to their businesses.<sup>119</sup> Part II of this Note discusses the issues these cases raise regarding how to apply the mandate to for-profit corporations. Subsection A of this Part addresses whether for-profit corporations engaged in secular business activities, but owned by religious individuals, have standing to assert RFRA claims as “person[s]” under the Act.<sup>120</sup> Subsection B explains the issue of how the “substantial burden” standard should be measured.<sup>121</sup> Subsection C describes the burden corporations must show that the law has on its business. Subsection D analyzes the issue of governmental interest.

### A. PERSONHOOD: IS A CORPORATION A “PERSON” UNDER RFRA?

The question of whether secular, for-profit corporations are able to state a claim as “person[s]” under RFRA is a novel one.<sup>122</sup> For that reason, several courts addressing the contraceptive mandate simply have dodged the question by either presuming the corporation has standing and moving on to the substantial burden analysis<sup>123</sup> or by stating that the corporation can, if nothing else, assert the religious rights of its owners based on a “pass-through” theory.<sup>124</sup> Notwithstanding the difficulties of addressing this issue, however, one court has undertaken the task of engineering an analysis.<sup>125</sup>

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119. See *Hobby Lobby*, 870 F. Supp. 2d at 1288; see also *supra*, note 77.

120. 42 U.S.C. § 2000bb-1 (2012).

121. *Id.*

122. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012).

123. See *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1168 (E.D. Mo. 2012).

124. See *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, at 115 (D.D.C. 2012) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009)); see also *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) (“It appears to this Court that, although it is first impression for this Circuit, a strong case for standing, at least on a *Stormans* pass-through instrumentality theory, is sustainable.”) (citing *Stormans*, 586 F.3d 1109).

125. See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291–92 (W.D. Okla. 2012).

Since RFRA does not define the term “person,” one possible test of corporate personhood is to use the generally applicable statutory definition of “person” as described above.<sup>126</sup> Under 1 U.S.C. § 1, when a federal statute is silent as to the definition of a person, the interpreter can assume that “the words ‘person’ and ‘whoever’ include corporations” “unless the context indicates otherwise.”<sup>127</sup> In *Hobby Lobby*, when the corporation and its owners argued that the definition from Section 1 obviously entitled the corporation to standing under RFRA, Judge Heaton seized upon the conjunctive phrase.<sup>128</sup> Citing Supreme Court precedent, the court found that courts interpreting Section 1 are free from applying personhood to corporations in “awkward” cases, including RFRA cases presents just such a case.<sup>129</sup> The court explained

General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise, is by its nature, one of those “purely personal” matters . . . which is not the province of a general business corporation.<sup>130</sup>

Therefore, the court held that the context of RFRA indicated that corporations cannot be considered “person[s]” under the Act.<sup>131</sup>

Yet this analysis is only one way of examining the issue. For example, the Supreme Court’s decision in *Citizens United* might impact the analysis.<sup>132</sup> Plaintiffs in both *Legatus* and *O’Brien* raised the point that in the wake of the *Citizens United* decision, corporate personhood under RFRA should be presumed.<sup>133</sup> They argued that if corporations have the right to free speech under the First Amendment, they must also

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126. See *supra* notes 105–06.

127. 1 U.S.C. § 1 (2012).

128. *Hobby Lobby*, 870 F. Supp. 2d at 1291.

129. *Id.* (citing *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 199 (1993)).

130. *Id.* (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

131. *Id.*

132. See *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).

133. See *id.*

hold the right to religious freedom.<sup>134</sup> From the plaintiff's line of argumentation, it is reasonable to infer that if they possess the constitutional right to challenge this law, they should possess the same right under a statute that was enacted to restore strict scrutiny for laws impinging on religious freedom. Neither court addressed the impact of *Citizens United* on RFRA, but these arguments represent another way to construe corporate personhood under the Act.<sup>135</sup>

#### B. SUBSTANTIALITY: HOW SHOULD THE "SUBSTANTIAL BURDEN" BE MEASURED?

In addition to the conflict regarding the definition of "person," courts have disagreed over how to assess whether a burden is "substantial."<sup>136</sup> As stated above, even the legislators who enacted RFRA did not agree on the meaning of the phrase "substantial burden."<sup>137</sup> Therefore, legislative history, which is often used to find a resolution for ambiguous statutory standards, is an impractical place for a court to begin its analysis.<sup>138</sup> In *O'Brien*, the court began the inquiry by looking to "plain meaning."<sup>139</sup> Since the term isn't defined by RFRA itself, the court stated that "the plain meaning of 'substantial' suggests that the burden on religious exercise must be more than insignificant or remote."<sup>140</sup> It then looked to Supreme Court precedent, and distinguished between the burden in cases like *Sherbert v. Verner*, and the burden imposed by the ACA.<sup>141</sup> Whereas the plaintiff in *Sherbert* was forced to choose between violating the precepts of her religion by working on Saturday and forfeiting unemployment benefits,<sup>142</sup> here, the contraceptive mandate does not force the plaintiffs to alter their behavior in a fashion that would directly prevent them from practicing their religion.<sup>143</sup> "Instead, [the] plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees

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134. *See id.*

135. *See id.*

136. *Compare* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012), *with* *O'Brien*, 894 F. Supp. 2d. 1149.

137. Knapp, *supra* note 92, at 278.

138. *Id.*

139. *O'Brien*, 894 F. Supp. 2d. at 1158.

140. *Id.*

141. *Id.*

142. *Id.* at 1158–59.

143. *Id.* at 1159.

from using contraceptives.”<sup>144</sup> Therefore, the *O’Brien* court found that the burden arose from the outlay of money that “circuitously flows to support the conduct of other free-exercise-wielding individuals who hold [different] religious beliefs . . . .”<sup>145</sup> And that burden, being “several degrees removed” from the company and its owners, was simply too insubstantial to state a claim under RFRA.<sup>146</sup>

At least one other court has disagreed with this characterization of the substantiality standard.<sup>147</sup> In *Tyndale House Publishers, Inc. v. Sebelius*, the court read the “substantial burden” measure to encompass several categories of burdens on religious practice,<sup>148</sup> explicitly declining to adopt the reasoning of the *O’Brien* court.<sup>149</sup> Instead, the *Tyndale* court held that as in *Wisconsin v. Yoder*<sup>150</sup>—where the state’s compulsory school-attendance laws on Amish parents under the threat of criminal sanction substantially burdened the Amish parents’ exercise of religious—the contraception mandate compels the plaintiffs to defy the tenets of their religion in order to comply with the law and avoid sanctions.<sup>151</sup> Therefore, the pressure inflicted by this “Hobson’s choice” is “unmistakable.”<sup>152</sup>

Furthermore, the *Tyndale* court took issue with the “degrees of separation” assessment used by the *O’Brien* court, as well as its distinction between financial support and consumption.<sup>153</sup> Because Tyndale Publishers provided direct coverage to Tyndale employees through a plan by which “Tyndale act[ed] as its own insurer,” one of the “degrees of separation” discussed by the *O’Brien* court was not

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144. *Id.*

145. *Id.*

146. *Id.* at 1160.

147. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012).

148. The *Tyndale* court looked to precedent from the D.C. Circuit, and cited *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981)), for the proposition that it must consider “whether the government action puts substantial pressure on [the] adherent[s] to modify [their] behavior and to violate [their] beliefs.” *Tyndale*, 904 F. Supp. 2d at 120–21 (quotations omitted) (alterations in original).

149. *See Tyndale*, 904 F. Supp. 2d at 123.

150. 406 U.S. 205 (1972).

151. *Id.* at 218.

152. *Tyndale*, 904 F. Supp. 2d at 121.

153. *Id.* at 123 (citing *O’Brien v. Sebelius*, 894 F. Supp. 2d at 1160–61 (E.D. Mo. 2012) (quotations omitted)).

present.<sup>154</sup> Moreover, the plaintiffs in *Tyndale* did not merely object to the use of contraceptives.<sup>155</sup> Their religious objections also encompassed “the provision of coverage” for contraceptives.<sup>156</sup> Therefore, the court held that since the plaintiffs objected to covering, and not just using contraceptives, the fact that the use of contraceptives depended on the independent decisions of third parties was irrelevant.<sup>157</sup> And since the court was cautious to avoid “parsing a plaintiff’s religious beliefs for inconsistency,” the court asserted that it would be an “impermissible interrogation” of the plaintiffs’ beliefs to insist that the plaintiffs may only object to providing direct coverage for contraceptives if they also object to contributing funds to federal programs that cover contraceptives.<sup>158</sup> In light of these factors, the *Tyndale* court held that the plaintiffs demonstrated a “substantial

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154. *Id.* (quotations omitted). The dissenting opinion in *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (Rovner, J., dissenting), disagreed with the *Tyndale* court’s analysis. Judge Rovner wrote:

[T]he decision whether to self-fund a health plan rather than to purchase coverage from an insurance carrier . . . is a decision made by the employer, likely in part or in whole for economic reasons. One effect of that arrangement, voluntarily undertaken by the employer, is that it places the employer financially closer to the employee’s health care choices. Thus, to the extent the self-funded nature of a health plan is a ‘crucial’ factor in determining whether the plan’s mandated coverage of contraceptive care burdens an employer’s religious liberties . . . one ought to acknowledge that the self-funding arrangement is one of the employer’s making—and possibly one having little or nothing to do with the employer’s religious beliefs—rather than the government’s.

*Id.* at 863 (citations omitted). Nonetheless, the majority of the Seventh Circuit panel considering the *Grote* case agreed with the principles expressed in *Tyndale* and found that the fact that the health care plan used by Grote Industries was self-insured “actually strengthen[ed] the equities in favor of granting an injunction pending appeal.” *Id.* at 854.

155. In *Tyndale*, the plaintiffs did not object to the use of all contraceptives, only to the use of “abortifacients and related education and counseling.” 904 F. Supp. 2d at 123. Effectively, this means they objected to intrauterine devices and drugs that might “cause the demise of an already conceived/fertilized human embryo.” *See id.* at 120 n.14. The *Tyndale* court did not assess the scientific validity of these claims, but it is worth noting that none of the drugs or devices they objected to have been proven to abort an existing pregnancy. *See Pam Belluck & Erik Eckholm, Religious Groups Equate Some Contraceptives With Abortion* N.Y. TIMES, Feb. 16, 2012 <http://www.nytimes.com/2012/02/17/health/religious-groups-equate-some-contraceptives-with-abortion.html>.

156. *Tyndale*, 904 F. Supp. 2d at 123.

157. *Id.*

158. *Id.* at 125.

burden” under RFRA<sup>159</sup> and that they were entitled to a preliminary injunction.<sup>160</sup>

In considering the substantial burden question, the *Hobby Lobby* court pointed out that no RFRA case from the Supreme Court had considered the “substantial burden” where the owners of a general business corporation claim that regulations affecting the company impose a substantial burden upon them.<sup>161</sup> Yet the court still applied “certain principles” from precedent to find that the degree to which a government regulation directly affects the religious exercise of an individual is a significant factor in considering if a substantial burden exists.<sup>162</sup> And because the contraceptive mandate applied only to Hobby Lobby Stores as a corporate entity, not to its owners in their individual capacities, the “indirect” and “attenuated” burden was not likely to be “substantial.”<sup>163</sup>

There are several disagreements over RFRA’s “substantial burden” standard.<sup>164</sup> First, courts disagree as to how the contraceptive mandate should be analyzed under the Supreme Court’s compelling interest test that had been applied before *Smith*, which RFRA was meant to restore to prominence.<sup>165</sup> Second, they disagree on whether courts may recast the claimed burden by characterizing the objection to use as more fundamental than the objection to financial support, or if such line-drawing is impermissible “parsing” of religious convictions.<sup>166</sup> Finally, courts disagree on who must be burdened: in *Hobby Lobby*, the court held that the company’s owners were too attenuated to bear any harm while in *Tyndale*, the court held that both the company and the owners could be substantially burdened.<sup>167</sup>

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159. *Id.* at 123.

160. *Id.* at 130.

161. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012)

162. *Id.* at 1293–94.

163. *Id.* at 1294.

164. 42 U.S.C. § 2000bb-1 (2012).

165. *See supra* notes 141–52.

166. *Compare* *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), *with* *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012).

167. *See supra* notes 153–63.

C. COMPELLING INTEREST AND LEAST RESTRICTIVE MEANS: CAN THE FEDERAL GOVERNMENT JUSTIFY THE CONTRACEPTIVE MANDATE?

Regardless of how substantiality is measured, these cases contain another sphere of ambiguity. As stated above, if the government can establish that the contraceptive mandate is the “least restrictive means” of furthering a “compelling” government interest, the mandate must be upheld, regardless of the burden it imposes;<sup>168</sup> however, what constitutes a compelling interest is inexact, and the way in which a court must gauge restrictiveness is a point of substantial debate.<sup>169</sup> The government has argued that the mandate advances two well-established federal interests.<sup>170</sup> First, it serves as a regulation of the healthcare market, which furthers the government’s interest in promoting public health.<sup>171</sup> Second, it helps offset inequalities in the costs of healthcare, which progresses the government’s interest in fostering gender equality.<sup>172</sup> Based on the long history of cases validating these contentions, all three courts that addressed the compelling interest question have accepted these assertions.<sup>173</sup> However, the mere existence of a *general* compelling interest does not end the inquiry.<sup>174</sup>

As noted by the *Newland* court, there is another dimension to the compelling interest test.<sup>175</sup> In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court examined whether the federal government could outlaw the religious use of hallucinogenic tea as part of a broad interest in preventing the recreational use of hallucinogenic drugs.<sup>176</sup> Finding that the government’s stated concerns were no more than a “slippery slope” argument, the Court held that “RFRA requires the [g]overnment to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’-the particular claimant whose sincere exercise of religion is being substantially burdened.”<sup>177</sup> The Court had to look beyond “broadly

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168. 42 U.S.C. § 2000bb-1.

169. See generally *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 995 (E.D. Mich. 2012).

170. See *Tyndale*, 904 F. Supp. 2d at 120.

171. See *id.*

172. See *id.* at 130; see also *Legatus*, 901 F. Supp. 2d at 992.

173. See *Tyndale*, 904 F. Supp. 2d at 130; *Legatus*, 901 F. Supp. 2d at 992–94, *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012).

174. See *Newland*, 881 F. Supp. 2d at 1297–98.

175. *Id.*

176. 546 U.S. 418 (2006).

177. *Id.* at 431, 435.



formulated interests” that justify the general applicability of government mandates, and analyze the potential harm of granting particular exemptions to particular religious claimants.<sup>178</sup> In that case, the Court held that another exception to the challenged law, which allowed users of peyote to remain exempt from the regulations, “fatally undermine[d]” the government’s argument.<sup>179</sup>

Consequently, in contraceptive cases, courts have emphasized this precedent.<sup>180</sup> Citing *Gonzales*, the *Newland* court pointed out that even assuming a compelling interest is furthered by the mandate, the “massive exemption” given by the government to religious employers completely undermines any compelling government interest in applying the contraceptive mandate to the plaintiffs.<sup>181</sup> The *Tyndale* court also echoed this sentiment.<sup>182</sup> It held that because the plaintiffs in that case only objected to particular forms of contraception, the government “[failed] to demonstrate why the plaintiffs in this case must be required to comply with the entirety of the contraceptive coverage mandate.”<sup>183</sup> Furthermore, as emphasized by the *Legatus* court, the government’s opposition to exempting these corporations was based on the “slippery slope” argument that to exempt one secular corporation would open the floodgates to innumerable other exemptions.<sup>184</sup> For all of those reasons, none of the three courts found the government’s compelling interests sufficient to meet the RFRA standard.<sup>185</sup>

However, these decisions disregard a large portion of the *Gonzales* analysis.<sup>186</sup> Although *Gonzales* requires the government to apply the compelling interest to the particular plaintiffs with religious objections, the Supreme Court did limit its decision.<sup>187</sup> The Court explicitly stated, “there may be instances in which a need for uniformity precludes the

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178. *Id.* at 431.

179. *Id.* at 434.

180. *See* *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 128 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 993–95 (E.D. Mich. 2012); *Newland*, 881 F. Supp. 2d at 1297.

181. *Newland*, 881 F. Supp. 2d at 1298.

182. *Tyndale*, 904 F. Supp. 2d at 128.

183. *Id.*

184. *Legatus*, 901 F. Supp. 2d at 993–95.

185. *See supra* notes 181–84 and accompanying text.

186. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

187. *See id.*

recognition of exceptions to generally applicable laws under RFRA.”<sup>188</sup> Furthermore, the Court recognized that pre-*Smith* standards differ substantially from the *Gonzales* decision, in that they establish that certain religious exemptions cannot be accommodated without undermining an entire regulatory scheme.<sup>189</sup> Although the Court stated that the facts of the *Gonzales* case differentiated it from prior decisions, it noted that cases like *United States v. Lee*<sup>190</sup> and *Sherbert v. Verner*<sup>191</sup> stand for the proposition that when the “whole point” of a regulatory scheme is defeated by exceptions, such exceptions cannot be made.<sup>192</sup> It conceded, if granting the religious accommodations would “seriously compromise” the government’s ability to administer a program, a government regulation may overcome the necessary scrutiny.<sup>193</sup> Thus, despite the coherence of these contraceptive mandate decisions, it is questionable whether the *Newland*, *Tyndale*, and *Legatus* courts properly applied the “compelling interest” standard.<sup>194</sup>

Although the *Tyndale* court did not reach the next step in the analysis—the “least restrictive” question—the *Newland* and *Legatus* courts did.<sup>195</sup> Speaking broadly, the *Newland* court held that even if the government could demonstrate a compelling interest in applying the mandate to the plaintiffs, it would also have to establish that there are “no feasible less-restrictive alternatives” to accomplish the same compelling interest.<sup>196</sup> Since the plaintiffs proposed that the government simply provide “free birth control” to women as an alternative, and the government “already provides free contraception to women,” the

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188. *Id.* at 436.

189. *See id.* at 435.

190. 455 U.S. 252 (1982). In this case, a member of the Old Order Amish sued the federal government for return of social security taxes he paid the Internal Revenue Service, claiming the imposition of such taxes violated his First Amendment free exercise rights based on his Amish faith. *Id.* The Supreme Court held that since “. . . the Government’s interest in assuring mandatory and continuous participation in and contribution to social security system is very high,” and “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in manner that violates their religious belief,” the imposition of social security taxes against Lee was constitutional. *Id.* at 258–60.

191. 374 U.S. 398 (1963).

192. *Gonzales*, 546 U.S. at 435.

193. *Id.*

194. *See* 42 U.S.C. § 2000bb-1; *supra* notes 181–84 and accompanying text.

195. *See* *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 995 (E.D. Mich. 2012).

196. *Newland*, 881 F. Supp. 2d at 1298–99.

government did not affirmatively establish that plaintiff's proposed alternative was "impractical . . ." <sup>197</sup> In other words, the *Newland* court read RFRA as holding a dual requirement.<sup>198</sup> The government must affirmatively prove that its chosen means are the least restrictive, and it must also disprove all alternative means proposed by the plaintiffs.<sup>199</sup> And simply stating that the alternatives were not "plausible" was inadequate.<sup>200</sup>

The *Legatus* court disagreed with this assessment.<sup>201</sup> Emphasizing that what comprises the least restrictive means and how it is ascertained is ardently debated, the court recognized that requiring the government to "prove a negative" may be equivalent to requiring it to "do the impossible."<sup>202</sup> Therefore, the court held that it was a draw.<sup>203</sup> It was "possible, but not strongly so" that the government would be able to establish that the mandate met the least restrictive means test, such that the alternatives offered by plaintiffs would not be practical solutions.<sup>204</sup>

### III. "RFRA IS A SHIELD, NOT A SWORD" – GENERAL BUSINESS CORPORATIONS CANNOT DEFEAT THE CONTRACEPTIVE MANDATE BY BRANDISHING RFRA AS A WEAPON

Subsection A of Part III explains why cases brought by general business corporations are inherently distinct from RFRA challenges brought by other entities, such as dioceses and educational institutions. Subsection B argues that in the wake of the *Citizens United* decision, corporations ought to be considered persons under RFRA, such that they may assert standing under the Act to challenge the contraceptive mandate. Subsection C of this Note argues that based on that corporate identity and the logical interpretations of the "substantial burden" test, general business corporations are unable to demonstrate that the contraceptive mandate imposes a substantial enough burden to violate their RFRA rights.<sup>205</sup> Subsection D of this Part then argues that even if

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 995 (E.D. Mich. 2012).

202. *Id.* at 996.

203. *Id.* at 997.

204. *Id.*

205. 42 U.S.C. § 2000bb-1 (2012).

these secular corporations could establish a substantial burden, the contraceptive mandate, as part of a broader regulatory scheme, is the least restrictive means of furthering a compelling government interest.

#### A. THE NATURE OF A CORPORATION

A wide array of organizations has instituted dozens of legal challenges to the contraceptive mandate.<sup>206</sup> Yet, despite the differences between these organizations, all have advanced similar claims: against the stringent standards of RFRA, the contraceptive mandate cannot stand.<sup>207</sup> Nevertheless, even with similar religious ideologies and virtually identical RFRA claims, these cases are not all the same.<sup>208</sup> Whereas a religious institution such as the Roman Catholic Archdiocese of New York may persuasively argue that forcing its organization to provide coverage for medications and devices it deems sinful is indisputably a “substantial burden,” general business corporations cannot convincingly say the same.<sup>209</sup>

The primary purpose of incorporation is to limit liability.<sup>210</sup> A corporation, in effect, is a government-crafted legal fiction that serves the purpose of allowing owners of an organization to conduct business without fear of unlimited liability.<sup>211</sup> It enables individuals to earn a

206. See *supra* notes 30–31 and accompanying text.

207. *Id.*

208. *Id.*

209. See *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310, 310 (E.D.N.Y. 2012). In this case, the government took the position that an injunction should not be granted to the Archdiocese because the issue was not ripe for judicial review. The government further argued that it was working to find a solution to this predicament, and therefore the court should not decide the issue. Despite these arguments, the court granted the injunction.

210. For a brief discussion on the history of limited liability and corporations, see Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 152–56 (1992); see also E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27, 28 n.1 (1936); *Grote v. Sebelius*, 708 F. 3d 850, 858 (2013) (Rovner, J., dissenting) (citing *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991)) (“[s]o long as the business’s liabilities are not the Grotes’ liabilities – which is the primary and ‘invaluable privilege’ conferred by the corporate form . . . neither are the business’s expenditures the Grotes’ own expenditures.”).

211. See Presser, *supra* note 211, at 152–56; see also *Grote*, 708 F. 3d at 857 (Rovner, J., dissenting) (“Although the corporations’ income flows to the Grotes, the corporate form significantly limits the Grotes’ liability[.]”).

profit from, for example, the sale of outdoor equipment,<sup>212</sup> without overexposure to legal accountability.<sup>213</sup> Based on that principle, a general business corporation that is engaged in secular, for-profit commercial activity is inherently distinct from a religious institution because whereas the latter may exist for a variety of spiritual objectives, a for-profit corporation exists to earn a profit. In addition, whether a law substantially burdens the religious freedom of the members of either organization cannot be evaluated in the same way. Therefore, although the question of whether the mandate truly imposes a substantial burden on religious institutions is beyond the scope of this Note, it is emphatically the case that a corporation cannot argue as persuasively as religiously affiliated institutions that the contraceptive mandate burdens its free exercise of religion.<sup>214</sup>

Furthermore, although it stands outside the scope of RFRA analysis, the principle stated by the New York Supreme Court in *American Book Company* is inarguably logical.<sup>215</sup> Once an organization enters the realm of a particular business enterprise, it is bound by the rules that govern that activity.<sup>216</sup> Consequently, when the religious individuals who own these corporations set out to gain the government-created benefits of incorporation, they subject themselves to the government-created regulations that control all corporations.<sup>217</sup> Unlike the dioceses or universities that may advance arguments about the excessive restrictiveness of the religious employer exemption and demonstrate that the purpose of their organizations is the inculcation of religious values, general business corporations cannot say the same.<sup>218</sup> No matter how the owners amend the companies' articles of

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212. The plaintiff corporation in *Legatus* sold "outdoor equipment." *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 980 (E.D. Mich. 2012).

213. See sources cited *supra* note 210.

214. Nonetheless, some corporations may fall into the space between a religious institution and a secular business that is geared only toward profit maximization. In her dissenting opinion in *Grote*, Judge Rovner emphasized that "there do exist some corporate entities which are organized expressly to pursue religious ends, and I think it fair to assume that such entities may have cognizable religious liberties independent of the people who animate them, even if they are profit-seeking." *Grote*, 708 F. 3d at 856. (Rovner, J., dissenting).

215. See *supra* notes 10–18 and accompanying text; *Am. Book Co. v. Yeshiva Univ. Dev. Found.*, 297 N.Y.S.2d 156, 158 (Sup. Ct. 1969).

216. *Id.*

217. *Id.*

218. *Id.*

incorporation to reflect their religious views, in the final analysis, these corporations exist to earn a profit.<sup>219</sup> If the corporation gains the benefit of making money while bearing protection from undue liability, it should have to adhere to the obligations placed upon it by the same government that facilitated those benefits as long as the government regulations do not violate any constitutional or statutory rights.

#### B. ARTIFICIAL *CITIZENS* UNDER RFRA

It is unclear whether the Supreme Court's decision in *Citizens United*<sup>220</sup> is dispositive on the question of corporate personhood under RFRA;<sup>221</sup> however, a strong argument can be made that based on that precedent, corporations challenging the contraceptive mandate under RFRA should be afforded standing. In *Citizens United*, the Supreme Court declared that the government may not suppress political speech simply because the speaker is a corporate entity.<sup>222</sup> Because in the past it had rejected the argument that corporate political speech ought to be treated differently under the First Amendment since corporations are not "natural persons," the Court extended First Amendment free speech protection to corporations.<sup>223</sup>

That decision is significant to any corporate RFRA claim. If corporations, despite the fact that they are not persons in the ordinary sense of the word, possess the same freedom of speech as do "natural persons" under the First Amendment, it seems logical that a similar analysis would apply to the Free Exercise Clause.<sup>224</sup> Although it is true that the generally applicable statutory definition of "person" presented in 1 U.S.C. § 1 may be ill-suited to the context of RFRA, it is also true that if the Supreme Court recognized that corporations hold one sort of First Amendment freedom, the logical corollary is that they possess

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219. In *Newland*, Judge Kane glossed over the fact that the Newland family had recently changed the articles of incorporation of Hercules, Inc. to include the religious ideology of its owners in order to bring their lawsuit against the federal government. See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

220. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

221. See *supra* Part II.A.

222. *Citizens United*, 130 S. Ct. at 914.

223. *Id.* at 900 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)). See generally *Sprague & Wells*, *supra* note 104.

224. See *Citizens United*, 130 S. Ct. at 900 (citing *First Nat'l Bank of Boston*, 435 U.S. at 765).

others as well.<sup>225</sup> Consequently, the precedent set by *Citizens United* could reasonably stand as the justification for allowing corporations to bring lawsuits under RFRA.<sup>226</sup>

Nonetheless, there are a few weaknesses inherent in this reading of *Citizens United*. First and foremost, it would be incorrect to assume that the right to political speech and the right to the free exercise of one's religion are intrinsically the same. While parties often exercise political speech through the expenditure of funds to pay for advertisements or to support particular candidates, the free exercise of religion may be considered a right more suited to the natural individual.<sup>227</sup> Given that a corporation cannot exercise religion in the same fashion as an actual person does, by attending religious services or receiving religious sacraments,<sup>228</sup> the two First Amendment freedoms might be seen as fundamentally divergent. Furthermore, just because the Supreme Court recognized one freedom does not mean courts should presume another exists as well.

However, the widely accepted reading of *Citizens United* is that the decision created a corporate "supercitizen."<sup>229</sup> Disregarding all the difficulties in finding that a fictional entity has the right to expound its political views,<sup>230</sup> the Court recognized the right of corporations to engage in political speech.<sup>231</sup> Based on that jurisprudence, it seems logical that the difficulties in declaring free exercise protection for corporations would not prevent a similar result. Although reasonable minds may differ on the intentions of the Justices, it appears that the Court meant to "breathe life" into the corporation, and to empower it with the same rights as any other individual.<sup>232</sup> Consequently, though the effects of *Citizens United* on RFRA are uncertain, a strong argument

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225. See *supra* notes 132–35 and accompanying text.

226. Meaning, RFRA was enacted to restore pre-*Smith* standards of free exercise challenges. See *supra* notes 88–97 and accompanying text. Therefore, it is reasonable to assume that if corporations possess a right under the First Amendment, and RFRA was intended to strengthen that right, corporations would possess the RFRA right as well.

227. *Citizens United*, 130 S. Ct. 876 (2010).

228. See *supra* note 130 and accompanying text.

229. See Sprague & Wells, *supra* note 104, at 507–10.

230. Such as the fact that large corporations are made up of hundreds of shareholders who do not all subscribe to the same viewpoint. *Id.*

231. *Id.*

232. *Id.*

can be made that corporations ought to be able to assert standing as “person[s]” under the Act – albeit as artificial ones.<sup>233</sup>

### C. THE INSUBSTANTIAL BURDEN

If corporations may assert standing under RFRA, then the fundamental question becomes whether they can meet the “substantial burden” test. An argument advanced by Judge Heaton in *Hobby Lobby* is useful to the analysis.<sup>234</sup> Although courts have treated corporations as holding personhood that is similar to that of a physical citizen, there is something irksome about suggesting that a corporation is able to exercise religion.<sup>235</sup> Given that a corporation can no more “worship” than it can “observe sacraments,” it is hard to imagine how a corporate entity can hold a religious objection to the provision or use of contraceptives.<sup>236</sup> In reality, the corporate shareholders bear the objection.<sup>237</sup> However, if the argument is accepted that *Citizens United* supports a corporate right to assert standing under RFRA, then the beliefs of the corporate shareholders are essentially irrelevant.<sup>238</sup> In *Citizens United*, the Court disregarded the fact that in large corporations, not all shareholders will agree as to the particulars of a political position.<sup>239</sup> It held that the corporation as an entity, despite its heterogeneous nature, holds the right to engage in political speech.<sup>240</sup> Likewise, in the case of religious freedom, the burden borne by the individual shareholders is beyond the scope of the substantial burden inquiry.<sup>241</sup> If the “substantial burden” is measured by the logical

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233. See 42 U.S.C. § 2000bb-1 (2012). See generally *Citizens United v. Federal Election Com’n.*, 558 U.S. 310 (2010).

234. See *supra* notes 128–31 and accompanying text.

235. See *id.*

236. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (2012).

237. *Id.*

238. See generally *Citizens United*, 558 U.S. 310.

239. See Sprague & Wells, *supra* note 104, at 507; *Citizens United*, 558 U.S. at 361.

240. Sprague & Wells, *supra* note 104; *Citizens United*, 558 U.S. at 364–65.

241. Meaning, the corporate entity and the individual shareholders are indisputably separate. As pointed out in *Grote*, [t]he owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so . . . . The [owners] are not at liberty to treat the company’s bank accounts as their own; co-mingling personal and corporate funds is a classic sign that a company owner is disregarding the corporate form and treating the business as his alter ego . . . . To suggest, for purposes of the RFRA, that monies used to fund the Grote Industries health plan – including, in particular, any monies spent paying



standard that “substantial” means something more than “insubstantial,” then the simple question is: does the mandate impose an onerous burden on the actual corporation?<sup>242</sup> Stated differently, will the free exercise of religion *by the corporation* be significantly violated by the provision of birth control coverage?<sup>243</sup>

To answer this question, it may be necessary to scrutinize the actual religious ideology at stake. Although a court should not “parse” religious beliefs, it is nevertheless important to consider the actual objections.<sup>244</sup> These mainly consist of objections to use, objections to provision of coverage for use, and objections to the provision of coverage for use of particular contraceptives.<sup>245</sup> Moreover, although the *Tyndale* court refused to consider the inconsistency presented by a religious ideology that allows payment of taxes that circuitously flow to support distribution of contraceptives but objects to payment into a healthcare plan that will do the same, a court must examine the totality of the arguments presented.<sup>246</sup> It is not an “impermissible interrogation of religious beliefs” for a court to consider the full context of a religious argument.<sup>247</sup> Instead, it is a legitimate exercise of judicial discretion to find that if a corporation pays taxes to the government that may tangentially support the provision of contraceptives, its argument that abiding by the contraceptive mandate imposes a substantial burden on the corporation’s religious freedom is somewhat undermined. By the same token that an exception to an unbreakable rule undercuts its inflexibility, the provision of coverage for contraceptives through taxes weakens a corporation’s claim that providing any coverage that might support the use of contraceptives violates its religious freedom.<sup>248</sup>

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for employee contraceptive care – ought to be treated as monies from the [owners’] own pockets would be to make an argument for piercing the corporate veil.” *Grote v. Sebelius*, 708 F. 3d 850, 858 (2013) (Rovner, J., dissenting). Therefore, to treat the burden borne by the corporation as identical to the burden borne by its owners would be to conflate the distinct identities of each party, and would undermine the fundamental precepts of corporate law.

242. 42 U.S.C. § 2000bb-1 (2012).

243. *Id.*

244. *See supra* note 158 and accompanying text.

245. *See supra* Part II.

246. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 124–25 (D.D.C. 2012).

247. *Id.*

248. *See Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418 (2006) (holding that the exemption to the rule undermined the government’s

The *O'Brien* court advanced another cogent point.<sup>249</sup> Logic and precedent imply that a “substantial burden” must be sizeable and arduous.<sup>250</sup> “Substantial” essentially means more than insubstantial.<sup>251</sup> Thus, if the government were compelling the corporation to directly violate its “free exercise of religion” by consuming contraceptives, the burden would clearly be unacceptable;<sup>252</sup> however, there is no forced consumption in this statute.<sup>253</sup> Instead, the corporation remains free to “exercise” religion by discouraging employees and shareholders from purchasing or consuming contraceptives.<sup>254</sup> It remains free to exercise political speech in opposition to contraceptives or the contraceptive mandate.<sup>255</sup> However, it cannot establish that dispensing funds that may, after a series of independent actions by doctors, patients, and pharmacists, lead to the use of contraceptives, imposes a “substantial burden” on the corporation.<sup>256</sup> The existence of independent decision-makers and the lack of mandated consumption virtually foreclose that argument from being persuasive.<sup>257</sup> If the burden is shouldered by the corporation, which is the case in this analysis, then there are simply too many barriers between the outlay of corporate funds and the use of contraceptives for a company to claim a “substantial burden” under

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argument that it held a compelling interest in uniform application of the Controlled Substances Act).

249. See *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d. 1149, 1158 (E.D. Mo. 2012).

250. See *id.*; 42 U.S.C. § 2000bb-1 (2012).

251. 42 U.S.C. § 2000bb-1.

252. *Id.* This point is made in spite of the fact that a company can no more consume a contraceptive than it can exercise speech. However, given the Supreme Court's decision in *Citizens United*, which disregarded the limitations of corporate personhood as to speech, the fact that a corporation cannot actually consume a medication is somewhat irrelevant.

253. See *O'Brien*, 894 F. Supp. 2d. at 1159.

254. *Id.*

255. *Id.*

256. *Id.* In the first of two Seventh Circuit decisions on this issue, Judge Rovner noted in her dissent that “[i]n the usual course of events, an employer is not involved in the delivery of medical care to its employee or even aware (by virtue of physician-patient privilege and statutory privacy protections) of what medical choices the employee is making in consultation with her physician . . . neither the company nor its owners are involved with the decision to use particular services, nor do they write the checks to pay the providers for those services.” *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*5 (7th Cir. Dec. 28, 2012) (Rovner, J., dissenting).

257. *O'Brien*, 894 F. Supp. 2d, at 1160.

RFRA.<sup>258</sup> For these reasons, even acknowledging that several courts disagree with this characterization, it is the argument of this Note that the burden imposed by the contraceptive mandate on general business corporations engaged in secular commercial activity is too insubstantial to state a claim under RFRA.<sup>259</sup> On these grounds alone, the cases should be dismissed.<sup>260</sup>

#### D. A NARROWER INTEREST AND PROPORTIONATE RESTRICTIVENESS

Yet, even if the corporations could demonstrate that the contraceptive mandate imposes a “substantial burden” on their religious freedom, they still should not prevail in their RFRA claims.<sup>261</sup> Certainly, *Gonzales* presents an important principle.<sup>262</sup> In a RFRA claim, the government must apply its asserted compelling interests to the plaintiffs bringing suit.<sup>263</sup> That standard applies to the contraceptive cases; however, there are meaningful differences between *Gonzales* and the instant cases, which suggest that the precedent may not be well suited for comparison with this category of RFRA challenges. First, the statutes in each case are categorically unlike.<sup>264</sup> In *Gonzales*, the plaintiffs contended that the Controlled Substances Act impermissibly burdened their free exercise of religion by prohibiting consumption of a

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258. *Id.* Furthermore, the fact that the company is not literally being forced to purchase contraceptives is significant. What these companies are “. . . actually required to fund is a health insurance plan that covers many medical services, not just contraception.” *Grote v. Sebelius*, 708 F. 3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting). Meaning, “the decision as to what services will be used is left to the employee and her doctor. To the extent the [company owners] themselves are funding anything at all—and . . . one must disregard the corporate form to say that they are—they are paying for a plan that insures a comprehensive range of medical care that will be used in countless ways by the hundreds of U.S.-based employees participating in the [company’s] health plan. No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense the Grotes’ decision or action.” *Id.*

259. 42 U.S.C. § 2000bb-1 (2012).

260. *Id.*

261. *Id.*

262. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430–31 (2006).

263. *Id.*

264. *See infra* notes 265–67 and accompanying text.

hallucinogenic tea that they used in religious rituals.<sup>265</sup> In the aforementioned cases, plaintiffs are challenging a regulatory mandate that compels the purchase of healthcare coverage, in violation of their religious objections to contraceptives.<sup>266</sup> Thus, whereas the burden in *Gonzales* arose from a prohibition of worship, the burden asserted in the contraceptive cases arises from the mandatory payment of monetary support.<sup>267</sup> On that distinction alone, the *Gonzales* precedent may not be the ideal framework under which to examine the contraceptive mandate.<sup>268</sup>

Additionally, the entities claiming RFRA protection in each case are distinguishable. The *Gonzales* plaintiffs were members of a small church congregation that used the hallucinogenic tea, called *hoasca*, as a religious sacrament.<sup>269</sup> The plaintiffs discussed in the contraceptive cases, by contrast, are general business corporations.<sup>270</sup> In this context, the difference between religious institutions and for-profit companies is extremely significant.<sup>271</sup> Whereas the former holds a strong presumption of religious freedom and can make a convincing case that the prohibition of worship burdens its free exercise rights, the latter cannot do the same.<sup>272</sup> Consequently, the nature of the organization raising the RFRA claim further distinguishes *Gonzales* from these cases.<sup>273</sup>

Moreover, the stated interests in these cases are not identical. While in *Gonzales*, the government sought to establish that it held an interest in the uniform application of a drug-ban in order to stop the recreational use of harmful substances,<sup>274</sup> in the contraceptive cases, it has advanced a different “compelling interest.”<sup>275</sup> Making a more moderate argument, the government has asserted that it holds an interest in advancing gender equality.<sup>276</sup> The mandate furthers that interest in

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265. *Gonzales*, 546 U.S. at 423.

266. *See supra* notes 69–76 and accompanying text.

267. *See supra* notes 56–60 and accompanying text.

268. *Gonzales*, 546 U.S. at 418.

269. *Id.* at 425.

270. *See supra* note 75 and accompanying text.

271. *See supra* notes 206–19 and accompanying text.

272. *Id.*

273. *Gonzales*, 546 U.S. at 418.

274. *Id.* at 426.

275. 42 U.S.C. § 2000bb-1 (2012).

276. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 992 (E.D. Mich. 2012); *see also Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012).

that the regulation will lessen the disparity in healthcare costs between men and women.<sup>277</sup> Thus, when examining this stated “compelling interest,” *Gonzales* is almost irrelevant. Because the government’s interest is framed in terms of advancement and not “uniformity,” *Gonzales* lacks yet another point of similarity.<sup>278</sup>

Furthermore, if the compelling interest is outlined with this modest terminology, then the exemptions that are given to “religious employers” do not “completely undermine[ ]” the stated goals of the regulation.<sup>279</sup> Since it is only possible to argue that the exemptions granted to “religious employers” undermine the compelling interest of the government if the government claims that its compelling interest is in the uniform application of the healthcare laws, considering the advancement of gender equality as a separate compelling interest cures the quandary discussed in *Newland*.<sup>280</sup> Likewise, applying the interest to the plaintiffs becomes far more straightforward.<sup>281</sup> Simply stated, the government holds a compelling interest in mandating that the plaintiffs comply with the regulation because creating an exemption for a general business corporation would hurt the advancement of gender equality.<sup>282</sup> It would add to the number of women who must pay more for healthcare coverage than men, and thus undermine the ability of women to participate equally in the economic and social aspects of life in the United States by harming their ability to control their reproductive lives.<sup>283</sup>

Admittedly, this stated interest comes very close to sounding like the “slippery slope,” discussed in *Gonzales* because it suggests that granting an exemption to one general business corporation would mean granting exemptions to others.<sup>284</sup> Setting aside the point that this

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The government also has asserted a compelling interest in promoting public health. *See supra* note 172 and accompanying text.

277. *Id.*

278. *Gonzales*, 546 U.S. at 421.

279. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

280. *See id.*

281. *See infra* text accompany notes 282–83.

282. *See supra* note 276 and accompanying text.

283. *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 993 (E.D. Mich. 2012) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992)).

284. *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418, 435–36 (2006).

argument, though slippery, may not be a fallacy,<sup>285</sup> there is another Supreme Court precedent that is more easily compared to the instant cases than *Gonzales*.<sup>286</sup> In *United States v. Lee*, a member of the Old Order Amish brought suit against the federal government, seeking the return of taxes his business had paid into the social security system.<sup>287</sup> Claiming that the outlay of money for social security violated central tenets of his religion, Lee argued that the imposition of these taxes on his business violated his rights under the Free Exercise Clause of the First Amendment.<sup>288</sup> He contended that as certain Amish individuals could, his business should qualify for the tax exemption given by the Internal Revenue Service to Amish persons who are self-employed.<sup>289</sup>

Although the Court recognized that Lee's religious objections to paying social security taxes were sincere, it nonetheless found that the mandatory participation to which Lee objected was essential to the fiscal vitality of the social security system.<sup>290</sup> Without forced contribution, it held, the tax system would be unable to function.<sup>291</sup> Consequently, the government had a significant interest in ensuring continuous and mandatory contributions to the social security system.<sup>292</sup> "If denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief," the

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285. Just consider all the cases that have been brought to challenge the contraceptive mandate in the last few months alone, as outlined by the Beckett Fund. *See supra* notes 30–31. Furthermore, if these RFRA challenges succeed, employers may be able to evade many other areas of medical coverage on the basis of religious objection. As stated by Judge Rovner in *Grote v. Sebelius*, 708 F. 3d 850, 866 (7th Cir. 2013) (Rovner, J., dissenting), "[i]f RFRA entitles the controlling shareholder of a corporation to exclude coverage for contraceptive care from the company's health plan on the basis of his religious beliefs, then . . . [there is] no reason why coverage for any number of medical services could not also be excluded from a workplace health plan on the same basis."

286. *Gonzales*, 546 U.S. at 418. In her dissenting opinion in *Grote*, Judge Rovner cited to *United States v. Lee* in order to explain that "[t]he Grotes have voluntarily elected to engage in a large-scale, secular, for-profit enterprise," and that the family therefore must comply with the laws that are "binding on others in that activity." *Grote*, 708 F. 3d at 859 (Rovner, J., dissenting) (citing and quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

287. *Lee*, 455 U.S. at 252; *see also supra* note 191.

288. *Lee*, 455 U.S. at 252.

289. *Id.*

290. *Id.* at 258.

291. *Id.* at 260.

292. *Id.* at 258–59.

entire tax program could unravel.<sup>293</sup> Therefore, Lee could not be reimbursed for his tax payments.<sup>294</sup>

The Court took the analysis one step further. To maintain an organized society that guarantees religious freedom to a wide variety of faiths, the court held, some religious practices must “yield to the common good.”<sup>295</sup> The presence of an exemption for self-employed Amish individuals did not automatically entitle Lee to an exemption as well.<sup>296</sup> The Court stated:

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.<sup>297</sup>

Although Lee held sincere religious objections to how the government might spend his tax dollars and despite the fact that Congress had already granted an exemption to self-employed Amish individuals, Lee did not qualify for the exemption.<sup>298</sup> Because he set out to operate a commercial enterprise, Lee lost his ability to claim a religious exemption as a self-employed Amish individual.<sup>299</sup> Despite the small size and arguably insignificant impact of extending the exemption to his business, granting him an exception from the rule could reasonably undermine the entire social security tax system.<sup>300</sup> The law withstood Lee’s challenge.<sup>301</sup>

The common themes between the contraceptive cases and *Lee* are therefore extremely clear. Just as the law in *Lee* mandated the outlay of tax money to support a government-created “compelling interest,”<sup>302</sup> the contraceptive mandate requires “large employers” to support the

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293. *Id.* at 260.

294. *Id.*

295. *Id.*

296. *Id.* at 259.

297. *Id.* at 261.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 258.

healthcare costs of women by covering minimum preventive services.<sup>303</sup> Likewise, the exemptions that are given to religious employers do not undermine the regulatory scheme of the ACA.<sup>304</sup> Instead, they are a consciously chosen means of accommodating the full extent of religious objections, while still implementing an effective program. For those reasons, *Lee*<sup>305</sup> is a far better case than *Gonzales*<sup>306</sup> against which to measure the “compelling interest[s]” asserted by the contraceptive mandate.<sup>307</sup> In fact, *Lee* should compel a new outcome.<sup>308</sup> The contraceptive mandate does serve to further a compelling government interest, regardless of whether that interest is defined as a uniform regulatory scheme or as the advancement of gender equality.

As a result, the only question that remains is whether the mandate is the “least restrictive means” to accomplish these compelling government interests.<sup>309</sup> A strong argument can be made that the contraceptive mandate passes scrutiny.<sup>310</sup> In passing RFRA, Congress sought to restore the pre-*Smith* compelling interest test for laws that substantially burden religion.<sup>311</sup> It did not intend to make any law that imposes a substantial burden on the free exercise of religion effectively null and void.<sup>312</sup> Meaning, if the least restrictive standard is read to include the dual requirements that were advanced by the *Newland* court, then the standard requires the government to both prove a negative, and disprove innumerable vague alternatives.<sup>313</sup> It requires the government to, effectively, “do the impossible.”<sup>314</sup> But to accept that interpretation would be to deem RFRA legislative absurdity. It would mean that Congress intended to enact impossible criteria that would render the entire compelling interest test, as a separate clause of a short statute, basically useless. Based on established principles of statutory interpretation, drawing such a conclusion would counteract the purpose

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303. See *supra* notes 20–26 and accompanying text.

304. See *supra* note 181 and accompanying text.

305. *Lee*, 455 U.S. at 252.

306. *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418 (2006).

307. 42 U.S.C. § 2000bb-1 (2012).

308. *Lee*, 455 U.S. at 252.

309. 42 U.S.C. § 2000bb-1.

310. *Id.*

311. See *supra* notes 92–94 and accompanying text.

312. Knapp, *supra* note 92, at 262.

313. See *supra* notes 196–200 and accompanying text.

314. See *supra* note 202 and accompanying text.



of judicial review. Therefore, the interpretation advanced by the *Newland* court is illogical, and other courts examining these cases should not adopt the same standard.<sup>315</sup>

Instead, it is far more reasonable to read RFRA as setting a stringent, but still passable standard.<sup>316</sup> It is sounder to presume that under the “least restrictive means” test, government must prove that all the alternatives advanced by the plaintiffs are either implausible or undesirable.<sup>317</sup> Although it is beyond the scope of this Note to delve into all the reasons why it is neither feasible nor sensible for the government to ‘provide free birth control,’<sup>318</sup> this Note advances the argument that because the IOM found that coverage for preventive care for women was an essential component of minimum health coverage for women in order to “close the gap” in healthcare costs between men and women,<sup>319</sup> the contraceptive mandate can certainly be classified as meeting the “least restrictive means” standard.<sup>320</sup> Stated simply, the mandate is the “least restrictive means” of furthering the broad interest of facilitating gender equality because it is only as broad as the actual gap in healthcare costs.<sup>321</sup>

### CONCLUSION

There are several convincing arguments that suggest the ACA might be a harmful piece of legislation. It may negatively impact the quality of healthcare by overregulating costs and thus discourage future generations from entering the medical field.<sup>322</sup> It may act as a blockade to commercial growth by discouraging businesses from hiring in the hopes that they can avoid the cost of becoming a “large employer.”<sup>323</sup> It may even be harmful to the culture of our nation if one accepts the

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315. See *supra* notes 196–200 and accompanying text.

316. 42 U.S.C. § 2000bb-1 (2012).

317. *Id.*

318. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

319. See IOM REPORT, *supra* note 26, at 80.

320. 42 U.S.C. § 2000bb-1.

321. *Id.* See generally IOM REPORT, *supra* note 26.

322. See generally Sally Pipes, *The Ugly Realities of Socialized Medicine Are Not Going Away*, FORBES (Dec. 19, 2011, 3:24 PM), <http://www.forbes.com/sites/sallypipes/2011/12/19/the-ugly-realities-of-socialized-medicine-are-not-going-away-3/>.

323. See *supra* note 38.

argument that universal healthcare is flagrantly inconsistent with the American tradition of hard work and self-sufficiency.

In spite of all these pitfalls, however, the ACA is the law. As stated aptly by Judge Jackson in *O'Brien*:

RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others.<sup>324</sup>

Therefore, it is possible that the contraceptive mandate may be one piece of a broad regulatory scheme that will ultimately hurt Americans.<sup>325</sup> And it is probable that many of the cases in this Note were initiated based on sincere religious belief, and not just political motive;<sup>326</sup> however, the mere conflict between religious ideology and government regulation does not justify the imposition of one's beliefs on another. Unlike churches and universities, where students at a school or individuals employed by a congregation knowingly associate with religious institutions, a business is not a place of worship. Thus, corporations that exist to earn a profit from commercial activity cannot use RFRA as a means to stop female employees from using contraceptives. Just as the government may never force a woman to consume contraceptives against the creed of her religion, an employer cannot force its own belief system upon its female employees.

Essentially, the point of this analysis is simple. Christian and Catholic employers do not possess the right to dictate which drugs their employees consume, any more than a Jewish University has the right to control which organizations sublease its property.<sup>327</sup> Just as an Amish individual who chooses to operate a commercial enterprise is obliged to pay social security taxes because not doing so would be tantamount to imposing his religion on his employees,<sup>328</sup> the owners of general business corporations are bound by the contraceptive mandate.<sup>329</sup> They

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324. *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012).

325. See *supra* notes 322–23 and accompanying text.

326. See *generally* *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

327. *Am. Book Co. v. Yeshiva Univ. Dev. Found.*, 297 N.Y.S.2d 156, 158 (1969); *supra* notes 8–20.

328. *United States v. Lee*, 455 U.S. 252 (1982); *supra* notes 287–301.

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must provide coverage for contraceptives because the law states that they must, and because RFRA cannot relieve them of their obligation. Therefore, an overarching principle of law dictates this analysis: “[r]eligious beliefs can be accommodated . . . but there is a point at which accommodation would ‘radically restrict the operating latitude of the legislature.’”<sup>330</sup> If the plaintiffs of these cases do not want to comply with this contraceptive mandate, they should not be looking to the judiciary. Instead, their remedy is to change the law.

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“[A] business owner complying with statutes of general application may be compelled to employ, transact business with, and otherwise provide goods, services, and benefits to people whose status, beliefs, or conduct are inconsistent with the owner’s religious beliefs and practices. In evaluating the burden that such requirements impose on a business owner’s religious liberties, one must distinguish between an owner’s commercial conduct and his religious beliefs and conduct. Requiring a secular business over the religious objection of its owner to do something in the commercial sphere that is required of nearly all such businesses ordinarily does not require the owner to abandon his religious tenets, to endorse conduct or express an opinion that is contrary to his religious beliefs, or to modify his private conduct as a religious observant.”

Grote v. Sebelius, 708 F. 3d 850, 860 (7th Cir. 2013) (Rovner, J., dissenting).

330. *Lee*, 455 U.S. at 259 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).