WHEN MIGHT DOES NOT CREATE RELIGIOUS RIGHTS: FOR-PROFIT CORPORATIONS' EMPLOYEES AND THE CONTRACEPTIVE COVERAGE MANDATE

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INTRODUCTION

It is classic Christian theology that "ye cannot serve God and mammon."[1] And yet, there are currently thirty-eight lawsuits pending that make the claim that not only does a for-profit corporation have religious rights, but also that the Patient Protection and Affordable Care Act Women's Health Amendment's contraceptive coverage mandate violates the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment by infringing on for-profit corporations' religious rights.

This Note provides an in-depth look at the specific claims raised by for-profit corporations challenging the contraceptive coverage mandate. Part I will first compare the legal standard under the Religious Freedom Restoration Act with the legal standard under the Free Exercise Clause of the First Amendment, an idiosyncrasy that stems from the Supreme Court's watershed decision of *Employment Division, Department of Human Resources of Oregon v. Smith*.[2] Part I will also give a brief background on the Patient

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1 *Matthew* 6:24 (King James) (from the Sermon on the Mount); *see also Mark* 12:17 (King James) ("And Jesus said unto them, Render to Caesar the things that are Caesar's, and to God the things that are God's."); 1 *Timothy* 6:10-11 (King James) ("For the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows. But thou, O man of God, flee these things.").

2 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to 2000bb-4 (2010)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006).

Protection and Affordable Care Act (ACA),[3] the Women's Health Amendment (WHA),[4] and the contraceptive coverage mandate.[5] Part II will provide a framework for analyzing the decisions issued so far, dividing the relevant arguments into three categories: corporations' religious rights, RFRA, and the Free Exercise Clause. Part II will use those categories as a structure for discussing the courts' analyses of the contraceptive coverage mandate. Lastly, Part III will address the three questions posed by these litigations using the categories developed in Part II, and will suggest that the key to answering these questions lies in recognizing the unrepresented but central interests of a third party in these lawsuits: the employees whose access to contraceptive services hangs in the balance.

I. Background

Part I will first provide an overview of the Religious Freedom Restoration Act[6] and the Free Exercise Clause legal standards and relevant case law, before covering the background and structural details of the Patient Protection and Affordable Care Act[7] and the Women's Health Amendment.[8]

A. Current Doctrine of RFRA and the Free Exercise Clause of the First Amendment

The Free Exercise Clause of the First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[9] It prohibits federal and state governments from infringing on an individual's ability to engage in religious practices.[10]

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3 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.).

4 42 U.S.C. § 300gg–13(a)(4) (2010).

5 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

6 Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to 2000bb–4 (2010)).

7 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.).

8 42 U.S.C. § 300gg–13(a)(4) (2010).

9 U.S. CONST. amend. I.

10 *See* Michael W. McConnell, *The Origins and Historic Understanding of Free Exercise of Religion*, 103

When the Supreme Court issued its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[11] the face of Free Exercise jurisprudence changed significantly.[12] Before *Smith*, the Free Exercise test developed by the Court in the regime-changing[13] cases of *Sherbert v. Verner*[14] and *Wisconsin v. Yoder*[15] required a plaintiff to show that the government had imposed a substantial burden on the plaintiff's religion; once the plaintiff showed such a burden, the government then had to show, as an affirmative defense, that it had a compelling interest in imposing that burden and that the burden represented the least restrictive means to achieving the government's objective.[16] In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court announced a new test under the Free Exercise Clause, which consists of asking only whether the law in question is neutral and whether it is generally applicable.[17] As long as the statute is both neutral and generally applicable, a party must comply regardless of the burden on its free exercise of religion.[18] Three years after *Smith*, Congress responded by

HARV. L. REV. 1409, 1416–17 (1990) (explaining this basic premise of the Free Exercise Clause).

11 494 U.S. 872 (1990) (holding that Oregon could deny unemployment benefits to individuals terminated for their religious use of peyote because the prohibition of use of peyote by Oregon was constitutional), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488, (codified as amended at 42 U.S.C. § 2000bb to 2000bb–4 (2010)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006).

12 A full review of the history of Free Exercise jurisprudence is beyond the scope of this Note. For a detailed analysis of pre-1990 Free Exercise jurisprudence, see McConnell, *supra* note 10.

13 *See* Vincent Martin Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1409–10 (2007) (noting that *Sherbert* was the first time that the Court had explicitly adopted the compelling interest test for religious liberty cases, and that *Yoder* was the "high-water mark" of the compelling interest test).

14 374 U.S. 398 (1963).

15 406 U.S. 205 (1972).

16 This is referred to as "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*" in RFRA. *See* 42 U.S.C. § 2000bb(b)(1) (2010); *see also* discussion *infra* Part I.A.1.

17 *See* Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488, (codified as amended at 42 U.S.C. § 2000bb to 2000bb–4 (2010)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (finding that an individual must comply with a law that is both neutral and generally applicable regardless of its effect on his or her religious exercise). The Court made an exception for "hybrid" situations in which a religious right is connected to another protected right. *Id.* at 881–82. No such hybrid right is at issue in the contraceptive coverage mandate cases.

18 *See id.* The Court has further clarified the inquiry in a post-*Smith* free exercise case as being that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if

passing, almost unanimously, the Religious Freedom Restoration Act, which reestablished the religious exercise test that had existed prior to *Smith*, as a statutory right rather than a constitutional one.[19]

The Supreme Court's holding in *Smith* has led to the development of two separate legal claims, and two lines of cases, that address freedom of religion. The first claim is that a law violates RFRA's statutory right. The second claim is that a law fails the post-*Smith* Free Exercise Clause test. This Note looks at each in turn.

1. Religious Freedom Restoration Act Jurisprudence

The Religious Freedom Restoration Act specifies the test that a court must apply when reviewing a claim of burden of religion brought under the statute.[20] RFRA states:

> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling government interest; and
> (2) is the least restrictive means of furthering that compelling

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the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (holding three ordinances unconstitutional because they targeted practitioners of Santeria). The two inquiries of neutrality and general applicability are interrelated such that "the failure to satisfy one . . . is a likely indication that the other" will also fail. *Id.*

19 *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to 2000bb–4 (2010)); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994) (recounting the history of RFRA's enactment and noting that it is a statutory right). The text of RFRA explicitly admits that it is working around the Court's holding in *Smith*. 42 U.S.C. § 2000bb states: "(a) The Congress finds that . . . (4) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminates the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.]"

20 *See* 42 U.S.C. § 2000bb–1(b) (2010). Today, RFRA does not apply to the states under the Court's holding in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); RFRA does still apply to the federal government. RFRA also applies to later-in-time statutes unless explicitly excluded. *See* 42 U.S.C. § 2000bb–3(b) (2010); *see also* Am. Life League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir. 1995) (noting that RFRA applies to later in time statutes unless explicitly excluded). The question of whether this stipulation is unconstitutional because it binds later Congresses by avoiding the later-in-time rule is beyond the scope of this Note; so too is the question of whether a later-in-time statute could act as an implied repeal of RFRA. The Court, however, applied RFRA to a statute amended in 1994 and again in 2000 and did not seem bothered by the binding of a later Congress or by possibility of an implied repeal. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424–25, 433 (2006) (applying RFRA without considering the propriety of applying the statute).

governmental interest.[21]

Using RFRA, Congress restored "the compelling interest test as set forth in *Sherbert v. Verner*[22] and *Wisconsin v. Yoder*[23]"[24] under an independent statutory scheme that "essentially prohibit[s] the enforcement of laws that cannot satisfy pre-*Smith* standards."[25] The history of RFRA makes clear that Congress intended to codify statutorily only the test articulated in *Sherbert* and *Yoder*.[26] RFRA did not codify the results of *Sherbert* and *Yoder*, which were anomalies even among cases applying the test they espoused.[27] Understanding RFRA, therefore, entails analyzing these and other pre-*Smith* cases to determine what qualifies as a "substantial burden," a "compelling interest," and a "least restrictive means."

a. Substantial Burden

In order for RFRA to apply, the injured party must first show that there is a substantial burden on the party's exercise of religion.[28] An individual's allegation of religious exercise is sufficient to form the basis of a claim under RFRA.[29] Pre-*Smith* case law, however, made

21 42 U.S.C. § 2000bb–1 (2010).

22 374 U.S. 398 (1963).

23 406 U.S. 205 (1972).

24 42 U.S.C. § 2000bb(b)(1) (2010).

25 United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629 (7th Cir. 2000) (outlining RFRA test and holding that application of federal employment taxes to church did not violate RFRA or the First Amendment).

26 *See* Laycock & Thomas, *supra* note 19, at 217–18 (reviewing RFRA's legislative history and explaining that although both *Sherbert* and *Yoder* were cases in which the Court found that the statute at issue as applied to the religious adherents was unconstitutional, RFRA does not dictate this same result in all cases under the statute).

27 *See* McConnell, *supra* note 10, at 1417 ("[S]ince 1972, the Court has rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert*. What once appeared to be a jurisprudence highly sympathetic to religious claims now appears virtually closed to them."); *see also* Bonventre, *supra* note 13, at 1403–04 (noting that, while *Smith* was a change in the Court's jurisprudence, a review of the cases prior to *Smith* "leads to the inescapable conclusion that the Supreme Court has, at the very best, been erratic").

28 *See* 42 U.S.C. § 2000bb–1(b) (2010); *see also* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (explaining the RFRA test).

29 *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 713–15 (1981) (holding that the religious exercise of a Jehovah's Witness was substantially burdened by denying him unemployment benefits after he quit working at a factory that made tanks, *even though* there were other Jehovah's witnesses

clear that not every burden on religious exercise will be found to be substantial. While the freedom to believe is absolute, the freedom to act, even pursuant to those beliefs, was "not totally free from legislative restrictions."[30] For example, the Court held that no substantial burden exists when a law operates "to make the practice of . . . religious beliefs more expensive" but does not make the practice unlawful; there the Court drew its line.[31] The Court opined that to invalidate laws for incidental burdens on religion would "radically restrict the operating latitude of the legislature."[32]

The outcome in *Sherbert* relies heavily on the substantial burden analysis. In *Sherbert*, the Supreme Court held a South Carolina statute unconstitutional because the government was unable to show a compelling interest in burdening a religious adherent by forcing her to choose between (1) following her religion and forfeiting unemployment benefits or (2) abandoning her religion in order to work.[33] The Court found that the disqualification for benefits imposed a burden on Sherbert's free exercise even though the burden was

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at the same factory who did not feel compelled to quit because of their religious beliefs). In that case, the Court stated that it is not the place of the Court to scrutinize a religious belief or exercise, instead finding that "[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 713–14. *See also* Mark L. Rienzi, *Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 VA. L. REV. IN BRIEF 10, 11 (2013) [hereinafter Rienzi, *Unequal Treatment*] (arguing that a court may not base its substantial burden analysis on an appraisal of the type of religious belief; instead, the court must accept any sincere religious exercise established by plaintiffs).

30 Braunfeld v. Brown, 366 U.S. 599, 603 (1961). *Braunfeld* is a pre-*Sherbert*/*Yoder* regime case; *Yoder*, however, references and distinguishes *Braunfeld*, which suggests that the case remains good law under the current RFRA test. *See* Wisconsin v. Yoder, 406 U.S. 205, 220, 230 (citing Braunfeld v. Brown, 366 U.S. 599 (1961), as a case in which "health, safety, and general welfare" interests were at stake and distinguishing *Yoder* as a case in which such interests were not implicated).

31 *See, e.g.*, *Braunfeld*, 366 U.S. at 605 (holding that a burden that causes an economic disadvantage is not a substantial burden on religion). In that case, members of the Orthodox Jewish community claimed that a Pennsylvania statute that criminalized the sale of certain goods on Sundays infringed on their religion because it would impair their ability to make a livelihood. *Id.* at 600–01. Appellants argued that they were being forced to make a choice between giving up their own Sabbath to work on Saturdays or facing a "serious economic disadvantage." *Id.* at 602.

32 *Id.* at 606.

33 Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (analyzing the burden and noting that the government did not have a compelling interest that could justify the substantial burden). Sherbert was terminated by her employer for refusing to work on Saturday, the Sabbath in her faith. *See id.* at 399. South Carolina's Employment Security Commission refused to grant her unemployment benefits because she did not have "good cause" to refuse to accept such work. *Id.* at 401 (noting that "good cause" was required by the state's Unemployment Compensation Act).

indirect.[34] "The ruling," the Court stated, "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[35] The imposition of such a choice was a substantial burden.[36]

The requirement that the burden on religion be substantial is a real one under RFRA. While the courts may not police the definition of religion, they will scrutinize the burden for substantiality.[37] An indirect burden on an individual is not necessarily an insubstantial burden.[38] A statute that forces a choice between abandoning religion or losing everything, sometimes called a Hobson's choice, is strong proof of a substantial burden.[39] But not every statute that imposes a choice between religion and something else creates a substantial burden.[40] Courts have found that neither paying money into a student health plan that uses some funds to cover abortion, nor otherwise making it more expensive or less convenient to exercise religion, is a substantial burden.[41] Substantial burden is a difficult threshold to

34 *See id.* at 403–04. The Court ultimately held that the South Carolina Unemployment Compensation Act was unconstitutional after finding that no compelling governmental interest in preventing "feigning religious objections to Saturday work" had been shown on the record presented and that the government had failed to show that no other, less restrictive means existed. *Id.* at 407.

35 *Sherbert*, 374 U.S. at 404.

36 *See id.*

37 *See, e.g.*, Goehring v. Brophy, 94 F.3d 1294, 1299–1301 (9th Cir. 1996) (holding university use of student fees to fund insurance program that covered abortion did not violate students' free exercise because the burden on students who are not required to "accept, participate in, or advocate in any manner" for abortions cannot outweigh the government's interest in public health), *overruled on other grounds by* City of Boerne v. Flores, 521 U.S. 507 (1997).

38 *See, e.g.*, *Sherbert*, 374 U.S. at 404 (noting that the loss of unemployment benefits is a substantial burden).

39 *See, e.g.*, *id.* (noting that a Hobson's choice is a good indication of the existence of a substantial burden). According to The Concise Oxford Dictionary, a Hobson's choice is the "option of taking the one offered or nothing." THE CONCISE OXFORD DICTIONARY 474 (7th ed. 1982).

40 *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 600–02 (1961) (holding that the financial burden imposed by a Sunday closing law on those who observe the Sabbath on Saturday, though potentially ruinous, is not a substantial burden).

41 *See, e.g.*, *id.*; Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 275 (3d Cir. 2007) (holding that burdening the plaintiff's pocketbooks by requiring them to build their church in a less convenient location did not violate their statutory religious rights); *Goehring*, 94 F.3d at 1299–1301 (holding university use of student fees to fund insurance program that covered abortion did not violate student's free exercise because the burden on students who are not required to "accept, participate in, or advocate in any manner" for abortions cannot outweigh the government's interest in public health); Goodall *ex rel.* Goodall

cross, and courts will scrutinize the options provided under the statute before determining whether a substantial burden exists.[42]

b. Compelling Interest

Once the religious adherent shows a substantial burden under RFRA, the burden shifts to the government to show that it has a compelling interest as part of its affirmative defense.[43] RFRA's compelling interest test looks at whether the government's interest is compelling generally, whether there are exceptions to the statute that undermine that interest, and what the effect of imposing that interest would be on the individual.[44] When the objector is an employer, a court will also inquire whether the government's interest is better served by allowing the religious practice or whether allowing the religious practice would create an imposition on others that is not in the government's, or the general public's, interest. The compelling interest inquiry is at the heart of RFRA's statutory scheme.

Compelling interests are limited to "interests of the highest order"; not every governmental interest counts as compelling under RFRA.[45] Only a court can determine whether an interest is compelling. Scholars, however, note that compelling interests are generally those pursued "uniformly across the full range of similar conduct."[46] Even if a governmental interest is compelling in general, it will not always be compelling as applied to the specific plaintiff. In *Yoder*, the Court determined that the government's interest was

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v. Stafford Cnty. School Bd., 60 F.3d 168, 171–73 (4th Cir. 1995) (holding that there was no RFRA violation when the state refuses to provide a cued speech service for a child in religious school that would have been provided for him had the child gone to a public school, noting that there is no substantial burden when a law merely makes the practice of religion more expensive).

42 *See* Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 735–36 (6th Cir. 2007) (reviewing the substantial burden test in the third, fourth, seventh, ninth, and eleventh circuits and concluding that "substantial burden is a difficult threshold to cross").

43 *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 429 (2006) (explaining the RFRA test).

44 *Id.* at 430–31 (noting that the government must show that it has a compelling interest in applying the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened").

45 *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (defining governmental interests that can outweigh substantial burdens on religious exercise).

46 *See* Laycock & Thomas, *supra* note 19, at 224 (comparing governmental interests that have qualified as compelling).

compelling in general but was not compelling with respect to the group in question.[47] The Court rejected the State's contention that its interest in education was "so compelling that even the established religious practices of the Amish must give way" after the Court found that the Amish practice prepared their children for life within the Amish community as well as outside of it.[48] Under RFRA, a court will "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[49] When the cost to the government's interest is less than the harm to the plaintiff's religious exercise, then the plaintiff will be granted an individualized exemption.

When a statutory scheme allows exemptions for conduct similar to the plaintiff's conduct, a court may find that the government's interest in applying the statute to the plaintiff is not compelling. In a case about sacramental ingestion of narcotics, the Court found that the government did not have a compelling interest in denying the petitioners an exemption for sacramental use because exemptions had already been made for use of narcotics in Native American religious ceremonies under the Controlled Substances Act's exemption for uses "consistent with the public health and safety."[50] In providing guidance for how to apply the "compelling interest" test going forward, the Court noted that while a general interest in uniformity cannot justify a substantial burden, the government can prove a compelling interest by showing that the asserted exemptions could not be accommodated because they would "seriously compromise its ability to administer" the statutory scheme.[51]

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47 *Yoder*, 406 U.S. at 207, 213 (holding unconstitutional a Wisconsin compulsory education law that imposed criminal penalties because the Court found that requiring the Amish to keep their children in school past the eighth grade to age sixteen violated their Free Exercise rights). The Court noted that "a State's interest in universal education . . . is not totally free from a balancing process when it impinges on [the] rights and interests . . . protected by the Free Exercise Clause" so long as the children would still be prepared for life in society. *Id.* at 214 (citations omitted).

48 *Id.* at 221, 223-29. The Court did not explicitly address the least restrictive means inquiry because it determined that the State had no compelling interest.

49 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 431 (2006) (asserting that this is what the Court did in *Sherbert* and *Yoder* and therefore what is required by RFRA). According to one scholar, *Sherbert*—in addition to being the "first and leading case" of modern Free Exercise jurisprudence—ushered in an era in which free exercise claimants asked for exceptions rather than general invalidation of the laws. *See* McConnell, *supra* note 10, at 1412-13 (describing *Sherbert* as the leading case in this area).

50 *O Centro*, 546 U.S. at 432-33 (determining that because the statute allowed exemptions, the existence of the statute could not be considered determinative of the government's compelling interest).

51 *Id.* at 435 (citing United States v. Lee, 455 U.S. 252 (1982), and Braunfeld v. Brown, 366 U.S. 599 (1961), for this proposition).

The Court has many times found a compelling governmental interest in regulating broadly in order to serve larger public goods akin to "health, safety, and the general welfare" in cases where "any harm to the physical or mental health of [an individual] or to the public safety, peace, order, or welfare" was implicated or proven.[52] In the early twentieth century, the Court noted that it is "a fundamental principle that persons . . . are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state."[53] In *Yoder*, the Court again emphasized that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[54] In this vein, the Court has recognized a compelling interest in mandatory policies enacted to protect the public health,[55] as well as a compelling interest in assuring women equal access to "goods, privileges, and advantages" in order to "remove the barriers to economic advancement and political and social integration."[56] In the seminal case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court tied the two together, noting that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[57] Public health and gender equality have already been recognized by the Court as government interests that are compelling in general.

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52 Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (citing Braunfeld v. Brown, 366 U.S. 599 (1961), as a case in which such interests were at stake). *Yoder* fronted the existence of this line of cases when the Court explained that *Yoder* was not a case about the "health, safety, and general welfare" of the public. This line of cases speaks to the frequency with which the idea of "compelling interest" comes up in constitutional law. Although a comprehensive exploration of the theme of the compelling interest in constitutional law is beyond the scope of this Note, it is worth noting that compelling interest is a factor in many of the substantive due process cases that the government cites to justify its compelling interest in the contraceptive coverage mandate. *See* discussion *infra* Parts II.B.2 & III.B.2.

53 Jacobson v. Mass., 197 U.S. 11, 26 (1905) (emphasis added) (finding a compelling government interest in mandatory vaccination because it was necessary for the public good).

54 *Yoder*, 406 U.S. at 215–16.

55 *See Jacobson*, 197 U.S. at 13, 26, 30 (finding a compelling government interest in mandatory vaccination because it was necessary for the public good); *see also* Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 498 (10th Cir. 1998) ("[P]ublic health is a compelling government interest.").

56 Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) (holding that requiring the U.S. Jaycees to accept female members did not violate the male members' right to freedom of association).

57 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (sustaining *Roe v. Wade*, 410 U.S. 113 (1973), as well as some restraints on abortion). This was a substantive due process, not a religious freedom, case.

Courts have also found that the government has a compelling interest in enforcing general laws that have the effect of protecting the interests of employees. For example, in *United States v. Lee*, the Supreme Court found that the government has a compelling interest in uniform application of national statutory schemes that impose fiscal burdens on employers for the benefit of their employees, regardless of the employer's religious beliefs.[58]

The Court also found that, even though the system allowed an exception, an exception for Lee as an employer would be different because of its effect on Lee's employees. 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.*[59]

Courts have consistently upheld as compelling the governmental interest in preventing discrimination against employees based on religious belief, even when the substantial burden affects an individual's ability to engage in commercial activity.[60] As the Minnesota Supreme Court explained, "when appellants entered into the economic arena . . . , they . . . subjected themselves to the standards the legislature has prescribed . . . for the benefit of prospective and existing employees [and] of the citizens of the state as a whole in an

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58 United States v. Lee, 455 U.S. 252, 254–55 (1982) (finding a compelling interest in requiring Lee to pay social security for his employees even though he, as an Older Order Amish, was religiously opposed to social security and even though Lee's employees were also Amish). When Lee brought suit alleging that social security violated his religious beliefs, the Court first found that there was a substantial burden on Lee's exercise of religion by his being forced to pay employer's social security. *Id.* at 257. The court then found that the government had a compelling interest in mandatory and continuous participation in the social security system, and that it would be difficult to accommodate religious exemptions. *See id.* at 258–60.

59 *Id.* at 261 (emphasis added).

60 *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620–21 (9th Cir. 1988) (finding that the state had a compelling interest in eradicating employment discrimination on the basis of religion and holding that, while the for-profit corporate owners could continue to hold religious services, objecting employees were required to be allowed to excuse themselves); Newman v. Piggie Park Enters., 256 F. Supp. 941, 945 (D.S.C. 1966) (holding that the government could impose the Civil Rights Act's requirement not to discriminate on the basis of race on an individual against his religious beliefs because the individual "does not have the absolute right to exercise and practice such beliefs in utter disregard for the clear . . . rights of other citizens").

effort to eliminate pernicious discrimination."[61] These courts found that the government maintains a compelling interest in enforcing general laws to protect employees against employers in commercial settings regardless of an employer's religious exercise claims.

c. Least Restrictive Means

The least restrictive means inquiry is the last of the RFRA inquiries and the one for which there is the least Supreme Court guidance. The least restrictive means inquiry seems to depend on the continued efficacy of the statutory scheme and on the persuasiveness of the evidence produced at trial. In *Sherbert*, the Court never uses the language of "least restrictive means" but differentiates its holding from the holding in *Braunfeld v. Brown* by noting that the *Braunfeld* Court rejected exemptions that "appeared to present an administrative problem of such magnitude . . . that such a requirement would have rendered the entire statutory scheme unworkable."[62] In *Yoder*, the Court again did not mention least restrictive means but noted that it was required to examine "the impediment to [the government's] objectives that would flow from recognizing the claimed . . . exemption."[63] The Court discussed extensively the evidence produced at trial regarding the ability of the statute to achieve the government's objectives.[64] These cases suggest that the least restrictive means test is a highly fact-based inquiry related to the continued efficacy and ability of the statute to achieve the government's objectives were the requested exemption to be granted.

The circuit courts' definitions of the least restrictive means inquiry further emphasize the need to focus on the government's objectives and to review the evidence presented carefully. Both the First Circuit and the Eighth Circuit parallel the Court in *Yoder*'s

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61 Minnesota *ex rel* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) (holding that an employer could not escape anti-discrimination laws when he hired only individuals who conformed to his religious beliefs); *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (noting that a landlord could not discriminate against unmarried couples on the basis of religion because "voluntary commercial activity does not receive the same status accorded to directly religious activity").

62 Sherbert v. Verner, 374 U.S. 398, 408–09 (1963) (referencing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

63 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

64 *See id.* at 222–29 (reviewing expert testimony, evaluating the success and self-sufficiency of the Amish as a social unit, and discussing the history and goals of compulsory education and child labor laws to determine whether the Amish system of education serves the overarching state goals behind the laws).

focus on the ability of the government to achieve its objectives.[65] The Tenth Circuit has further clarified the inquiry by noting that the government is "not required to refute every conceivable" alternative; instead, the court will review all of the evidence to make certain that "none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests."[66] Lastly, the Fourth Circuit has spoken on the role of exemptions in the least restrictive means inquiry, stating that when "there is no principled way of exempting the [employer] without exempting all other [similarly situated employers]," then any exemption will likely undermine Congress's goals.[67] It is reasonable to conclude that a court applying the least restrictive means inquiry will look at the statutory objectives, the proposed alternatives, and the evidence offered in order to determine whether granting the exemption would negate the government's ability to achieve its goals.

2. The New Free Exercise Clause Jurisprudence

The second post-*Smith* development is the case law analyzing its requirement that a law be both neutral and generally applicable in order to survive scrutiny under the Free Exercise Clause.

a. Neutral

A law is not neutral if it discriminates against religion on its face or if the object of the law is to target or prohibit religious practices.[68] There are very few, if any, laws today that

65 *See* New Life Baptist Church Acad. v. Town of East Longmeadow, 855 F.2d 940, 947 (1st Cir. 1989) (asking "[t]o what extent does [the exemption/exception] threaten potential administrative difficulties, including those costs and complexities which (when combined with the precedential effect of a rule of law that would give similar rights . . . to others with different beliefs) may significantly interfere with the state's ability to achieve its [statutory] objectives?" (parentheses in original) and holding that the Free Exercise Clause did not preclude a town committee from enforcing state law on a religious school); Murphy v. Arkansas, 852 F.2d 1039, 1042 (8th Cir. 1988) (defining the test as "the least restrictive system possible to assure [the government's] goal," and holding that the Arkansas Home School Act did not violate parent's right to free exercise of religion).

66 United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011) (discussing the least restrictive means inquiry as applied by the Tenth Circuit and holding that the Bald and Golden Eagle Protection Act did not violate RFRA).

67 *See* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that that the federal government's interest in making minimum wages and equal pay a reality under the Fair Labor Standards Act outweighed a religious school's interest in supplying a "head of household" supplement to men only).

68 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993) (defining Free Exercise Clause neutrality).

discriminate against religion on their face; the inquiry will most often focus on the purpose of the law in question. This is similar to the Court's Equal Protection jurisprudence, and the Court has noted that, as in Equal Protection cases, a court may look to both direct and circumstantial evidence in determining whether a law's object is neutral.[69] This is a highly fact-based inquiry which relies in part on legislative history regarding why the law was adopted, as well as looking at secular practices to which the law could have but did not apply.[70] In addition, "the effect of a law in its real operation is strong evidence of its object" and will be scrutinized by a court.[71]

In one of the Court's recent free exercise cases, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court found that three ordinances were not neutral because their purpose was to suppress Santeria.[72] Although none of the ordinances addressed Santeria on their face, the Court looked at the legislative history and found that the city council had expressly said that the ordinances would address Santeria.[73] The Court also noted that the three ordinances, working in tandem, had a practical effect limited to practitioners of Santeria.[74] Finally, the Court deemed it significant that the ordinances targeted more activity than was necessary to achieve their stated goals of protecting public safety and preventing animal cruelty, which suggested a religious targeting motivation.[75] The Court found the circumstantial evidence sufficient to support a finding of religious targeting and held that the statutes were not neutral.[76]

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69 *See id.* at 540 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977), for the Equal Protection standard).

70 *See, e.g., id.* at 534–38 (looking at legislative history and practical effect to judge laws' neutrality).

71 *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535.

72 *See id.* at 534. The three ordinances prohibited the sacrifice of animals by non-licensed individuals within the city limits and limited animal slaughter to the area zoned for slaughterhouses. *See id.* at 527–28.

73 *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534–35.

74 *See id.* at 535–38 (noting that the prohibition on the ritual slaughter of animals did not apply to kosher slaughter, that the ordinance prohibiting possessing or slaughtering animals for food did not apply to licensed food establishments, and that the prohibition on the unnecessary killing of animals only applied to religious killings as only religious killings were deemed "unnecessary").

75 *See id.* at 538 (noting that if the true purposes were to protect the public health and to prevent cruelty to animals, then restrictions that fell short of those imposed would suffice).

76 *See id.* at 542 (holding that the ordinances failed the Free Exercise Clause neutrality inquiry).

The neutrality inquiry asks whether a law impermissibly targets religion. It is a fact-driven inquiry based on the text of the law and the circumstantial evidence surrounding the law's adoption and application. A law that is not neutral will be declared an unconstitutional restraint of the free exercise of religion.

b. Generally Applicable

The second part of the new Free Exercise test is the generally applicable inquiry. This inquiry focuses on whom the law burdens and whether that burden is placed only or disproportionately on religious conduct.[77] Refinement of the standard has been left to the circuit courts.[78] Those courts have generally focused on the use of exemptions and the point at which those exemptions transform a law from generally applicable to "a system of individualized exemptions."[79] The mere existence of exemptions, however, does not negate a statute's general applicability.[80]

Exemptions that pose problems are exemptions that stem from a routine individualized government assessment.[81] Such assessments engage the government in considerations of particular facts and circumstances, which render the law no longer generally applicable.[82] Then-Judge Alito, writing for the Third Circuit, said that if any individualized exceptions

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77 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993) (referencing the generally applicable inquiry).

78 *See id.* at 543 ("[W]e need not define with precision the standard used to evaluate whether a prohibition is of general application for these ordinances fall well below the minimum standard.").

79 *See, e.g.*, Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012) (holding that because University policies allowed for secular exemptions to the requirement that counseling students counsel anyone who asked for help, the university could not deny religious exemptions).

80 *See, e.g.*, Storman's Inc. v. Selecky, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (holding that narrow and not discriminatory exemptions do not negate general applicability of a requirement that pharmacists deliver FDA approved medications like Plan B because the exemptions were not under inclusive and did not render the requirement inapplicable except to those who objected for religious reasons); Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) (holding that exemptions in the Controlled Substances Act for some uses of sacramental narcotics did not mean that statute was not generally applicable).

81 *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 650–55 (10th Cir. 2006) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)) (holding that the municipality's zoning law was not unconstitutional because the prohibition on day cares was imposed on all institutions in the zone, not just on religious institutions).

82 *See id.* (citing *Smith*, 494 U.S. at 884) (noting that some assessments violate the general applicability requirement while others do not).

are provided, religious exemptions must also be provided or else the government has impermissibly decided "that secular motivations are more important than religious" ones.[83] Alito further noted that categorical exemptions for secular but not religious objections would be even more suspect.[84] The rule for exemptions seems to be that as long as they do not allow for individualized assessment and do not render the statute only applicable to religious adherents, the law is generally applicable.

The Supreme Court has yet to face the question of whether religious exemptions render a law not generally applicable. The two highest state courts to have considered this question have both found that religious accommodations do not render laws less than generally applicable.[85] The New York Court of Appeals noted that "[t]o hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."[86] If these precedents are indicative, then the existence of religious accommodations should not negate a statute's general applicability.[87]

The general applicability inquiry focuses on the existence and extent of exemptions to a law to determine whether it impermissibly targets or disproportionately effects religious adherents. Barring a finding of either, and barring a Supreme Court decision that accommodations of religions violate general applicability, a law will pass the general applicability inquiry. A law that is both neutral and generally applicable will be upheld under the Free Exercise Clause.

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83 Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (holding that requiring Muslim officers to shave beards when medical exemptions were provided violated Free Exercise Clause). This is still good law in the Third Circuit.

84 *See id.* (citing Church of Lukumi Babalu Aye, Inc.v. City of Hialeah, 508 U.S. 520, 542 (1993)).

85 *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 32 Cal. 4th 527, 545 (2004) (holding that California's contraceptive coverage mandate did not violate free exercise); Catholic Charities of the Diocese of Albany v. Serio, 825 N.Y.S.2d 653, 658 (2006) (holding that New York's contraceptive coverage mandate did not violate free exercise).

86 *Catholic Charities of Diocese of Albany*, 825 N.Y.S.2d at 658 (citing *Catholic Charities of Sacramento, Inc.*, 32 Cal. 4th at 551).

87 *See also* Liberty Univ. v. Geithner, 753 F. Supp. 2d 611, 642 (W.D. Va. 2010) (holding that the ACA is neutral and generally applicable because the accommodation allows for recognition of certain religious interests and the fact that the University falls outside the accommodation does not make the ACA discriminatory), *vacated on other grounds*, 761 F.3d 391 (4th Cir. 2011), *vacated on reh'g*, 133 S.Ct. 679 (2012).

B. The Patient Protection and Affordable Care Act and the Women's Health Amendment

The Patient Protection and Affordable Care Act[88] was signed into law on March 23, 2010,[89] with the aim of increasing the number of Americans covered by health insurance and decreasing the cost of health care for all Americans.[90] The ACA contains ten titles with hundreds of provisions that fill over 900 pages.[91] Of those provisions, two of the most contentious—the individual mandate and the expansion of Medicaid—were addressed by the Supreme Court in last year's landmark case, *National Federation of Independent Business v. Sebelius*.[92] Those two provisions are not, however, the only contentious parts of the ACA; another is the contraceptive coverage mandate of the WHA.

The WHA requires that all insurance plans include coverage without cost sharing for preventative care and screenings for women.[93] The scope of this requirement is determined by guidelines created by the Health Resources and Services Administration (HRSA).[94] The HRSA guidelines, issued on August 1, 2011, require coverage without cost-sharing for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization

88 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.).

89 *See* Barack Obama, Remarks on Signing the Patient Protection and Affordable Care Act (Mar. 23, 2010) (transcript available at http://www.gpo.gov/fdsys/pkg/DCPD-201000196/pdf/DCPD-201000196.pdf) (stating some of the benefits and goals of the ACA).

90 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (noting the justifications for passing the ACA and holding the ACA's requirement that individuals buy healthcare was constitutional under the taxing power).

91 *See id.* (describing the ACA).

92 132 S. Ct. at 2600, 2608 (holding the individual mandate constitutional under the taxing power and holding the Medicaid expansion unconstitutional but severable from the rest of the ACA).

93 *See* 42 U.S.C. § 300gg–13(a)(4) (2010). The WHA states that:

> (a) A group health plan and a health insurance issuer offering group and individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

94 *See id.*

procedures, and patient education and counseling for all women with reproductive capacity."[95] This requirement was based on recommendations from the Institute of Medicine, which did a comprehensive study of the effect of women's preventative services on women's and children's health.[96] This requirement has come to be known as the contraceptive coverage mandate.

Though the HRSA guidelines define what is required to be provided under the WHA, three departments—the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services ("the Departments")—were put in charge of implementing the WHA though issuing regulations.[97] The Departments published their initial interim final rule on July 19, 2010,[98] and published an amended interim final rule with request for comment on August 3, 2011.[99] The amended rules were adopted without change on February 15, 2012.[100]

In the amended interim rule, the Departments included HRSA's proposed religious exemption to the contraceptive coverage mandate for notice and comment.[101] HRSA's

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95 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (brackets in original) (announcing the HRSA guidelines).

96 *See* COMM. ON PREVENTIVE SERVS. FOR WOMEN, BD. ON POPULATION HEALTH & PUB. HEALTH PRACTICE, INST. OF MED. OF THE NAT'L ACADS., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011) [hereinafter "IOM STUDY"] (providing the evidence on which the requirement was based); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8726 (recognizing that the mandate's requirements are based on recommendations from the IOM STUDY).

97 *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,728 (proposed July 19, 2010) (to be codified at 45 C.F.R. pt. 147) (noting that the Departments were charged with implementing the WHA).

98 Interim Final Rules for Group Health Plans and Health Insurance Issuers, 75 Fed. Reg. at 41,726.

99 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147) (requesting comment on proposed rules).

100 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8725 (announcing the adoption of the amended interim rules without change).

101 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (proposed Aug. 3, 2011) (to be codified

proposed exemption was limited to religious employers who met four criteria.[102] These criteria require that a "religious employer" be limited to an employer that: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization [under the federal tax code]."[103] The amended interim rule noted that this exemption was limited under the tax code to applying to houses of worship and their auxiliaries or associations.[104] It also highlighted that this exemption was based on existing exceptions used by most states that had state laws mandating contraceptive coverage.[105]

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at 45 C.F.R. pt. 147). The amendment that occurred between the July 19, 2010 rule and the August 3, 2011 rule allowed HRSA the discretion to exempt certain religious employers from the contraceptive requirements of HRSA's guidelines. *See id.* at 46,623. This is not too surprising considering that, of the twenty-eight states that had previously required contraceptive coverage to be provided by health insurers, all but eight had some type of exemption, although the exemptions varied in scope. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1490 (2012) (citing GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF OCTOBER 1, 2012: INSURANCE COVERAGE OF CONTRACEPTIVES 2 (2012), *available at* www.guttmacher.org/statecenter/spibs/spib_ICC.pdf); *see also* Daniel J. Rudary, Note, *Drafting a "Sensible" Conscience Clause: A Proposal for Meaningful Conscience Protections For Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives*, 23 HEALTH MATRIX 353, 388–89 (2013) (noting that ten states used language broader than that used by the federal government and some of those "d[id] not even attempt to define 'religious employer' and accept[ed] any bona fide religious objection as grounds for exemption" from state contraceptive coverage requirements). During the notice and comment period, HRSA received many comments regarding the inclusion of a religious exemption from the contraceptive coverage requirement. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8726. Some commenters were proponents of a religious exemption while most others, including some religious organizations, recommended that the HRSA guidelines be binding on all insurance plans with no religious exemption. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623. The Departments amended the interim final rules to give HRSA the discretion to establish a religious exemption. *See id.*

102 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623 (defining a "religious employer" for the purposes of the contraceptive coverage mandate).

103 *Id.*

104 *See id.* (explaining the "religious employer" definition's relationship to the federal tax code).

105 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623. *See generally* Wilson, *supra* note 101, at 1490 (noting that, of the twenty-eight states that had previously required contraceptive coverage to be provided by health insurers, all but eight had some type of exemption for religious objectors although the exemptions varied in scope).

The Departments solicited comments on this exemption, receiving over 200,000 comments, before adopting it without any changes.[106] In adopting the final rule, the Departments stressed the benefits that would come from the contraceptive coverage mandate. The Departments focused on Congress's recognition of the unique healthcare needs and burdens of women, including contraceptive coverage.[107] The final rule highlights the health benefits of contraceptives beyond pregnancy prevention, as well as the risks to women and their offspring from unplanned pregnancies.[108] It also mentions the cost saving benefits to employers of contraceptive coverage, as well as noting that "[r]esearchers have shown that access to contraceptives improves the social and economic status of women."[109]

The rule focuses in particular on the effect of employer exceptions on the employees, and argues that the requirement that religious employers primarily employ persons who share the employer's faith adequately addresses this issue.[110] A non-profit employer who employs persons of the same faith is more likely to share beliefs about contraception with those employees than will a for-profit employer who cannot consider faith in employment decisions.[111] As the rule explains:

> A broader exemption, as urged by some commenters, would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits described above. Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. *Including these employers within the scope of the*

106 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8726–27 (describing the rule's history and process).

107 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8727 (justifying the final rule).

108 *See id.* (citing IOM STUDY, *supra* note 96, at 107).

109 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8728 (citations omitted).

110 *See id.* (explaining the rationale for the definition of "religious employer").

111 An employer may not discriminate on the basis of religion under Title VII, 42 U.S.C. § 2000(e) to § 2000(e)–2 (2010). There is, however, an exemption for "religious entities." *See* 42 U.S.C. § 2000(e)–1(a) (2010).

> *exemption would subject their employees to the religious views of the employer*, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.[112]

The attention given to the effect of an exemption on employees who do not share their employer's religion suggests that the government has an interest in maintaining the protections for employees in the contraceptive coverage mandate going forward.

The Departments created a "temporary enforcement safe harbor" in the final rule to address religious employers' concerns.[113] The safe harbor gave the Departments time to reassess the final regulations' religious employer exemption in light of two goals: "[(1)] providing contraceptive coverage without cost-sharing to individuals who want it and [(2)] accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services."[114] To this end, the Departments issued an advanced notice of proposed rulemaking ("ANPRM") on March 21, 2012.[115] The ANPRM requested comment on an accommodation for "non-exempt, non-profit" religious organizations, although the Departments also sought comment on whether "for-profit employers with [religious] objections should be considered as well."[116] After receiving nearly 200,000 comments,[117] the Departments released a notice of proposed rulemaking on February 6, 2013, and the final rule was adopted without change on July 2, 2013. The rule amends the religious employer exemption to include religious institutions of higher education and eliminates the

112 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8728 (emphasis added) (explaining the "religious employer" definition).

113 *See id.* at 8727–28 (describing the temporary enforcement safe harbor under the rule).

114 *Id.* at 8727. This is not a case by case assessment, but a further assessment of the exemption adopted in the regulations.

115 Certain Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 16501 (proposed Mar. 21, 2012).

116 *See id.* at 16503–04 (describing the parameters of the proposed rulemaking). At least one scholar has criticized the proposed rule for creating a two-tiered system of religious employers in which one tier is granted an exemption from the mandate and the other an accommodation for their beliefs. *See* Stanley W. Carson-Thies, *Which Religious Organizations Count as Religious? The Religious Employer Exemption of the Health Insurance Law's Contraceptives Mandate*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 58, 62 (2012). Carson-Thies argues that this creates some uncertainty as to whether the accommodation under the ANPRM will always be honored. *Id.*

117 *See* Brief Statement Regarding Status of Rulemaking Process at *2, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061) (describing the ongoing rulemaking process).

first three requirements of the original exception while redefining the fourth requirement as encompassing only an employer which is "organized and operates as a nonprofit entity" and which "holds itself out as a religious organization."[118] The Departments stated that this rule will not change which plans are covered by the exemption, but is meant only to eliminate confusion about whether the exemption covers religious organizations that provide beneficial services to persons without discriminating on the basis of religion.[119] The application of the contraceptive coverage mandate to for-profit corporations remains unchanged.[120]

II. Current Litigation

Thirty-eight for-profit corporations are challenging the contraceptive coverage mandate.[121] This Part will describe the common analytic moves made by the district and

118 Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874 (July 2, 2013) (to be codified at 45 C.F.R. §147.131) (noting that the rulemaking would amend the religious employer exemption "to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths"); *see also* John K. DiMugno, *The Affordable Care Act's Contraceptive Coverage Mandate*, 25 No. 1 CAL. INS. L. & REG. REP. 1 (Feb. 2013) (noting that the new definition of religious employers is limited to the Internal Revenue Service's definition of non-profit houses of worship and religious orders).

119 *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39874 (explaining that the number of covered plans will not change and the aim of relaxing the requirements was to cover religious organizations that provide benevolent services to their communities irrespective of the beliefs of the recipients).

120 *See id.* at 39874 ("[T]he Departments do not propose that the definition of eligible organizations extend to for-profit secular employers.").

121 The thirty-eight cases differ slightly in the named defendant, but the difference in name is merely a difference in form and not a difference in kind.

Twenty-seven of the cases present Kathleen Sebelius as the named defendant, but all are suing Ms. Sebelius in her official capacity as the Secretary of the United States Department of Health and Human Services. *See* Barron Indus. Inc. v. Sebelius, No. 1:13-cv-01330-KBJ, slip op. at 1–2 (D.D.C. Sept. 25, 2013) (granting unopposed preliminary injunction and unopposed stay pending the D.C. Circuit's decision in Gilardi v. U.S. Dep't of Health and Human Servs. (*Gilardi II*), No. 13-5069 (D.C. Cir. Mar. 29, 2013)); The QC Group, Inc. v. Sebelius, No. 1:13-cv-01726, slip op. at 2–3 (D. Minn. Sept. 11, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in Annex Med., Inc. v. Sebelius (*Annex Med II*), No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013), or O'Brien v. U.S. Dep't of Health and Human Servs. (*O'Brien II*), No. 12-3357 (8th Cir. Nov. 28, 2012)); Midwest Fastener Corp. v. Sebelius, No. 1:13-cv-01337-ESH (D.D.C. filed Sept. 5, 2013) (no decision); Willis & Willis PLC v. Sebelius, No. 1:13-cv-01124, slip op. at 1 (D.D.C. Aug. 23, 2013) (granting unopposed preliminary injunction and unopposed stay pending the D.C. Circuit's decision in *Gilardi II*, No. 13-5069 (D.C. Cir. Mar. 29, 2013)); Bindon v. Sebelius, No.

1:13-cv-01207-EGS, slip op. at 1 (D.D.C. Aug. 14, 2013) (granting unopposed preliminary injunction and unopposed stay pending the D.C. Circuit's decision in *Gilardi II*, No. 13-5069 (D.C. Cir. Mar. 29, 2013)); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *1 (E.D. Mich. July 11, 2013) (denying preliminary injunction); SMA, LLC v. Sebelius, No. 13-CV-1375, slip op. at 1–3 (D. Minn. July 8, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *19 (M.D. Fla. June 25, 2013) (granting preliminary injunction); Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH, slip op. at 1 (D.D.C. May 24, 2013) (granting unopposed preliminary injunction); M&N Plastics, Inc. v. Sebelius, No. 1:13-cv-00819 (E.D. Mich. filed May 8, 2013) (no decision); Hall v. Sebelius, No. 0:13-cv-00295-JRT-LIB, slip op. at 2–3 (D. Minn. Apr. 2, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Bick Holdings, Inc. v. Sebelius, No. 4:13-cv-0000462-AGF, slip op. at 1 (E.D. Mo. Apr. 1, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Eden Foods, Inc. v. Sebelius (*Eden Foods II*), No. 13-11229, slip op. at 10 (E.D. Mich. May 21, 2013) (denying preliminary injunction based on Autocam Corp. v. Sebelius (*Autocam II*), No. 12-2673 (6th Cir. Dec. 28, 2012), and Justice Sotomayor's opinion in Hobby Lobby Stores Inc. v. Sebelius (*Hobby Lobby III*), 113 S. Ct. 641, 643 (Dec. 26, 2012)), *aff'd*, Eden Foods Inc. v. Sebelius (*Eden Foods III*), 13-1677, slip op. at 3 (6th Cir. June 28, 2013) (denying preliminary injunction pending appeal); Tonn & Blank Constr., LLC v. Sebelius, No. 1:12-cv-00325-JD-RBC, slip op. at 2 (N.D. Ind. Apr. 1, 2013) (granting unopposed preliminary injunction to be enforced until thirty days after the Seventh Circuit issues a decision in Grote v. Sebelius (*Grote II*), 708 F.3d 850 (7th Cir. 2013), and Korte v. Sebelius (*Korte II*), No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012)); Geneva College v. Sebelius (*Geneva College I*), No. 2:12-cv-00207, 2013 WL 838238, at *38 (W.D. Pa. Mar. 6, 2013) (denying motion to dismiss the RFRA and free exercise claims of the for-profit plaintiff, the Seneca Hardwood Lumber Company), *preliminary injunction granted by* Geneva College v. Sebelius (*Geneva College II*) 2013 WL 1703871, at *13 (W.D. Pa. Apr. 19, 2013) (granting preliminary injunction); Courtroom Minutes at 2, Armstrong v. Sebelius, No. 1:13-cv-00563-RBJ (D. Colo. May 10, 2013) (denying preliminary injunction), *preliminary injunction granted by* Armstrong v. Sebelius, No. 13-1218, 2013 WL 4757949, at *1 (10th Cir. Sept. 5, 2013) (granting preliminary injunction and remanding to the district court in light of Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby IV*), 723 F.3d 1114 (10th Cir. 2013)); Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *1 (D. Colo. Feb. 27, 2013) (denying motion for temporary restraining order), *amended by* Briscoe v. Sebelius, 2013 WL 4781711, at *4 (D. Colo. Sept. 6, 2013) (granting preliminary injunction based on the Tenth Circuit's decision in *Hobby Lobby IV*, 723 F.3d 1114); Sioux Chief Mfg. v. Sebelius, No. 4:13-cv-0036, slip op. at 1 (W.D. Mo. Feb. 28, 2013) (granting unopposed preliminary injunction and stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Conestoga Wood Specialties Corp. v. Sebelius (*Conestoga I*), 917 F. Supp. 2d 394, 419 (E.D. Pa. 2013) (denying preliminary injunction), *injunction pending appeal denied*, Conestoga Wood Specialties Corp. v. Sebelius (*Conestoga II*), No. 13-1144, 2013 WL 1277419, at *3 (3d Cir. Feb. 8, 2013), *denial of preliminary injunction aff'd by* Conestoga Wood Specialties Corp. v. Sebelius (*Conestoga III*), 724 F.3d 377, 389 (3d Cir. 2013) (denying preliminary injunction), *petition for cert. filed*, Conestoga Wood Specialties Corp. v. Sebelius (*Conestoga IV*), No. 13-356 (U.S. Sept. 19, 2013); Infrastructure Alts., Inc. v. Sebelius, No. 1:13–cv-00031-RJJ (W.D. Mich. filed Jan. 10, 2013) (no decision); Annex Med., Inc. v. Sebelius (*Annex Med I*), No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013) (denying preliminary injunction), *injunction pending appeal granted*, Annex Med., Inc. v. Sebelius (*Annex Med II*), No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013); Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026, at *13 (E.D. Mich. Mar. 14, 2013)

(granting preliminary injunction); Grote Indus. LLC v. Sebelius (*Grote I*), 914 F. Supp 2d 943, 957 (S.D. Ind. 2012) (denying preliminary injunction), *injunction pending appeal granted sub nom.* Grote v. Sebelius (*Grote II*), 708 F.3d 850, 852 (7th Cir. 2013); Autocam Corp. v. Sebelius (*Autocam I*), No. 1:12-CV-1096, 2012 WL 6845677, at *12 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *injunction pending appeal denied*, Autocam Corp. v. Sebelius (*Autocam II*), No. 12-2673, slip op. at 3 (6th Cir. Dec. 28, 2012), *aff'g denial of preliminary injunction*, Autocam Corp. v. Sebelius (*Autocam III*), No. 12-2673, 2013 WL 5182544, at *9 (6th Cir. Sept. 17, 2013) (affirming district court's denial of preliminary injunction); Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby I*), 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (denying preliminary injunction), *injunction pending appeal denied*, Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby II*), No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *injunction pending appeal denied by Circuit Justice*, Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby III*), 133 S. Ct. at 643, *rev'd and remanded*, Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby IV*), 723 F.3d 1114, 1147 (10th Cir. 2013) (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, Hobby Lobby Stores, Inc. v. Sebelius (*Hobby Lobby V*), No. CIV-12-1000-HE, 2013 WL 3869832, at *1–2 (W.D. Okla. July 19, 2013) (granting preliminary injunction), *petition for cert. filed*, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. Sept. 19, 2013); Legatus v. Sebelius, 901 F. Supp. 2d 980, 984 (E.D. Mich. 2012) (granting preliminary injunction), *appeal docketed*, Legatus v. Sebelius, No. 13-1092 (6th Cir. filed Jan. 24, 2013); Newland v. Sebelius (*Newland I*), 881 F. Supp. 2d 1287, 1290 (D. Colo. 2012) (granting preliminary injunction), *aff'd* Newland v. Sebelius (*Newland II*), No. 12-1380, 2013 WL 5481997, at *2–3 (10th Cir. Oct. 3, 2013) (affirming district court's grant of preliminary injunction in light of *Hobby Lobby IV*, 723 F.3d 1114).

The other eleven cases name the United States Department of Health and Human Services as the first defendant, without naming Ms. Sebelius as a defendant in her official capacity. *See* MK Chambers Co. v. U.S. Dep't of Health and Human Servs., No. 13-11379, 2103 WL 5182435, at *8 (E.D. Mich. Sept. 13, 2013) (denying preliminary injunction); Ozinga v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-3292-TMD, slip op. at 1 (N.D. Ill. July 16, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit issues its mandate in *Grote II*, 708 F.3d 850, and *Korte II*, 2012 WL 6757353); Holland v. U.S. Dep't of Health and Human Servs., 2:13-cv-11111 (S.D. W. Va. filed June 24, 2013) (no decision); Hartenbower v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-02253, slip op. at 2 (N.D. Ill. Apr. 18, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit issues its mandate in *Grote II*, 708 F.3d 850, and *Korte II*, 2012 WL 6757353); Lindsay v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-01210, slip op. at 1 (N.D. Ill. Mar. 20, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit's decision in *Grote II*, 708 F.3d 850, and *Korte II*, 2012 WL 6757353); Gilardi v. U.S. Dep't of Health and Human Servs. (*Gilardi I*), 926 F. Supp. 2d 273, 274 (D.D.C. 2013) (denying preliminary injunction), *injunction pending appeal granted*, Gilardi v. U.S. Dep't of Health and Human Servs. (*Gilardi II*), No. 13-5069, slip op. at 1 (D.C. Cir. Mar. 29, 2013) (per curiam) (granting preliminary injunction pending appeal); Triune Health Grp., Inc. v. U.S. Dep't of Health and Human Servs., No. 12-cv-06756, slip op. at 2 (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction), *appeal docketed*, Triune Health Grp., Inc. v. Sebelius, No. 13-1478 (7th Cir. filed Mar. 5, 2013) (no decision); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *1 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *1 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction), *appeal docketed*, Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 13-1395 (8th Cir. filed Feb. 25, 2013) (no decision); Korte v. U.S. Dep't of Health and Human Servs. (*Korte I*), 912 F. Supp. 2d 735, 749 (S.D. Ill. 2012) (denying preliminary injunction), *injunction pending appeal granted sub nom.* Korte v. Sebelius (*Korte II*), No. 12-3841, 2012 WL

6757353, at *1 (7th Cir. Dec. 28, 2012); O'Brien v. U.S. Dep't of Health and Human Servs. (*O'Brien I*), 894 F. Supp. 2d 1149, 1169 (E.D. Mo. 2012) (denying preliminary injunction), *injunction pending appeal granted*, *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012).

Of the thirty-four cases in which there has been a district court decision, there is one other distinction: all of the district court decisions were on a motion for a preliminary injunction, except for two motions to dismiss and three motions for a temporary restraining order. *See, e.g.*, *Eden Foods, Inc.* (*Eden Foods I*), No. 13–11229, 2013 WL 1190001, at *5 (Mar. 22, 2013) (denying motion for temporary restraining order); *Geneva College I*, 2013 WL 838238, at *38 (denying motion-to-dismiss claims of the for-profit plaintiff, the Seneca Hardwood Lumber Company); *Briscoe*, 2013 WL 755413, at *1 (denying motion for temporary restraining order); *Sharpe Holdings, Inc.*, 2012 WL 6738489, at *1 (granting temporary restraining order); *O'Brien I*, 894 F. Supp. 2d at 1169 (granting motion to dismiss). Although the standards for each motion are different, this Note will address the courts' decisions only as they apply to the merits of the RFRA and Free Exercise claims.

There are fourteen appeals currently pending in the circuit courts, with the Seventh, Eighth, Tenth, and D.C. Circuits having granted preliminary injunctions in two, two, three, and one case(s) each respectively, the Third and Sixth Circuits having denied preliminary injunctions in one and two cases each respectively. In two of its three decisions, the Tenth Circuit remanded to the district court for further consideration on two remaining preliminary injunction factors. *See Newland II*, No. 12-1380, 2013 WL 5481997, at *2–3 (affirming district court's grant of preliminary injunction in light of *Hobby Lobby IV*, 723 F.3d 1114); *Conestoga III*, 724 F.3d at 389 (denying preliminary injunction), *petition for cert. filed*, *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013); *Autocam III*, No. 12-2673, 2013 WL 5182544, at *9 (6th Cir. Sept. 17, 2013) (affirming district court's denial of preliminary injunction); Armstrong v. Sebelius, No. 13-1218, 2013 WL 4757949, at *1 (10th Cir. Sept. 5, 2013) (granting preliminary injunction and remanding to the district court in light of *Hobby Lobby IV*, 723 F.3d 1114); *Eden Foods III*, No. 13-1677, slip op. at 3 (6th Cir. June 28, 2013) (denying preliminary injunction pending appeal); *Gilardi II*, No. 13-5069, slip op. at 1 (D.C. Cir. Mar. 29, 2013) (per curiam) (granting preliminary injunction pending appeal); Triune Health Grp., Inc. v. Sebelius, No. 13-1478 (7th Cir. filed Mar. 5, 2013) (no decision); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 13-1395 (8th Cir. filed Feb. 25, 2013) (no decision); *Annex Med II*, 2013 WL 1276025, at *3 (granting preliminary injunction pending appeal); *Grote II*, 708 F.3d 850; (granting preliminary injunction pending appeal); Legatus v. Sebelius, No. 13-1093 (6th Cir. filed Jan. 24, 2013) (no decision); *Korte II*, 2012 WL 6757353, at *1 (granting preliminary injunction); *Hobby Lobby II*, 2012 WL 6930302, at *3 (denying preliminary injunction), *application for injunction denied by Circuit Justice*, *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, 2013 WL 3869832, at *1–2 (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting preliminary injunction pending appeal). On December 26, 2012, Justice Sotomayor denied Hobby Lobby's application for an injunction pending appeal. *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, 2013 WL 3869832, at *1–2 (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013). There are currently two petitions for certiorari pending before the Supreme Court on this issue. *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013).

This Note will not address *Tyndale House Publishers, Inc. v. Sebelius* for two reasons. 904 F. Supp. 2d 106 (D.D.C. 2012). The first is that the plaintiff corporation there is a "Christian publishing company" that publishes Bibles; all of the corporate plaintiffs in which this Note is interested engage in businesses that have no religious

circuit courts in judging the plaintiffs' RFRA and the Free Exercise Clause claims, looking first at how the courts have addressed the question of whether corporate plaintiffs have religious rights and then at their resolutions of the RFRA and the Free Exercise claims on the merits.

A. Corporate Plaintiffs and Religious Rights

The first hurdle facing the for-profit corporations that seek to challenge the contraceptive coverage mandate is proving to the court that a corporation has religious rights or exercises religion such that the corporation can bring a claim under RFRA and the Free Exercise Clause. This is a question of first impression.[122] Nine district courts have addressed this issue, as have three circuit courts; the remaining courts have punted the question.[123]

connotations. *See id.* at 111. The second reason is that the plaintiff corporation in *Tyndale House Publishers, Inc.* is 96.5% owned by a non-profit religious foundation; none of the for-profit corporations in which this Note is interested share that ownership structure. *See id.* at 111. The court in *Tyndale House Publishers, Inc.* specifically distinguished that case from *O'Brien* by noting that the corporation *O'Brien* provided insurance through an insurance company whereas *Tyndale House Publishers, Inc.* self-insured; the court found this made the burden on the *Tyndale* plaintiffs more direct. *Id.* at 123-24. Other courts, however, have not drawn this line. *Compare Gilardi I*, 296 F. Supp. at 283 (finding that the self-insurance mechanism does not compel a different result than the court's decision to deny a preliminary injunction); *Grote I*, 914 F. Supp. 2d at 952 (noting that self-insurance should not change the court's analysis in these cases); *Hobby Lobby I*, 870 F. Supp. 2d at 1285 (noting that the *Hobby Lobby* plaintiff's insurance plan is self-insured but nonetheless finding that the mandate did not violate plaintiff's RFRA or Free Exercise rights) *with Legatus*, 901 F. Supp. 2d 980, 987 (citing Complaint at 8, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061), noting that plaintiff used a third party insurance company, and still finding that the mandate does violate plaintiff's RFRA rights). This Note will not distinguish between for-profit corporations that self-insure and those that buy third-party health insurance because no other court has distinguished on those grounds.

122 *See, e.g.*, *Newland I*, 881 F. Supp. 2d at 1296 (noting that this case "pose[s] difficult questions of first impression").

123 *Compare Conestoga III*, 724 F.3d at 382–88 (addressing the threshold question of "whether Conestoga, a for-profit, secular corporation, can exercise religion" and concluding that it cannot under either the Free Exercise Clause or RFRA); *Eden Foods III*, 13-1677, slip op. at 2 (stating that it is "not persuaded, at this stage of the proceeding, that a for-profit corporation has rights under RFRA"); *Hobby Lobby IV*, 723 F.3d at 1128–32 (en banc) (finding that corporations are "persons" within the meaning of RFRA); *Korte II*, 2012 WL 6757353, at *3 (finding that the plaintiff owners' rights are sufficient to support a RFRA claim because the corporate form is not dispositive); *MK Chambers*, 2013 WL 5182435, at *4-6 (noting that courts have held that the mandate applies only to the corporate entity and that any burden on the corporate owners is too attenuated to be substantial under both RFRA and the Free Exercise Clause); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *10–12 (E.D. Mich. July 11, 2013) (discussing the issue of standing for both the corporation and corporate owners and finding that the corporation is not a religious organization, cannot exercise religion, and is unlikely to succeed on its RFRA claim); *Beckwith Elec. Co.*, 2013 WL 3297498, at *6–13 (finding that corporations can exercise religion within the meaning of the First

The question of whether a corporation has rights under the RFRA statute is separate but connected to the question of whether a corporation has rights under the Free Exercise Clause.[124] For the constitutional question, many of the courts analyzed the history and purpose of the constitutional right, determining that if the guarantee was "purely personal" then it could not run to a corporate entity, and vice versa.[125] The courts found that religious

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Amendment and RFRA); *Gilardi I*, 926 F. Supp. 2d at 278–279 (citing *Conestoga I*, 917 F. Supp. 2d at 406–409, 411 and *Autocam I*, 2012 WL 6845677, at *7, before finding that the RFRA claims of the corporation and of its owners must be evaluated separately and further that the corporation does not exercise religion under RFRA); *Briscoe*, 2013 WL 755413, at *4–5, *7 (following the court in *Hobby Lobby I*, 870 F. Supp. 2d at 1288, 1291, and holding that for-profit corporations do not exercise religion under RFRA or the Free Exercise Clause); *Conestoga I*, 917 F. Supp. 2d at 406–09, 411 (finding that for-profit, secular corporations cannot state a claim under either the Free Exercise Clause or RFRA); *Autocam I*, 2012 WL 6845677, at *4 (addressing without resolving the question); *Korte I*, 912 F. Supp. 2d at 743 (incorporating by reference the court's analysis from *Hobby Lobby I*, 870 F. Supp. 2d at 1287-88); *Hobby Lobby I*, 870 F. Supp. 2d at 1287–88, 1290–92 (addressing the question of whether corporations have religious rights under the Free Exercise Clause and under RFRA) *with Eden Foods II*, No. 13-11229, slip op. at 7 (E.D. Mich. May 21, 2013) (applying substantial burden test without addressing standing); *Monaghan*, 2013 WL 1014026, at *6 (taking no position on whether corporations can exercise religious rights after finding that the corporate owner's religious rights are sufficient to support a RFRA claim); *Geneva College I*, 2013 WL 838238, at *17–19 (concluding that the court "need not address head-on the issue whether all for-profit corporations may exercise First Amendment free exercise rights" because the close corporation could exercise the claims on behalf of its owners following EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620–21 (9th Cir. 1988), and Storman's, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009)); *Grote I*, 914 F. Supp. 2d at 949 ("We decline to reach the issue of whether a secular, for-profit corporation is capable of exercising religion within the meaning of RFRA or the First Amendment."); *O'Brien I*, 894 F. Supp. 2d at 1158 ("[T]his Court declines to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment."); *Newland I*, 881 F. Supp. 2d at 1296 ("These arguments pose difficult questions of first impression. Can a corporation exercise religion? . . . These questions merit more deliberate investigation."); *see also Am. Pulverizer Co.*, 2012 WL 6951316, at *4–5 (quoting *Newland I*, 881 F. Supp. 2d at 1296 for the principle that the "difficult questions of first impression" presented merit deliberate investigation and tip the balance in favor of injunctive relief).

124 *See, e.g.*, *Hobby Lobby I*, 870 F. Supp. 2d at 1287–88, 1290–92 (addressing first Free Exercise and then RFRA rights).

125 *Conestoga III*, 724 F.3d at 383–86 (finding that free exercise rights are purely personal and cannot run to a for-profit corporation because the "nature, history, and purpose" of the Free Exercise clause does not support such a conclusion); *MK Chambers*, 2103 WL 5182435, at 6; *Hobby Lobby I*, 870 F. Supp. 2d at 1287–88 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (further internal citations omitted)); *see also Eden Foods I*, 2013 WL 1190001, at *4 (citing *Conestoga I*, 917 F. Supp. 2d. at 406–09 and finding that corporation did not have a right to proceed under the Free Exercise Clause); *Conestoga I*, 917 F. Supp. 2d at 406–07 (quoting *Bellotti*, 435 U.S. at 778 n.14, and distinguishing the history of the Free Exercise clause from the history of the Free Speech clause that the Court relied on to find that corporations have free speech rights in Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339–40 (2010)); *Korte I*, 912 F. Supp. 2d at 743 (incorporating by reference the analysis from *Hobby Lobby* without significant elaboration). Another district court found no authority for the proposition that corporations have Free Exercise rights but did not resolve the

liberty is a right that runs to the individual, not to an institution.[126] As one court explained, while *Citizens United* "built upon the long-accepted principle that corporations have free speech rights," there was "no historical support for the proposition that a secular, for-profit corporation possesses the right to free exercise of religion."[127]

Almost all of the district courts, and the one circuit court to hold on the issue, agreed that for-profit corporations do not have religious rights under the First Amendment.[128] The one district court to disagree relied heavily on the Supreme Court's decision in *Citizens United*. The court emphasized that the Court in *Citizens United* had found no reason to distinguish between corporations and individuals in the text of the Free Speech clause, and that it could similarly find no reason to distinguish between corporations and individuals in the text of the Free Exercise clause.[129]

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issue. *Autocam I*, 2012 WL 6845677, at *4 (addressing without resolving the question).

126 *See, e.g.*, *Hobby Lobby I*, 870 F. Supp. 2d at 1288 (deciding without much discussion, citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963), for the statement that the purpose of the Free Exercise Clause is "to secure religious liberty in the individual").

127 *Conestoga I*, 917 F. Supp. 2d at 406–08 (distinguishing free exercise from free speech in *Citizens United*, 558 U.S. at 342 (listing numerous cases that have found that corporations have free speech rights)); *see also Conestoga III*, 724 F.3d 377, 386–88 (3d Cir. July 26, 2013) (stressing that the Free Speech Clause and Free Exercise clause have "historically . . . been interpreted separately"). Another court specified that while religious organizations are protected by the First Amendment because "believers exercise religion through religious organizations," for-profit companies do not share this quality and thus are not entitle to Free Exercise protections. *Hobby Lobby I*, 870 F. Supp. 2d at 1288 (internal quotation marks omitted) (citing Corp. of Presiding Bishops of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 341 (1983) (Brennan, J. concurring)). *But see Geneva College I*, 2013 WL 838238, at *21 (noting that for-profit corporations should have free exercise rights after *Citizens United*, 558 U.S. at 342, because there is no clear language distinguishing the Free Speech and Free Exercise clauses in the First Amendment). The *Geneva College* court, however, did not hold on this basis, instead concluding that the court "need not address head-on the issue whether all for-profit corporations may exercise First Amendment free exercise rights" because the close corporation could exercise the claims on behalf of its owners. *Geneva College I*, 2013 WL 838238, at *17–19 (citing *Townley*, 859 F.2d 610, and *Storman's, Inc.*, 586 F.3d 1109). That case, therefore, is not included in this section's tally.

128 *See, e.g.*, Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *11–12 (E.D. Mich. July 11, 2013) (finding unconvincing the argument that the Supreme Court would extend religious exercise protections to for-profit corporations and determing that the corporation is unlikely to succeed on its RFRA claim); *Autocam I*, 2012 WL 6845677, at *4 (noting that neither plaintiffs nor the court could provide any authority for the idea that a for-profit corporation has First Amendment free exercise rights).

129 Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *8, 19 (M.D. Fla. June 25, 2013) (finding that corporations have the right to exercise religion under the First Amendment following *Citizens United*). *But see Conestoga III*, 724 F.3d at 386-388 (stressing that the Free Speech Clause and Free Exercise clause have "historically . . . been interpreted separately").

Where the courts differed more significantly was on the question of whether a corporation could bring a claim as a "person" under the RFRA statute.[130] Four district courts, the Third Circuit, and the Sixth Circuit found that the contraceptive coverage mandate was a situation in which "'the context indicates'" that the word "person" should not include corporations under 1 U.S.C. § 1.[131] The courts determined that the 1 U.S.C. § 1 exemption to the definition of person was meant to apply in situations where the definition does not

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130 *Compare Korte I*, 912 F. Supp. 2d at 746 (finding that a corporation is a "person" under RFRA) *with Hobby Lobby I*, 870 F. Supp. 2d at 1291 (finding that a corporation is not a "person" under RFRA). The plaintiffs had argued that the RFRA statute does not define "person" and that 1 U.S.C § 1 requires that "'unless the context indicates otherwise . . . 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" *See, e.g.*, Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 7–8, *O'Brien I*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-CV-476(CEJ)) (quoting 1 U.S.C. § 1 (2011) and referencing RFRA, 42 U.S.C. § 2000bb to 2000bb–4 (2010)); Plaintiff's Reply in Support of Motion for Preliminary Injunction at 10, *Hobby Lobby I*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) (same). One court noted that the use of "person" rather than "individual" in the RFRA statute could suggest a legislative intention to extend protection to corporations. *See Autocam I.*, 2012 WL 6845677, at *4 (contrasting the use of "person" with the reality that a corporation cannot exercise religion nor experience a burden on that exercise before declining to resolve the question). That court, however, took issue with the idea of a corporation 'exercising religion' under RFRA but did not resolve the issue. *See id.* (citing *Hobby Lobby II*, No. 12-6294, 2012 WL 6930302, at *2 n.4 (10th Cir. Dec. 20, 2012), for the proposition that it need not resolve the question to reach the merits).

131 *See Autocam III*, No. 12-2673, 2013 WL 5182544, at *7–9 (6th Cir. Sept. 17, 2013) (holding that a corporation is not a "person: under RFRA because there are "strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking persons . . . under RFRA"); *Conestoga II*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (incorporating by reference the analysis of the district court); *Gilardi I*, 926 F. Supp. 2d 273, 281 (D.D.C. 2013), (finding that the corporate form is dispositive in this case on the issue of whether the corporation "exercises religion"); Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *4–5 (D. Colo. Feb. 27, 2013) (following the court in *Hobby Lobby I*, 870 F. Supp. 2d at 1288, 1291, and holding that for-profit corporations do not exercise religion under RFRA); *Conestoga I*, 917 F. Supp. 2d at 411 (citing 1 U.S.C. § 1 (2011), which requires that "unless the context indicates otherwise . . . 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," and finding that the context indicates otherwise because the court had already found that a corporation did not have constitutional religious rights under the Free Exercise Clause); *Hobby Lobby I*, 870 F. Supp. 2d at 1291 (quoting 1 U.S.C. § 1 (2011)). The *Eden Foods, Inc.* court is not counted here as it expressed reservations on this issue, but denied a temporary restraining order on the grounds that plaintiffs had not sufficiently briefed the issue. *See Eden Foods I*, No. 13-11229, 2013 WL 1190001, at *3–4 (E.D. Mich. Mar. 22, 2013) (finding plaintiffs had not sufficiently briefed the issue of whether corporate entity was a "person" under RFRA). The *MK Chambers* court is not counted here as it based its holding that the plaintiffs had not shown likelihood of success on the divergent opinions of other courts without further discussion. MK Chambers Co. v. U.S. Dep't of Health and Human Servs., No. 13-11379, 2103 WL 5182435, at *4-6 (E.D. Mich. Sept. 13, 2013) (noting that other courts have held that the mandate applies only to the corporate entity and that any burden on the corporate owners is too attenuated to be substantial).

seem to fit with the Congressional statute.[132] They decided that defining a corporation as a "person" did not fit with RFRA in the contraceptive coverage mandate situation for the same historical reasons that the courts relied on in concluding that constitutional religious rights were "purely personal" and did not run to corporations.[133]

The other three courts, including the Seventh Circuit in two appeals and the Tenth Circuit, found that a corporation did qualify as a "person" under RFRA.[134] The district courts determined that the religious and financial interests of the owners and of the corporation were indistinguishable enough to satisfy the "person" requirement under RFRA.[135] On appeal in two cases, the Seventh Circuit found that the plaintiff owners had religious rights sufficient to assert a RFRA claim, citing *Citizens United* for the general proposition that the corporate form is not dispositive on the question of whether a corporation can have First Amendment rights.[136] The Tenth Circuit, meanwhile, found that the plain meaning

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

133 *See Conestoga I*, 917 F. Supp. 2d at 411 (quoting 1 U.S.C. § 1 (2011) and finding that the context indicates otherwise because the court had already found that a corporation did not have constitutional religious rights under the Free Exercise Clause); *Hobby Lobby I*, 870 F. Supp. 2d at 1291 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)). The *Hobby Lobby* court easily dismissed the plaintiffs' reliance on *United States v. Lee*, 455 U.S. 252 (1982), and *Braunfeld v. Brown*, 366 U.S. 599 (1961), by noting that neither case involved an incorporated entity, and similarly dismissed *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1306 (11th Cir. 2006), by noting that Primera was classified by the court as an "incorporated religious organization" rather than a for-profit corporation. *See Hobby Lobby I*, 870 F. Supp. 2d at 1291–92 n.12 & n.13.

134 *See Grote II*, 708 F.3d 850, 854–55 (7th Cir. 2013) ("[A]s in *Korte*, the Grote family's use of the corporate form is not dispositive of the claim") (citing *Korte II*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012)); *Korte II*, 2012 WL 6757353, at *3 (finding that the plaintiff owners' rights can give rise to a RFRA claim as the corporate form is not dispositive); *Beckwith Elec. Co.*, 2013 WL 3297498, at *6–8 (finding that a corporation qualifies as a "person" under RFRA and can exercise religious rights under the First Amendment); *Korte I*, 912 F. Supp. 2d at 746 (holding that the corporation is a person under RFRA).

135 *See Beckwith Elec. Co.*, 2013 WL 3297498, at *6 (finding that all corporations are "persons" under RFRA); *Korte I*, 912 F. Supp. 2d at 741–42, 746 (noting the intersection between the third party standing and RFRA "person" analysis and relying on the fact that the corporation was a closely held, family-owned S-corporation to find that a corporation had religious rights). The *Korte* district court, however, noted that though the corporation had standing to assert a claim under RFRA, the corporate form would be "dispositive" under the subsequent substantial burden analysis. *See id.* at 746 (noting that "legal fictions" cannot be ignored and would be dispositive in this situation).

136 *See Korte II*, 2012 WL 6757353, at *3 (citing generally Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)); *see also Grote II*, 708 F.3d 854–55 ("[A]s in *Korte*, the Grote family's use of the corporate form is not dispositive of the claim") (citing *Korte II*, 2012 WL 6757353, at *3).

of RFRA encompassed corporations.[137] It determined that the "context [did not] indicate[] otherwise" because Congress had crafted for-profit corporate religious exemptions before in other statutes but chose not to do so here, and further that the government's reliance on case law suggesting a clear distinction between for-profit and not-for-profit corporations did not clarify Congress's intentions when it passed RFRA.[138] The Tenth Circuit further found that the Free Exercise clause was not a "purely personal" right as it extends to non-profit organizations, that the right extends to individuals who engage in for-profit businesses, and so held that exclusion of a for-profit corporation was not "rooted in the text of the First Amendment."[139] As mentioned above, only twelve courts have addressed this issue, and have diverged on whether corporations can exercise religious rights under RFRA and the First Amendment.[140] The other courts have punted this question.[141] All the courts, nonetheless, have addressed the RFRA and Free Exercise claims on the merits as if the corporate owners could exercise religion and have left the threshold question for appellate

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137 *Hobby Lobby IV*, 723 F.3d 1114, 1129 (10th Cir. 2013) (en banc) (finding that the plain meaning of RFRA in conjunction with 1 U.S.C. § 1 indicated that corporations are covered by the statute).

138 *Id.* at 1129–32 (finding that RFRA covers for-profit corporations because it does not explicitly exclude those corporations as other statutes, like Title VII and the Americans with Disabilities Act, have and because none of the cases cited by the government "say anything about what Congress intended in RFRA").

139 *Id.* at 1133–37 (internal quotations and citations omitted) (finding that Free Exercise rights do not "somehow disappear" when a corporation is for-profit rather than not-for-profit and explaining why differentiating between the two is incorrect in this situation).

140 *Compare Eden Foods III*, 13-1677, slip op. at 2 (6th Cir. June 28, 2013) (stating that it is "not persuaded, at this stage of the proceeding, that a for-profit corporation has rights under RFRA"); *Conestoga II*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (incorporating by reference the district court's finding in *Conestoga I*, 917 F. Supp. 2d 394, 406–09, 411 (E.D. Pa. 2013), that corporations do not have religious rights under either RFRA or the free Exercise Clause); *Korte I*, 912 F. Supp. 2d at 743 (incorporating by reference the court's analysis from *Hobby Lobby I*, 870 F. Supp. 2d 1278, 1287–88 (W.D. Okla. 2012)); *Hobby Lobby I*, 870 F. Supp. 2d at 1287–88, 1290–92 (finding that a corporation cannot claim religious rights) *with Korte II*, 2012 WL 6757353, at *3 (finding that the plaintiff owners' rights can give rise to a RFRA claim as the corporate form is not dispositive).

141 *See, e.g.*, *Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *17–19 (W.D. Pa. Mar. 6, 2013) (concluding that the court "need not address head-on the issue whether all for-profit corporations may exercise First Amendment free exercise rights" because the close corporation could exercise the claims on behalf of its owners following EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), and Storman's, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009)); Legatus v. Sebelius, 901 F. Supp. 2d 980, 987-90 (E.D. Mich. 2012) (failing to address the issue); *O'Brien I*, 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (declining to address the issue of whether a corporation is capable of exercising religion under RFRA and the First Amendment); *Newland I*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (determining that the question should be adjudicated in a trial on the merits and not at a preliminary injunction).

courts to address.[142]

B. The Religious Freedom Restoration Act

All of the courts have addressed the for-profit plaintiffs' RFRA claim, diverging primarily between courts which have found no substantial burden and therefore no merit to the plaintiffs' claim, and those which have found a substantial burden as well as no clear compelling interest in applying the mandate to the plaintiffs and therefore have granted the plaintiffs' preliminary injunctive relief. Eleven district courts found that the plaintiffs had failed to prove a substantial burden under RFRA.[143] Five district courts, on the other

142 *See, e.g.*, *Legatus*, 901 F. Supp. 2d at 987–90. The courts have done this by imputing the interests of the corporate owners to the corporations. *See, e.g.*, *Storman's Inc.*, 586 F.3d at 1120–21 (holding that the for-profit corporation lacks standing to bring a claim for infringement of religious rights and focusing instead on the rights of the religious owners); *Townley*, 859 F.2d at 619-20 (holding that Townley is not a religious corporation but that it is "merely the instrument through and by which" the Townleys express their religious beliefs so the court need not address whether corporations have religious rights because the Townleys' religious rights can be used instead); *see also* Minnesota *ex rel* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985) (declining to decide the issue since the examiner already pierced the corporate veil). *But see Autocam III*, No. 12-2673, 2013 WL 5182544, at *5 (6th Cir. Sept. 17, 2013) (rejecting the argument that the corporation can assert claims on behalf of individual corporate owners on the Ninth circuit's "pass through" theory from Storman's, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009), and EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)); *Conestoga III*, 724 F.3d 377, 386-388 (3d Cir. 2013) ("We decline to adopt the *Townley*/ *Storman's* theory, as we believe that it rests on erroneous assumptions regarding the very nature of the corporate form. . . . [Plaintiffs] chose to incorporate and conduct business through [a corporation], thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction . . . We hold—contrary to *Townley* and *Storman's*—that the free exercise claims of a company's owners cannot "pass through" to the corporation."); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *13 (E.D. Mich. July 11, 2013) (disagreeing with *Townley* and *Storman's Inc.* and holding that the owners chose the corporate form and so cannot now ignore it in order to impute their beliefs the corporation).

143 *See* Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *15–16 (E.D. Mich. July 11, 2013) (finding no substantial burden as the burden described by plaintiffs is too attenuated to be substantial); *Eden Foods II*, No. 13-11229, slip op. at 10 (E.D. Mich. May 21, 2013) (finding no substantial burden based on *Autocam II*, No. 12-2673 (6th Cir. Dec. 28, 2012) and Justice Sotomayor's opinion in *Hobby Lobby III*, 113 S. Ct. 641, 643 (Dec. 26, 2012)); *Gilardi I*, 926 F. Supp. 2d 273, 283 (D.D.C. 2013) (finding that there is no substantial burden on the corporate owners because "the regulations do not compel the [corporate owners] to personally arrange for, pay for, provide or facilitate health coverage") (internal quotation marks omitted); Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *5–6 (D. Colo. Feb. 27, 2013) (holding that there is no substantial burden because the mandate only applies to the corporation and not to the corporate owner); *Conestoga I*, 917 F. Supp. 2d at 413–14 (citing and following *Hobby Lobby I*, 870 F. Supp. 2d at 1293–96, to find no substantial burden on plaintiffs); *Annex Med I*, No. 12-2804(DSD/SER), 2013 WL 101927, at *4–5 (D. Minn. Jan. 8, 2013) (finding no substantial burden on plaintiffs), *Grote I*, 914 F. Supp. 2d 943, 950–52 (S.D. Ind. 2012) (same); *Autocam I*, No. 1:12-CV-1096, 2012 WL 6845677, at *6–8 (W.D. Mich. Dec. 24, 2012) (same); *Korte I*, 912 F. Supp. 2d at 748–9 (same); *O'Brien I*, 894 F. Supp. 2d at 1158–60

hand, granted the plaintiffs a preliminary injunction after finding that the government had provided too many exemptions to the contraceptive coverage mandate for a compelling government interest to exist.[144] Lastly, three district courts granted the plaintiffs preliminary relief because the courts' uncertainty on the merits warranted maintaining the *status quo*.[145]

(same); *Hobby Lobby I*, 870 F. Supp. 2d at 1293–96 (same). One court, after discussing the plaintiff's RFRA claim, denied a preliminary injunction on a finding that plaintiffs had not "carried their burden" in showing that a corporation had rights under RFRA. MK Chambers Co. v. U.S. Dep't of Health and Human Servs., No. 13-11379, 2103 WL 5182435, at *6 (E.D. Mich. Sept. 13, 2013) (finding that plaintiffs were not likely to succeed on the merits of their RFRA claim because they had not established that corporations have rights under RFRA). The second Third Circuit opinion denying a preliminary injunction similarly found that plaintiffs could not assert a RFRA claim because (1) the corporation could not exercise religion and (2) the mandate did not impose any requirements on the plaintiffs as individuals. *Conestoga III*, 724 F.3d at 388–89 (finding neither corporation nor corporate owners could assert a claim under RFRA). The Sixth Circuit held in one case that a for-profit corporation was not a "person" under RFRA. *Autocam III*, 2013 WL 5182544, at *7–9. These courts are not included in the above or in any subsequent tallies.

144 *See* Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013) (finding that the broad exemptions to the contraceptive coverage mandate render the government's interest not compelling as applied to the plaintiff); *Geneva College II*, No. 2:12-CV-00207, 2013 WL 1703871, at *7–8 (W.D. Pa. Apr. 19, 2013) (same); Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026, at *10 (E.D. Mich. Mar. 14, 2013) (finding that the broad exemptions to the contraceptive coverage mandate render the government's interest not compelling as applied to the plaintiff); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012) (same); *Newland I*, 881 F. Supp. 2d at 1297 (same).

145 *See* Triune Health Grp., Inc. v. U.S. Dep't of Health and Human Servs., No. 12-cv-06756, slip op. at 1–2 (N.D. Ill. Jan. 3, 2013) (granting a preliminary injunction under the binding precedent established in *Korte II*, 2012 WL 6757353); Sharpe Holdings, Inc.v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012) (finding that plaintiff is entitled to relief because there is a substantial burden while the issues of the compelling interest and least restrictive means prongs are unresolved); *Legatus*, 901 F. Supp. 2d at 997 ("Neither Plaintiffs nor the Government have shown a strong likelihood of success on the merits"). The *Legatus* court justified granting the preliminary injunction based on its finding that no ruling on the merits could possibly occur before January 1, 2013, the date by which the corporate plaintiff must comply with the mandate. The court interpreted a decision not to grant a preliminary injunction as "grant[ing] the Government a default success on the merits." *Legatus*, 901 F. Supp. 2d at 998. Given the court's uncertainty on the merits, it found that a preliminary injunction was warranted. *Id.* Thirteen district courts granted relief because the Department of Justice did not oppose the order. *See* Barron Indus. Inc. v. Sebelius, No. 1:13-cv-01330-KBJ, slip op. at 1-2 (D.D.C. Sept. 25, 2013) (granting unopposed preliminary injunction and unopposed stay pending the D.C. Circuit's decision in *Gilardi II*, No. 13-5069 (D.C. Cir. Mar. 29, 2013)); The QC Group, Inc. v. Sebelius, No. 1:13-cv-01726, slip op. at 2–3 (D. Minn. Sept. 11, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013), or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Ozinga v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-3292-TMD, slip op. at 1 (N.D. Ill. July 16, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit issues its mandate in *Grote II*, 708 F.3d 850 (7th Cir. 2013), and *Korte II*, 2012 WL 6757353); Willis & Willis PLC v. Sebelius, No. 1:13-cv-01124, slip op. at 1 (D.D.C. Aug. 23, 2013) (granting unopposed

The circuit courts have also differed: the Seventh, Eighth, Tenth, and District of Columbia Circuits granted two, two, three, and one preliminary injunctions each respectively, while the Third and Sixth Circuits, and Circuit Justice Sonia Sotomayor reviewing the Tenth Circuit's decision, denied one, two, and one each respectively. In two of its three decisions, the Tenth Circuit remanded to the district court for further consideration on two remaining preliminary injunction factors.[146] This section will focus on the courts' consistent points of

preliminary injunction and unopposed stay pending the D.C. Circuit's decision in *Gilardi II*, No. 13-5069 (D.C. Cir. Mar. 29, 2013)); Bindon v. Sebelius, No. 1:13-cv-01207-EGS, slip op. at 1 (Aug. 14, 2013) (granting unopposed preliminary injunction and unopposed stay pending the D.C. Circuit's decision in *Gilardi II*, No. 13-5069 (D.C. Cir. Mar. 29, 2013)); SMA, LLC v. Sebelius, No. 13-CV-1375, slip op. at 1-3 (D. Minn. July 8, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH, slip op. at 1 (D.D.C. May 24, 2013) (granting unopposed preliminary injunction); Hartenbower v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-02253, slip op. at 2 (N.D. Ill. Apr. 18, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit issues its mandate in *Grote II*, 708 F.3d 850, and *Korte II*, 2012 WL 6757353); Hall v. Sebelius, No. 0:13-cv-00295-JRT-LIB, slip op. at 2–3 (D. Minn. Apr. 2, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Bick Holdings, Inc. v. Sebelius, No. 4:13-cv-0000462-AGF, slip op. at 1 (E.D. Mo. Apr. 1, 2013) (granting unopposed preliminary injunction and unopposed stay pending the Eighth Circuit's decision in *Annex Med II*, 2013 WL 1276025, or *O'Brien II*, No. 12-3357 (8th Cir. Nov. 28, 2012)); Tonn & Blank Constr., LLC v. Sebelius, No. 1:12-cv-00325-JD-RBC, slip op. at 2 (N.D. Ind. Apr. 1, 2013) (granting unopposed preliminary injunction to be enforced until thirty days after the Seventh Circuit issues a decision in Grote v. Sebelius, No. 13 Civ. 1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) and *Korte II*, 2012 WL 6757353); Lindsay v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-01210, slip op. at 1 (N.D. Ill. Mar. 20, 2013) (granting preliminary injunction by agreement of the parties to be enforced until thirty days after the Seventh Circuit's decision in *Grote II*, 708 F.3d 850, and *Korte II*, 2012 WL 6757353); Sioux Chief Mfg. v. Sebelius, No. 4:13-cv-0036, slip op. at 1 (W.D. Mo. Feb. 28, 2013) (granting preliminary injunction without opposition from the Department of Justice). These courts are not included in the tally above or in any subsequent tallies. One denied relief from the bench; this court is also not included. Courtroom Minutes at 2, Armstrong v. Sebelius, No. 1:13-cv-00563-RBJ (D. Colo. May 10, 2013) (denying preliminary injunction).

146 *See Newland II*, No. 12-1380, 2013 WL 5481997, at *2–3 (affirming district court's grant of preliminary injunction in light of *Hobby Lobby IV*, 723 F.3d 1114); *Conestoga III*, 724 F.3d at 389 (denying preliminary injunction), *petition for cert. filed*, *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013); *Autocam III*, 2013 WL 5182544, at *9 (affirming district court's denial of preliminary injunction); Armstrong v. Sebelius, No. 13-1218, 2013 WL 4757949, at *1 (10th Cir. Sept. 5, 2013) (granting preliminary injunction and remanding to the district court in light of *Hobby Lobby IV*, 723 F.3d 1114); *Eden Foods III*, No. 13-1677, slip op. at 3 (6th Cir. June 28, 2013) (denying preliminary injunction pending appeal); *Gilardi II*, No. 13-5069, slip op. at 1 (D.C. Cir. Mar. 29, 2013) (per curiam) (granting preliminary injunction pending appeal); Triune Health Grp., Inc. v. Sebelius, No. 13-1478 (7th Cir. filed Mar. 5, 2013) (no decision); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 13-1395 (8th Cir. filed Feb. 25, 2013) (no decision); *Annex Med II*, 2013 WL 1276025, at *3 (granting preliminary injunction pending appeal); *Grote II*, 708 F.3d 850 (granting preliminary injunction pending appeal); Legatus v. Sebelius, No. 13-1093 (6th Cir. filed Jan. 24, 2013) (no decision); *Korte II*, 2012 WL 6757353, at *1 (granting preliminary injunction); *Hobby Lobby II*, 2012 WL 6930302, at *3

tension.

1. Substantial Burden

The linchpin for the courts under the substantial burden prong is deciding what is the specific burden that the contraceptive coverage mandate imposes on a for-profit plaintiff's religious exercise, and whether the burden is a sufficiently direct imposition on an action rather than a belief to qualify as substantial.[147] The courts have most diverged over this prong, with the courts that have found a substantial burden subsequently finding that the contraceptive coverage mandate fails RFRA, while the courts that have found that there is no substantial burden necessarily finding that the mandate survives RFRA scrutiny.

Eleven district courts, the first Third Circuit opinion, the Sixth Circuit, and the first Tenth Circuit opinion found that the contraceptive coverage mandate did not violate RFRA because there was no substantial burden on the corporate plaintiff.[148] This result followed

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(denying preliminary injunction), *application for injunction denied by Circuit Justice*, *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, No. CIV-12-1000-HE, 2013 WL 3869832, at *1–2 (W.D. Okla. July 19, 2013) (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting preliminary injunction pending appeal). On December 26, 2012, Justice Sotomayor denied Hobby Lobby's application for an injunction pending appeal. *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, 2013 WL 3869832, at *1–2 (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013). There are currently two petitions for certiorari pending before the Supreme Court on this issue. *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013).

147 *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (noting that while the freedom to believe is absolute, the freedom to act, even pursuant to those beliefs, is "not totally free from legislative restrictions").

148 *See, e.g.*, Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702 at *15–16 (E.D. Mich. July 11, 2013) (finding no substantial burden as the burden described by plaintiffs is too attenuated to be substantial); *Eden Foods III*, 13-1677, slip op. at 2–3 (6th Cir. June 28, 2013) (finding that the burden is "too attenuated" for plaintiffs to be likely to succeed on the merits); *Conestoga II*, 2013 WL 1277419, at *2 (incorporating by reference the district court's finding in *Conestoga I*, 917 F. Supp. 2d at 414–15, that the burden was too attenuated and indirect to be substantial); *Hobby Lobby II*, 2012 WL 6930302, at *3 (quoting *Hobby Lobby I*, 870 F. Supp. 2d at 1294, in denying an injunction pending appeal); *Conestoga I*, 917 F. Supp. 2d at 413–14 (citing and following *Hobby Lobby I*, 870 F. Supp. 2d at 1293–96); *Korte*, 912 F. Supp. 2d at 747–49 (finding burden is too distant to be substantial); *Hobby Lobby*, 870 F. Supp. 2d at 1294 (quoting *O'Brien*, 894 F. Supp. 2d at 1159); *O'Brien I*, 894 F. Supp. 2d at 1158–59 (finding that the burden was too attenuated

from characterizing the burden complained of as being that "the funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by healthcare providers and [employees] covered by [the plaintiff]'s plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion."[149] None of these courts found anything in the regulations that required the plaintiffs to personally participate in the activity to which they objected, or to change their behavior, or to change their religious exercise.[150] One court analogized the plaintiff's argument to asking the court to find a burden because an employee spends her salary on something of which the employer does not approve; another emphasized that the choice to use contraceptives ultimately rested not with the corporation or its owners, but with the employees.[151] A third court found this situation to be comparable to the situation in *Lee*, stressing that both were concerned with the effect of the employer's religion on the employees.[152] The courts

to be substantial). The Sixth Circuit decision is not included because the preliminary injunction was denied without discussion. *See Autocam II*, No. 12-2673, slip op. at 3 (6th Cir. Dec. 28, 2012).

149 *See O'Brien I*, 894 F. Supp. 2d at 1159; *see also Grote I*, 914 F. Supp. 2d 943, 951 (S.D. Ind. 2012) (quoting *O'Brien I*, 894 F. Supp. 2d at 1159); *Hobby Lobby I*, 870 F. Supp. 2d at 1294 (same). The Tenth Circuit directly quoted this language in its order denying an injunction pending Hobby Lobby's appeal. *See Hobby Lobby II*, 2012 WL 6930302, at *3 (quoting *Hobby Lobby I*, 870 F. Supp. 2d at 1294, in denying an injunction pending appeal).

150 *See Gilardi I*, 926 F. Supp. 2d 273, 283 (D.D.C. 2013) (citing Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013) to explain that the burden does not require the plaintiffs to take any supportive action); *Briscoe*, 2013 WL 755413, at *5 (finding no substantial burden because the mandate does not requires the corporate owner to "personally endorse, support, or engage in pro-abortion or pro-contraception activity [and] does not prevent [the owner] from personally opposing abortion and contraception"); *Korte I*, 912 F. Supp. 2d 735, 748 (S.D. Ill. 2012) (characterizing the connection between the government regulation and the burden as "too distant"); *Hobby Lobby I*, 870 F. Supp. 2d at 1294; *O'Brien I*, 894 F. Supp. 2d at 1159.

151 *See Conestoga I*, 917 F. Supp. 2d at 414 (noting that contraceptive use is the personal choice of the employee and akin the choice of how to use one's salary); *O'Brien I*, 894 F. Supp. 2d at 1160 (analogizing the restriction of promised medical benefits to the restriction of one's use of one's salary); *see also Autocam I*, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) (noting that the contraceptive coverage mandate is in practice no different from the plaintiff's old system of giving their employees money to spend on healthcare at the employee's discretion). One court stressed the distance by analogizing the space between the group health plan and the corporation to a "legal 'veil'" which it could not ignore. *See Korte I*, 912 F. Supp. 2d at 748. Another court warned of the possibility that this logic could extend to other "religiously-based scruples," including non-heterosexual behaviors or refusal of all health care. *See Grote I*, 943 F. Supp. 2d at 951.

152 *See Hobby Lobby I*, 870 F. Supp. 2d at 1295-96 (citing United States v. Lee, 455 U.S. 252, 261 (1982), and focusing on the effect on Hobby Lobby's 13,500 employees). The court stressed that the employee's rights at issue are rights of a "constitutional dimension—related to matters of procreation, marriage contraception, and abortion." *Id.* at 1296 & n.18 (citing Roe v. Wade, 410 U.S. 113 (1973), Gonzales v. Carhart, 550 U.S. 124 (2007), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

concluded that the contraceptive coverage mandate was "degrees removed" from imposing a burden on the corporation, even further removed from imposing one on the corporate owner who benefited from the corporate form, and that such a claim could not support a finding of substantial burden as required by RFRA.[153] This burden was too attenuated to be substantial.

By contrast, the courts that have found that there is a substantial burden on the corporate plaintiffs have done so by accepting the plaintiff's characterization of that burden without independently scrutinizing the burden for substantiality.[154] For example, one district court stated that courts "often simply assume that a law substantially burdens a person's exercise of religion when that person so claims," before determining without analysis that the corporate plaintiff was "likely to show at trial" that the mandate constituted a substantial

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153 *See O'Brien I*, 894 F. Supp. 2d at 1160; *see also Hobby Lobby II*, 2012 WL 6930302, at *3 (quoting *Hobby Lobby I*, 870 F. Supp. 2d at 1294, in denying an injunction pending appeal); *Conestoga I*, 917 F. Supp. 2d at 414–15 (finding the burden too attenuated to be substantial both because of the long series of events and personal choices involved and because the corporate form separates the owners from the burden); *Autocam I*, 2012 WL 6845677, at *7 (noting that the corporate form brings costs as well as burdens, and the cost here was that the burden was not substantial); *Korte I*, 912 F. Supp. 2d at 748–49 (finding no substantial burden); *Hobby Lobby I*, 870 F. Supp. 2d at 1295 (finding that this burden is insufficiently direct in comparison to the burdens complained of in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The district court in *Annex Medical, Inc.* stressed in particular that the burden was de minimis and it could not meet the Eighth Circuit's requirement that a movant for a preliminary injunction establish a substantial likelihood of success on the merits. *See Annex Med I*, No. 12-cv-02804 (DSD/SER), 2013 WL 101927, at *4–5 (D. Minn. Jan. 8, 2013) (comparing the Seventh Circuit's "reasonable likelihood" standard with the Eighth Circuit's "substantial likelihood" standard for injunctive relief, and citing *O'Brien I*, 894 F. Supp. 2d at 1159-60 in support of its no substantial burden finding). That district court did not find itself bound by the Eighth Circuit's decision in *O'Brien* because the court could not interpret the Eighth Circuit's granting of a stay without a decision as indicating the requisite likelihood of success on the merits. *Id.* at *3–4 (explaining divergence from *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012)); *see also* Grote Indus. LLC v. Sebelius, No. 4:12–cv–00134–SEB–DML, 2013 WL 53736, at *1–3 (denying reconsideration of denial of preliminary injunction and finding itself not bound the Seventh Circuit's decision in *Korte II*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012), as that was a "grant of emergency relief, based on [a] preliminary determination," rather than a "plenary decision of the Court on the merits"). The Eighth Circuit subsequently clarified that the *O'Brien* decision was a grant of a preliminary injunction pending appeal, and granted the same relief to the *Annex Medical* petitioners. *See Annex Med II*, No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013) (granting preliminary injunction pending appeal and clarifying the Eighth Circuit's grant of a preliminary injunction in *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012)).

154 *See, e.g.*, *Conestoga I*, 917 F. Supp. 2d at 413 (noting that the court in Legatus v. Sebelius, 901 F. Supp. 2d 980, 990–91 (E.D. Mich. 2012), had stated that a plaintiff shows a burden is substantial by claiming so). *But see* Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013) (emphasizing that the test is not whether the plaintiff can show "any burden" by "alleging sincerity," but whether there is a "substantial burden" only).

burden.[155] In a similar move, the Seventh Circuit found a substantial burden after accepting the plaintiff's explanation that the religious burden stemmed from the requirement that the plaintiffs provide coverage in the first place, not from the subsequent use of that contraception by the employees.[156] The court therefore found that the burden was direct, dividing from the Tenth Circuit in this characterization.[157] The Tenth Circuit initially agreed with the district court on appeal's finding that the burden was based on plaintiff's objections to their employees' actions, not on the plaintiff's purchase of health coverage.[158] The Tenth

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155 *See Legatus*, 901 F. Supp. 2d at 990–91 (citing *Lee*, 455 U.S. at 257 for the proposition that courts will generally just assume a burden is substantial); *see also Geneva College II*, No. 2:12-CV-00207, 2013 WL 1703871, at *7–8 (W.D. Pa. Apr. 19, 2013) (finding a Hobson's choice as a result of plaintiff being forced to choose between violating their beliefs and terminating their employee health insurance); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012) (finding that there is a substantial burden as a result of the ACA's financial burden without further explanation); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012) (finding that there was a substantial burden without going into detail on how the court came to this conclusion); *Newland I*, 881 F. Supp. 2d 1287, 1296–97 (D. Colo. 2012) (equating the question of substantial burden with the question of whether a corporation can exercise religious rights, before determining that it cannot answer that question on a motion for a preliminary injunction. The court then granted the plaintiffs a preliminary injunction).

156 *See Korte II*, 2012 WL 6757353, at *3–4; *see also* Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *14-15 (M.D. Fla. June 25, 2013) (finding that plaintiff's religious exercise is burdened by being required to provide a different health insurance plan); *Geneva College II*, 2013 WL 1703871, at *8 (noting that the plaintiff's argument is more subtle than just an objection to payment for contraceptive but rather is an objection to providing coverage at all); Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026, at *9 (E.D. Mich. Mar. 14, 2013) (noting that the plaintiff is burdened by the provision of coverage alone and finding that the requirement that plaintiff modify his behavior is a substantial burden); *Grote II*, 708 F.3d 850, 855 (7th Cir. 2013) (following *Korte II*, 2012 WL 6757353, at *3–4, and noting that the "government's minimalist characterization of the burden continues to obscure the substance of the religious liberty violation"); Triune Health Grp., Inc. v. U.S. Dep't of Health and Human Servs., No. 12-cv-06756, slip op. at 1-2 (N.D. Ill. Jan. 3, 2013) (granting a preliminary injunction under the binding precedent established in *Korte II*, 2012 WL 6757353).

157 *See Korte II*, 2012 WL 6757353, at *3–4 ("With Respect, we think this [characterization by the Tenth Circuit in *Hobby Lobby*] misunderstands the substance of the claim."); *cf. Monaghan*, 2013 WL 1014026, at *8–9 (finding that even though the burden to carry health coverage may be indirect, it is still substantial). In circuits other than the Seventh and Tenth Circuits, the Eighth Circuit issued its first decision without discussion and its second relied on the first without further clarification, and the Sixth Circuit relied on Justice Sotomayor's opinion in denying relief without further reasoning. *See Annex Med II*, 2013 WL 1276025, at *3 (granting preliminary injunction pending appeal pursuant to *O'Brien*'s precedent); *Autocam II*, No. 12-2673, slip op. at 2–3 (6th Cir. Dec. 28, 2012) (denying preliminary injunction pending appeal in light of Justice Sotomayor's opinion); *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting injunction pending appeal without discussion).

158 *Hobby Lobby II*, 2012 WL 6930302, at *2–3 (finding that the burden was too attenuated and not

Circuit subsequently changed its interpretation of the burden, finding that "[o]ur only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief," and clarifying that the question is only about "the coercion the claimant feels."[159] The court then found a substantial burden because the claimants indicated that the provision of health insurance alone was a burden and the court found that the cost of violating the mandate was prohibitive.[160] If other courts accept the provision of health insurance as itself a substantial burden on religious exercise, then the compelling interest prong rather than the substantial burden prong is likely to be the primary battleground for the contraceptive coverage mandate going forward.

2. Compelling Interest

There are two points of contention for the courts to address under the compelling interest prong: the first asks whether the government's interests in the contraceptive coverage mandate are compelling at all, the second focuses on the effect that the exemptions to the contraceptive coverage mandate have on the government's claim that their interests are compelling. Eight courts have addressed the compelling interest test under RFRA, and two of those courts spent the most time analyzing this part of the RFRA test.[161]

substantial); *see also Conestoga II*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (incorporating by reference the district court's finding in *Conestoga I*, 917 F. Supp. 2d at 414–15, that the burden was too attenuated and indirect to be substantial); *Hobby Lobby I*, 870 F. Supp. 2d at 1293 (noting that "it is not the province of the courts to tell plaintiffs what their religious beliefs are," but that RFRA still only applies to a substantial burden). One district court decision stressed the importance of scrutinizing the burden for substantiality, warning that without that check, every government regulation could be subject to RFRA scrutiny based on an asserted religious objection. *See Autocam I*, 2012 WL 6845677, at *7.

159 *Hobby Lobby IV*, 723 F.3d 1114, 1137–40 (10th Cir. 2013) (en banc) (explaining the substantial burden test).

160 *Id.* at 1140–43 (applying the substantial burden test).

161 *Compare Newland I*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012); Legatus v. Sebelius, 901 F. Supp. 2d 980, 991–95 (E.D. Mich. 2012) *with Hobby Lobby IV*, 723 F.3d at 1140–43 (en banc) (discussing the substantial burden prong, but only briefly); *Beckwith Elec. Co.*, 2013 WL 3297498, at *14–16 (same); *Geneva College II*, 2013 WL 1703871, at *9–11 (same); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012) (cursory discussion); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (same). One court spent a similar amount of time addressing each part of the RFRA test. *See Monaghan*, 2013 WL 1014026, at *6–11 (discussing all three inquiries under RFRA).

The Seventh and Eighth Circuit decisions are not included in this discussion because neither circuit decided whether the interests were compelling; the Seventh Circuit has found the burden alone sufficient for a preliminary injunction and the Eighth Circuit has held to the precedent of a one line long decision without

The government has argued that the contraceptive coverage mandate supports two compelling interests. These interests are: (1) promoting public health, especially of women, newborn children, and developing fetuses, and (2) furthering gender equality by ensuring women's equal access to preventative health care thereby allowing women to participate equally in the workplace and in American life generally.[162] American Civil Liberties Union (ACLU) amicus briefs suggest a third compelling interest: an interest in eliminating gender discrimination against employees under the guise of religious exercise, an interest which outweighs any religious interest in not providing insurance coverage for contraceptive services to women.[163]

Six of the courts to address the compelling interest prong recognized that the government's two interests could be compelling generally.[164] The one court to push back

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explanation. *See Annex Med II*, 2013 WL 1276025, at *3 (granting preliminary injunction pending appeal pursuant to *O'Brien*'s one line precedent); *Grote II*, 708 F.3d at 853–55 (finding itself bound by *Korte II*, 2012 WL 6757353, at *4, to grant a preliminary injunction on the burden alone); *Korte II*, 2012 WL 6757353, at *4 (finding the burden was sufficient to grant a preliminary injunction); *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (one line decision granting preliminary injunction).

162 *See, e.g.*, *Monaghan*, 2013 WL 1014026, at *9–10 (describing the government's two interests); *Legatus*, 901 F. Supp. 2d at 991–92 (accepting the government's two interests as stated); Defendant's Memorandum in Support of their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 22–25, 27, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (stating the government's compelling interests).

163 *See* Brief for ACLU as Amici Curiae Supporting Defendants, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061); Brief for ACLU as Amici Curiae Supporting Defendants, *O'Brien I*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-CV-476(CEJ)). The ACLU also stressed that an alternative finding in this case would open the door for discrimination in the name of religion under countless other statutes. *See id.* at 2. The ACLU argued that past precedent proved that religious freedom was not absolute, and that one of the important restrictions on religious freedom was the right of another to be free from discrimination. *See id.* at 5, 7 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that a school could not forbid interracial dating and marriage or refuse to integrate classrooms on the basis of religion because the government had a compelling interest in ending racial discrimination in education); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that a school could not pay men more than women on the basis that men were the "head of the house" according to the Bible but that the school had to comply with the Equal Pay Act because the government had a compelling interest in ending gender discrimination in employment); Newman v. Piggie Park Enters. Inc., 256 F. Supp. 941, 944 (D.S.C. 1966) (holding that a diner could not refuse to serve black customers on religious grounds), *aff'd in relevant part and rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968)).

164 *See Hobby Lobby IV*, 723 F.3d at 1143–44 (noting that the interests are important but broad); Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *16 (M.D. Fla. June 25, 2013) (finding that the government's interest is "certainly compelling in a broad, general sense"); *Geneva College II*, 2013 WL 1703871, at *9 ("[P]laintiffs do not appear to seriously dispute that public health and gender

recognized that the government has an interest in women's health and prenatal health which can be aided by the ability to control pregnancy and pregnancy spacing, but was hesitant to acknowledge that the availability of oral contraceptives helped increase the presence of women in the workforce, noting only that this "appears" to be true "according to some researchers."[165] That court, however, noted that "plaintiffs do not contest that women of child-bearing age spend significantly more than men on out-of-pocket health care costs"; accordingly, it was evident to the court that the laws relied upon by plaintiff as already covering the issue did not adequately address the government's goals.[166] In the end, all of the courts seemed prepared to find that the government's interests in using the contraceptive coverage mandate to address public health concerns and create gender equality are compelling in general.

After finding that the interests are compelling in the abstract, a court must then find that the government's interests as applied to the for-profit plaintiffs are compelling even though the ACA and mandate provide other exemptions. Six courts found that the contraceptive coverage mandate provides too many exemptions to further a compelling interest when applied to the for-profit plaintiff. The "massive exemption" to the contraceptive mandate

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equality can . . . be compelling government interests"); *Monaghan*, 2013 WL 1014026, at *9–10 (discussing the government's compelling interests, without explicitly holding them to be compelling, before finding too many exceptions for the interest to be compelling as applied to plaintiff); *Legatus*, 901 F. Supp. 2d at 994 (stating that the government "seems at least capable of persuading, to some level of satisfaction, that the [contraceptive coverage] mandate promotes one, and perhaps both, interests and that each interest may be compelling"); *Newland I*, 881 F. Supp. 2d at 1297 (assuming that the government has a compelling interest in promoting public health generally).

165 *See, e.g.*, *Legatus*, 901 F. Supp. 2d at 991–92 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) for the proposition that public health is at times a compelling government interest and citing the IOM STUDY, *supra* note 96, at 103, as evidence of the compelling nature of women's health); *see also* Defendant's Memorandum in Support of their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 22–23, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (citing IOM STUDY, *supra* note 96, at 20, 103–04, for further evidence of the compelling nature of women's health).

166 *Legatus*, 901 F. Supp. 2d at 993. Plaintiffs have also questioned the existence of an access to contraception problem in America. *See, e.g.*, Motion for a Preliminary Injunction at 16, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061). No court has taken this claim up. Similarly, no court has addressed plaintiff's contention that there is no evidence that cost of contraceptive leads to non-use. *See, e.g.*, Reply in Support of Motion for Preliminary Injunction at 21–24, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK).

permitted for grandfathered plans,[167] small employers,[168] and religious employers[169] rendered the government's interest in applying the contraceptive coverage mandate to this particular plaintiff less than compelling because one more exemption would not greatly affect the efficacy of the government's program.[170]

Another court disagreed, stating that gradual implementation is not indicative of the strength of the government's interests and that the grandfathering plan is a "reasonable plan for instituting an incredibly complex health care law while balancing competing

167 42 U.S.C. § 18011 (2010).

168 26 U.S.C. § 4980H(c)(2) (2011) (exception for employers with less than fifty employees).

169 45 C.F.R. §147.130(B) (2011), which states that:

> (B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:
> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

This definition has been changed by rulemaking, but is reproduced here as it was presented to the court. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39873–74 (July 2, 2013) (to be codified at 45 C.F.R. §147.131) (eliminating the first three criteria of the religious employer exception and clarifying that the rule does not apply to houses of worship that provide "educational, charitable, or social services to their communities" or eligible institutions of higher learning).

170 *See Newland I*, 881 F. Supp. 2d at 1297–98 (finding that the exemptions rendered the government's interest not compelling); *see also Hobby Lobby IV*, 723 F.3d 1114, 1143–44 (10th Cir. 2013) (en banc) (finding convincing that the exemptions already "leave unprotected all women who work for exempted business entities"); Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013) (finding that the millions of Americans exempted cut against finding the government had a compelling interest in applying the mandate to plaintiff); *Geneva College II*, No. 2:12-CV-00207, 2013 WL 1703871, at *9–10 (W.D. Pa. Apr. 19, 2013) (finding that the government has failed to show how exempting the plaintiffs will "compromise [their] ability to administer the program" and further stating that the exemptions "severely undermine" any claim to a compelling interest) (internal quotations and citations omitted); Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026, at *10 (E.D. Mich. Mar. 14, 2013) (finding that the exceptions "called into question" the government's compelling interest); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4–5 (W.D. Mo. Dec. 20, 2012) (assuming that the exceptions undermined the government's compelling interest enough to warrant a preliminary injunction without going into detail).

interests."[171] That court stressed that finding otherwise would provide the government with perverse incentives to "require immediate and draconian enforcement" of similar laws in the future to preserve "compelling interest status."[172] The court also suggested that a court-ordered exemption for one plaintiff may only be a "miniscule hindrance," but that if "owners of other secular, for-profit companies" could qualify, then that could "undermine various interests the [g]overnment presently seeks to advance."[173]

Courts have come to opposite conclusions about the effect of the exemptions on the compelling nature of the contraceptive coverage mandate.[174] The opposing viewpoints rely on divergent opinions of to whom the court's holding would apply. The courts that found that the exemptions render the mandate not compelling also found that an exemption for one more employer is not a problem.[175] The court that found that the mandate is compelling regardless of the exemptions also found that an exception should not be granted because that exemption would likely extend to cover all for-profit corporate plaintiffs, which would in turn undermine the government's compelling interest.[176] These two approaches to the exemption question cannot be reconciled.

The courts' determinations suggest that the most contentious issue is the effect of the exemptions on the compelling nature of the government's interests. While courts have not firmly held that the government's interests are compelling, they seem likely to do so if the government can clearly articulate the relationship of the contraceptive coverage mandate to its compelling interests. On the effect of the exemptions question, the courts have taken opposing viewpoints that can only be reconciled by an appellate court.

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171 *Legatus*, 901 F. Supp. 2d at 994.

172 *Id.* (internal quotation marks omitted).

173 Legatus v. Sebelius, 901 F. Supp. 2d 980, 994–95 (E.D. Mich. 2012).

174 Not all of the courts who granted plaintiffs' request for relief addressed this explicitly; instead granting relief after finding that the government had not shown enough to prove that such relief was not warranted. *See, e.g.* Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012) (noting that "this unresolved issue does not detract from plaintiff's entitlement to relief at this stage").

175 *See Newland I*, 881 F. Supp. 2d at 1297–98; *see also Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *23 (W.D. Pa. Mar. 6, 2013) (noting that the fact of granting such exemptions undermines the government's claim to any compelling interest).

176 *See Legatus*, 901 F. Supp. 2d at 994–95.

3. Least Restrictive Means

The least restrictive means prong relies on the court to evaluate the alternatives provided by the plaintiff against the government's evidence that such alternatives are infeasible. Plaintiffs have provided a range of alternatives: the government (1) could provide contraception itself without burdening religious individuals;[177] (2) could reimburse people for contraceptives; (3) could offer tax deductions or credits for the use of contraceptive services; (4) could require pharmaceutical companies to provide contraceptives at pharmacies and doctor's offices free of charge;[178] or (5) could use community health centers, or (6) a new administrative agency to distribute contraceptives.[179]

The five district courts and two circuit courts to have addressed this issue diverged in their evaluations of the adequacy of the government's response to the alternatives proposed.[180] The government has argued that these schemes cannot pass the least restrictive means test because they will (1) impose costs and burdens on the government and (2) impose logistical and administrative obstacles on women who wish to receive preventative services.[181] In addressing these two impediments, one court found that the government had "failed to adduce facts establishing that government provision of contraceptive services will

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177 *See* Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013) (noting plaintiff's proposed alternatives without judging their efficacy).

178 *See Sharpe Holdings, Inc.*, 2012 WL 6738489, at *5 (noting proposed alternatives without holding on the least restrictive means prong).

179 *See* Legatus v. Sebelius, 901 F. Supp. 2d 980, 996–97 (E.D. Mich. 2012) (listing plaintiff's proposed alternatives).

180 *See Hobby Lobby IV*, 723 F.3d 1114, 1144 (10th Cir. 2013) (en banc) (finding the government cannot explain why excepting this plaintiff would "fundamentally frustrate its goals"); *Grote II*, 708 F.3d 850, 855 (7th Cir. 2013) (noting that the government has "not demonstrated that requiring religious objectors to provide cost-free contraceptive coverage is the least restrictive means of increasing access to contraceptives."); *Geneva College II*, No. 2:12-CV-00207, 2013 WL 1703871, at *11 (W.D. Pa. Apr. 19, 2013) (finding that the proposed scheme would provide coverage for uncovered women and arguing that that should apply to plaintiff's female employees too); *Monaghan*, 2013 WL 1014026, at *11 (finding that the government had not adequately refuted the proposed alternatives); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012) (noting proposed alternatives without holding on the least restrictive means prong); *Newland I*, 881 F. Supp. 2d at 1298–99 (finding that the government had failed to address the alternatives adequately); *Legatus*, 901 F. Supp. 2d at 997 (noting that plaintiff's alternatives may not be practical but the government needs to prove that).

181 *See, e.g.*, *Newland I*, 881 F. Supp. 2d at 1298–99 (noting these as the two reasons why proposed alternatives to the contraceptive coverage mandate could fail the least restrictive means inquiry).

necessarily entail logistical and administrative obstacles."[182] Two courts seemed persuaded by the claim that "the government already provides free contraception to women," and by the government's inability to refute that claim.[183] Another court stated that the proposed rules already "suggest several approaches for providing coverage to female employees," and stated that the scheme should apply to plaintiffs as well.[184] The most recent court to speak on this issue agreed, finding that the government had "failed to meet its burden" on the least restrictive means prong.[185] One district court disagreed, noting that the plaintiff's proposed alternatives "raise[] a host of administrative and logistical problems . . . and do[] not appear practical" because of their high cost both to the women who would seek to obtain contraceptives and to the government.[186] In between two of the earlier district court opinions, the government refocused its argument, relying more heavily than before on Congress's choice to use the existing employer based system rather than create a new system as indicative of the administrative and logistical benefits of the current program.[187] Although this does not account for the most recent decisions, it does suggest that a court's decision on the least restrictive means inquiry will depend on the plaintiff's ability to

182 *Id.*

183 *Id.* (internal quotation marks omitted); *see also Grote II*, 708 F.3d at 855 (noting that the government has "not demonstrated that requiring religious objectors to provide cost-free contraceptive coverage is the least restrictive means of increasing access to contraceptives"). One scholar takes up this point, arguing that the government does not have a compelling interest because it already provides family planning services through Title X family planning centers. *See* Mark L. Rienzi, *Constitutional Challenges: Religious Liberty and The HHS Mandate*, 29 J. CONTEMP. HEALTH L. & POL'Y 1, 6 & n. 19 (2012). The lecture does not mention, however, that the Title X family planning centers primarily cover low-income and uninsured persons, rather than insured persons whose insurance will not cover contraceptive services. The number and therefore the availability of the Title X family planning centers is also limited. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., TITLE X FAMILY PLANNING (Apr. 2013), http://www.hhs.gov/opa/pdfs/title-x-national-family-planning-overview.pdf (noting the target population of Title X family planning centers and that there are only 4,400 centers).

184 *Geneva College II*, 2013 WL 1703871, at *11 (finding that the proposed scheme would provide coverage for uncovered women and arguing that that should apply to plaintiff's female employees too).

185 *See Monaghan*, 2013 WL 1014026, at *11 (finding that the government had not adequately refuted the proposed alternatives).

186 Legatus v. Sebelius, 901 F. Supp. 2d 980, 97 (E.D. Mich. 2012).

187 *Compare* Defendant's Memorandum in Support of their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 30, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo., 2012) (No. 1:12-cv-1123-JLK) (spending only one paragraph on arguing that the mandate was more effective than the proposed alternatives) *with* Opposition to Plaintiff's Motion for a Preliminary Injunction at 32–34, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061) (spending multiple pages arguing that the mandate was the least restrictive means because Congress had specifically determined that it was the most effective alternative).

draw analogies to existing programs versus the government's ability to dispute any such analogies and stress the determinacy of Congress's specific choice of means.

C. The Free Exercise Clause

The plaintiffs will have a harder time prevailing on their Free Exercise Clause claim than on their RFRA claim given *Smith*'s narrower test. The Free Exercise Clause analysis in these cases focuses on whether the exemptions to the contraceptive coverage mandate and the ACA render the mandate non-neutral or not generally applicable. Thirteen courts have addressed the plaintiff's Free Exercise Clause claim; the other courts granted or denied preliminary injunctions based only on the RFRA claim without reaching the Free Exercise Clause claim.[188] This section will examine the courts' divergent analyses of the effect of the exemptions on the mandate's neutrality and general applicability.

1. Neutral

In the contraceptive coverage mandate cases, the neutrality inquiry has focused on whether the action that the contraceptive coverage mandate proscribes is unique to religious employers or to particular types of religious employers rather than shared by religious and secular employers alike.[189] Plaintiffs have attacked the mandate's neutrality by arguing that, in granting an exemption for some religious employers and not others, the government favored the religious beliefs of more obviously religious employers over the

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188 *Compare Contestoga II*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (addressing free exercise claim by reference); MK Chambers Co. v. U.S. Dep't of Health and Human Servs., No. 13-11379, 2103 WL 5182435, at *6 (E.D. Mich. Sept. 13, 2013) (addressing free exercise clause claim); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *9 (E.D. Mich. July 11, 2013) (same); *Eden Foods II*, No. 13-11229, slip op. at 10–12 (E.D. Mich. May 21, 2013) (same); *Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *26–28 (W.D. Pa. Mar. 6, 2013) (same); Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at * 6–7 (D. Colo. Feb. 27, 2013) (same); *Conestoga I*, 917 F. Supp. 2d 394, 406–10 (E.D. Pa. 2013) (same); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012) (same); *Grote I*, 914 F. Supp. 2d 943, 952–53 (S.D. Ind. 2012) (same); *Autocam I*, No. 1:12-CV-1096, 2012 WL 6845677, at *4–5 (W.D. Mich. Dec. 24, 2012) (same); *Korte I*, 912 F. Supp. 2d 735, 743–46 (S.D. Ill. 2012) (same); *Hobby Lobby I*, 870 F. Supp. 2d 1278,1287–90 (W.D. Okla. 2012) (same); *O'Brien I*, 894 F. Supp. 2d 1149, 1160–62 (E.D. Mo. 2012) (same) *with Legatus*, 901 F. Supp. 2d at 987 (noting that plaintiffs brought their preliminary injunction motion under RFRA only); *Newland I*, 881 F. Supp. 2d at 1295 (declining to address plaintiff's challenges under the First Amendment because RFRA provided adequate grounds for relief).

189 *See O'Brien I*, 894 F. Supp. 2d at 1160 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33, 543 (1993), for this standard).

religious beliefs of for-profit employers.[190]

Eleven courts, including the Third Circuit, have held that the contraceptive coverage mandate is neutral because it was adopted in order to address women's health, not to target religion, and it imposes on all employers regardless of religion.[191] Six of the courts noted that the inclusion of a religious employer exemption strengthens this finding of neutrality, demonstrating that the objective of the mandate was not to restrict religious practices because of their religious motivations but rather to restrict any practices which would adversely affect Congress's goal of making contraceptive coverage broadly available.[192]

190 *See, e.g.*, *Korte I*, 912 F. Supp. 2d at 744 (outlining the plaintiff's arguments to this effect); Brief for Appellants at 39, *O'Brien II*, No. 12-3357 (8th Cir. Nov. 13, 2012) (making this argument); *see also* Carson-Thies, *supra* note 116, at 62 (arguing that the proposed rule creates a two tiered system of religious employers in which one tier is granted an exemption from the mandate and the other an accommodation for their beliefs).

191 *See, e.g.*, *Conestoga II*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (incorporating by reference the district court's finding in *Conestoga I*, 917 F. Supp. 2d at 409–10, that the contraceptive coverage mandate is neutral and generally applicable); *MK Chambers*, 2013 WL 5182435, at *6 (finding that the mandate is "not specifically targeted at conduct motivated by religious belief" and that mandate's purpose is "not to target religion, but instead to promote public health and gender equality"); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *9 (E.D. Mich. July 11, 2013) (finding that the mandate is neutral and promotes women's health and gender equality); *Eden Foods II*, No. 13-11229, slip op. at 11 (E.D. Mich. May 21, 2013) (finding that the inclusion of exemptions does not indicate that the mandate is targeted at burdening religion); *Korte I*, 912 F. Supp. 2d at 744 (noting that the purpose of the mandate was "tied to public health and gender equality, not religion"); *Hobby Lobby I*, 870 F. Supp. 2d at 1289 (noting that plaintiffs have not disputed that the "mandate's purpose is secular in nature and intended to promote public health and gender equality"); *O'Brien I*, 894 F. Supp. 2d at 1160–61; *see also* Defendant's Memorandum of Law in Support of Their Motion to Dismiss the First Amended Complaint at 28, *O'Brien I*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-CV-476(CEJ)) (analogizing this to cases in which courts have upheld the statutory requirement that employers verify the immigration status of their employees (referencing provisions of the Immigration Reform and Control Act) and complaints alleging that the requirement burdened the religious exercise of an individual who believed they were required to hire persons in need (citing Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991) and Intercommunity Ctr. for Justice & Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990))); Defendant's Reply in Support of Their Motion to Dismiss the First Amended Complaint at 17–18, *O'Brien I*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-CV-476(CEJ)) (emphasizing that the individuals tasked with determining the requirements under the WHA were "*medical* experts at the IOM [tasked] with conducting a *science-based* review"; there was no mention of religion); Defendant's Memorandum in Support of their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 37, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (noting that the mandate's purpose, to increase women's access to preventative services in order to improve public health and increase gender equality, is a purely secular one).

192 *See MK Chambers*, 2013 WL 5182435, at *6 (finding that the exemptions show an effort to accommodate, not burden, religion); *Briscoe*, 2013 WL 755413, at *7 (noting that the religious employer exemption sufficiently protects religious organizations from governmental burdens that would violate the free exercise clause); *Korte I*, 912 F. Supp. 2d at 744 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534, 535, 540, for the

Disproportionate impact is not enough to violate the Free Exercise Clause, as it may be that some groups of religious adherents are simply more likely to engage in a prohibited practice.[193] These courts agree that the mandate is neutral because it neither targets nor is designed specifically to interfere with religious adherents.[194]

2. Generally Applicable

Under the generally applicable prong of the Free Exercise Clause analysis, a court must address whether the exemptions render the mandate not generally applicable.[195] This challenge is similar to the challenge under the RFRA compelling interest prong.

The previous eleven courts also held that the contraceptive coverage mandate is generally applicable because exemptions that undermine "general applicability" under the Free Exercise Clause are only those that suggest disfavoring of a religion.[196] As long

proposition that a court should scrutinize the law's application to find whether it is neutral); *see also Conestoga I*, 917 F. Supp. 2d at 410 (noting that the accommodation counsels in favor of the regulation's neutrality); *Grote I*, 914 F. Supp. 2d at 953 (citing *Hobby Lobby I*, 870 F. Supp. 2d at 1289); *Hobby Lobby I*, 870 F. Supp. 2d at 1289–90 (noting that the fact that the exemption do not go so far as to cover the plaintiffs does not make the mandate not neutral) (citing neutrality language from Catholic Charities of Diocese of Albany v. Serio, 825 N.Y.S.2d 653, 658 (2006)).

193 *See O'Brien I*, 894 F. Supp. 2d at 1161 (quoting Storman's Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009) ("The Free Exercise Clause is not violated even though a group motivated by religio[n] . . . may be more likely to engage in the proscribed conduct.")).

194 *See, e.g.*, *Autocam I*, No. 1:12-CV-1096, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012) (finding that mandate is neutral).

195 The plaintiffs have incorporated the same arguments as under the compelling interest inquiry, and the government has similarly responded by arguing that these are categorical exemptions of which most apply to both religious and secular employers (the grandfathered exemption, the small employer exemption) and the one other accommodates religion without disfavoring it (the religious employer exemption). *See e.g.*, Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction at 2–3, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-12061) (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010), for the proposition that corporations have First Amendment rights); Reply in Support of Motion for Preliminary Injunction at 29, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (arguing that the mandate cannot be considered generally applicable when it excludes "tens of millions [of] employees"); Defendant's Memorandum in Support of their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 35–40, *Newland I*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (citations to circuit cases omitted) (arguing that the mandate is neutral and generally applicable because the exemptions do not target or disfavor religion).

196 *See, e.g.*, *Conestoga II*, 2013 WL 1277419, at *2 (incorporating by reference the district court's finding in *Conestoga I*, 917 F. Supp. 2d at 409–10, that the contraceptive coverage mandate is neutral and generally

as society is "'prepared to impose'" the restriction on itself and not just on religious individuals, a restriction is generally applicable.[197] The courts held that the mandate applies to all employers who do not fall under an exemption, regardless of whether the employer is religious or not, and thus the mandate is generally applicable.[198]

Only two courts have found that the contraceptive coverage mandate violates the Free Exercise Clause.[199] One court interpreted the exceptions for grandfathered plans, employers with less than 50 employees, and religious employers as indicating a preference for secular purposes over religious ones and for specific types of religious purposes over others.[200] The other added that the government had engaged in a "religious gerrymander" by extending exemptions to an increasing number of religious entities while discriminating against "close corporate entities seeking to advance the religious beliefs of their owners."[201] The courts found that the narrow reach of the mandate after all of the exceptions were taken into account meant that the mandate violated the Free Exercise Clause.

Following the courts' holdings, it seems that for-profit plaintiffs will have an uphill, though not impossible, battle in proving that the contraceptive coverage mandate is not generally applicable or not neutral. It seems difficult to counter the current presumption that the contraceptive coverage mandate does not violate the Free Exercise Clause.

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applicable); *Korte I*, 912 F. Supp. 2d at 745 (noting that the exemptions are not targeting at a particular religion or belief and that the law is not so narrow as to target the plaintiff's religious objections); *Hobby Lobby I*, 870 F. Supp. 2d at 1290; *O'Brien I*, 894 F. Supp. 2d at 1162 (citing Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008), for the proposition that "general applicability does not mean absolute universality").

197 *O'Brien I*, 894 F. Supp. 2d at 1162 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545–56 (1993)).

198 *See Hobby Lobby I*, 870 F. Supp. 2d at 1290 (noting that the mandate does not only pursue conduct motivated by religious beliefs outside of the exemptions and therefore that it is generally applicable); *see also Conestoga I*, 917 F. Supp. 2d at 409 (same); *Grote I*, 914 F.Supp.2d 943, 953 (S.D. Ind. 2012).

199 *See Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *28 (W.D. Pa. Mar. 6, 2013) (finding that mandate was not generally applicable because of the secular exemptions and "religious gerrymander[ing]"); Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489, at *6 (E.D. Mo. Dec. 31, 2012) (finding that mandate's numerous exemptions indicated a preference for secular purposes over religious ones).

200 *See Sharpe Holdings, Inc.*, 2012 WL 6738489, at *5–6.

201 *Geneva College I*, 2013 WL 838238, at *28 (finding that the contraceptive coverage mandate was not generally applicable because of the secular exemptions and "religious gerrymander[ing]").

III. Suggested Analysis

This Part suggests that the key to answering the three questions posed to the courts in these lawsuits is to recognize a third group whose interests are affected by the outcome: the employees whose access to contraceptives hangs in the balance. The issue of whether a corporation has religious rights under RFRA or the Free Exercise Clause hinges on a historical understanding of whom and what the Free Exercise Clause was meant to protect. In recognizing that the Free Exercise Clause protects the beliefs of the employees as much as it protects the beliefs of the employers, it becomes clearer that corporations should not have religious rights that can infringe on the rights of their employees. Under the RFRA balancing analysis, the central role of the employee in making an independent decision to use her healthcare to fund her contraceptive choices shifts the focus away from the employer and suggests that the burden on the employer is not direct and therefore should not be found to be substantial. Similarly, recognizing that the compelling interest analysis is polycentric rather than bilateral allows the employee's compelling interest in the ability to choose contraceptive healthcare to weigh against her employer's interests in denying her government-promised choices. This extends into the least restrictive means analysis by giving increased weight to employee access as a consideration in judging the adequacy of proposed alternatives. Finally, under the Free Exercise Clause, the addition of broad employee interests in having the protections offered by the mandate strengthens the argument that the mandate is both neutral and generally applicable.

A. Do Corporations Have Religious Rights?

A court should not extend religious rights to corporations because of the adverse effect that extending Free Exercise or RFRA protections to corporations would have on the rights of employees. The Supreme Court alone may extend constitutional rights to corporations that were once unique to individuals.[202] In *Citizens United*, the Supreme Court extended free speech rights to corporations by "recogniz[ing] that First Amendment protection extends to corporations."[203] The Court in its opinion emphasized the need for free speech rights in a

202 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that corporations have free speech rights under the First Amendment); Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 687 (1978) (holding that corporations should be treated as "persons" for the purposes of Art. III and federal court jurisdiction). It is also a fundamental tenet of corporate law that a corporation is a "legally different entity with different rights and responsibilities due to its different legal status" as compared to the corporate owners and the corporate employees; this is the purpose of incorporation. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (noting that the president/sole shareholder of a close corporation is different from the corporation even when he is the sole owner).

203 *Citizens United*, 558 U.S. at 336–37, 342.

democracy, and focused on the dialogue which free speech protections are meant to foster.[204] That dialogue, reasoned the Court, is made better and more effective as more people are allowed to and are able to participate.[205] The Court accordingly held that corporations have First Amendment Free Speech rights because allowing corporate speech has the result of adding to the dialogue the right to freedom of speech was meant to foster.[206]

Citizens United should not be read to extend beyond the free speech protections of the First Amendment to encompass the First Amendment's religion clauses or, by extension, RFRA. The purpose of the freedom of religion clauses in the First Amendment is to protect the religious liberty of the individual, not to encourage discourse.[207] The founding fathers wanted to protect religion because they saw it as a source of the individual virtue that they wished to have as the foundation of government, and their concept of virtue required the exercise of free will to follow one's own conscience.[208] The First Amendment's religious freedom provisions were included in order to prevent religious oppression, the crushing of that free will, of the minority by the majority.[209]

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204 *See id.* at 339–43.

205 *Id.* at 342–343.

206 *See id.* at 342, 353. The court cites First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978) for this principle, which it characterizes as being "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, 558 U.S. at 347. Following the Court's re-characterization of *Bellotti*'s principle as restricted to political speech and free speech under the First Amendment, plaintiffs can no longer rely on *Bellotti* for a larger holding nor avail themselves of dicta in *Minnesota* ex rel *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985), that corporations have religious rights based on *Bellotti*. The same is true of *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) which cites *Bellotti*, 435 U.S. at 780, for the proposition that corporations have religious rights that include the right to free exercise under the First Amendment.

207 *See* City of Boerne v. Flores, 521 U.S. 507, 549–50 (1997) (recounting the history of the passage of the Bill of Rights and of the First Amendment).

208 *See* Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 4–5, 10–11 (Fall 2010) (providing quotations from Benjamin Franklin, Samuel Adams, John Adams, Patrick Henry, and George Washington discussing the goals of the First Amendment's religion clauses, and providing applicable text from Federalist 10 and 51 discussing the importance of protections for religious freedom); *see also* McConnell, *supra* note 10, at 1515 (citing THE FEDERALIST NOS. 10, 51 (James Madison) and discussing the Federalists' and Madison's views of the need for freedom of religion assurances).

209 *See* McConnell, *supra* note 10, at 1479–80 (discussing the Federalists' and Madison's views of the need for freedom of religion assurances).

The history and purpose of the Free Exercise Clause are not served by allowing for-profit corporations to claim religious rights.[210] Whereas the goal of the Free Speech Clause is served by encouraging all to participate in the discourse, the goal of the Free Exercise Clause is served by allowing individuals to practice their religious exercise without being imposed upon and without imposing on others. A for-profit corporation that hires individuals who need not adhere to the faith of the owners will, almost by definition, impose on those employees' free exercise of religion if the corporation is allowed to claim religious rights.[211] This is antithetical to the purpose of the Free Exercise Clause and cannot be supported by the reasoning in *Citizens United*.[212] If, as the Court stated in *Citizens United*, "[t]he First Amendment confirms the freedom to think for ourselves," then a corporation cannot be given religious rights that would allow the corporation to think and make religious decisions for its employees.[213]

The same reasoning holds true in evaluating a for-profit corporation's rights under RFRA. In adopting RFRA, Congress intended to re-establish the old Free Exercise test and to restore the previous Free Exercise rights, not to create a new test or new rights.[214] The historical interests protected under the Free Exercise Clause were meant to be protected under RFRA, but RFRA was not meant to create new interests or to proscribe an outcome for

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210 One author has suggested that the courts should differentiate between closely-held corporations and larger corporations in determining whether a corporation has religious rights. *See* John K. DiMugno, *supra* note 118, at 1 (arguing that closely-held corporations may have a better claim to religious rights than larger public companies); *see also Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *17–19 (W.D. Pa. Mar. 6, 2013) (concluding that the court "need not address head-on the issue whether all for-profit corporations may exercise First Amendment free exercise rights" because the close corporation could exercise the claims on behalf of its owners following EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), and Storman's Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009)); *Korte I*, 912 F. Supp. 2d 735, 746 (S.D. Ill. 2012) (relying on the fact that the corporation was a closely held, family owned S-corporation to find that the corporation could assert the owners' religious rights, before holding there was no substantial burden). *Contra* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (noting that the President/sole shareholder of a close corporation is different from the corporation even when he is the sole owner). Because there is no difference between the employees that work for corporations as opposed to for close corporations, this Note will not differentiate between the two.

211 This result follows from the fact that an employer may not discriminate on the basis of religion under Title VII, 42 U.S.C. §2000e–2 (a) (2010).

212 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–342 (finding that the goals of the free speech clause are served by extending the protection to corporations).

213 *Id.* at 908.

214 *See* Laycock & Thomas, *supra* note 19, at 218-19 (reviewing RFRA's legislative history).

claims brought under its statutory right.[215] The historical interests described above indicate that the interests protected by the Free Exercise Clause do not extend to the contraceptive coverage mandate. Under RFRA, "the context indicates" that "person" should not be read to extend statutory protections to corporations because the Free Exercise Clause on which RFRA was based did not extend constitutional protections to corporations.[216] Any court faced with the contraceptive coverage mandate should find that a for-profit corporation cannot exercise religious rights sufficient to state a claim under either the Free Exercise Clause or RFRA.[217]

B. Does the Contraceptive Coverage Mandate Violate RFRA in its Application to For-Profit Corporations?[218]

The contraceptive coverage mandate does not violate RFRA in its application to for-profit corporations because there is no substantial burden on the religious exercise of the corporate owners, three compelling government interests can be asserted because the plaintiffs are employers, and the contraceptive coverage mandate is the least restrictive means of achieving the government's goal.

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215 *See id.* (explaining that the statute was "designed to perform a constitutional function" to take the place of the altered Free Exercise Clause).

216 *See* 1 U.S.C. § 1 (2011); *see also Hobby Lobby I*, 870 F. Supp. 2d 1278, 1291-92 (W.D. Okla. 2012) (making this argument); *cf.* FCC v. AT&T, Inc., 131 S. Ct. 1177, 1181-84 (2011) (holding that "personal privacy" under FOIA does not extend to corporations, even though corporations are "persons" under 1 U.S.C. §1, because there is a difference between that which is "personal" and that which flows to all legal "persons"; "[personal] suggests a type of [right] evocative of human concerns—not the sort usually associated with an entity like [a for-profit corporation]").

217 *See, e.g.*, *Hobby Lobby I*, 870 F. Supp. 2d at 1287-88, 1290-92 (holding that for-profit corporations cannot state a claim under either RFRA or the Free Exercise Clause).

218 Even if the appellate courts decide that corporations do not have religious rights, it seems likely that the courts will address the RFRA question on the merits by piercing the corporate veil and considering the owners' religious beliefs as the beliefs subject to the burden. *See, e.g.*, Storman's Inc. v. Selecky, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (holding that the for-profit corporation lacks standing to bring a claim for infringement of religious rights and focusing instead on the rights of the religious owners); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988) (holding that Townley is not a religious corporation but that it is "merely the instrument through and by which" the Townleys express their religious beliefs so the court need not address whether corporations have religious rights because the Townleys' religious rights can be used instead). This is a tactic that courts have taken in substance if not in form in addressing the contraceptive coverage mandate. *See, e.g.*, *Geneva College I*, No. 2:12-cv-00207, 2013 WL 838238, at *17–19 (W.D. Pa. Mar. 6, 2013) (concluding that the court "need not address head-on the issue whether all for-profit corporations may exercise First Amendment free exercise rights" because the close corporation could exercise the claims

1. There Is No Substantial Burden on the Religious Exercise of the Corporate Owners

The contraceptive coverage mandate does not place a substantial burden on the religious exercise of corporate owners because the burden of which the plaintiffs complain is limited to arguing that an employee's potential and personal choice to use contraceptives covered by the employers' insurance plan infringes on those corporate owners' religious beliefs.[219] This situation seems analogous to the Court's Establishment Clause jurisprudence, in which the Court has "repeatedly recognized" that "private choice, . . . [i.e. the] independent decisions of private individuals," severs the "*imprimatur* of . . . endorsement" by the provider of those benefits.[220] There, the Court has held that taxpayers cannot claim that the government is inappropriately endorsing religion if recipients of government aid make a "true private choice" to use that aid to fund religious schools via tax deductions, scholarships, or vouchers.[221] So too here a secular employer should not be able claim that his religious exercise is burdened if an independent employee chooses to use government-mandated, employer-sponsored health insurance to make the personal and private health

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on behalf of its owners following *Townley*, 859 F.2d 610, and *Storman's, Inc.*, 586 F.3d 1109); *O'Brien*, 894 F. Supp. 2d at 1158, 2012 WL 4481208, at *4 (addressing the claims on the merits without deciding whether the corporation had religious rights); *Newland I*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (same). *But see Autocam III*, No. 12-2673, 2013 WL 5182544, at *5 (6th Cir. Sept. 17, 2013) (rejecting the argument that the corporation can assert claims on behalf of individual corporate owners on the Ninth circuit's "pass through" theory from Storman's, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009), and EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)); *Conestoga III*, 724 F.3d 377, 386-388 (3d Cir. 2013) ("We decline to adopt the *Townley*/ *Storman's* theory, as we believe that it rests on erroneous assumptions regarding the very nature of the corporate form. . . . [Plaintiffs] chose to incorporate and conduct business through [a corporation], thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction . . . We hold—contrary to *Townley* and *Storman's*—that the free exercise claims of a company's owners cannot "pass through" to the corporation."); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702, at *13 (E.D. Mich. July 11, 2013) (disagreeing with *Townley* and *Storman's Inc.* and holding that the owners chose the corporate form and so cannot now ignore it in order to impute their beliefs the corporation).

219 *See O'Brien I*, 894 F. Supp. 2d at 1159–61 (finding that the plaintiff's burden is indirect and de minimis).

220 Zelman v. Simmons-Harris, 536 U.S. 639, 654–55 (2002) (holding that a school voucher program did not violate the establishment clause because the voucher recipients' choice severed the government's relationship to the eventual school that received the voucher).

221 *Id.* at 649–54 (citing Muller v. Allen, 463 U.S. 388 (1983) (program of tax deductions), Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481 (1986) (vocational scholarship program), and Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (program providing sign language interpreters for deaf students in religious schools) as support).

decision to use contraceptive services.[222] In both situations, "the incidental [burden] . . . is attributable to the individual recipient, not to the government, whose role ends with the [regulating] of benefits."[223] The individual choice of how to use the benefit severs the relationship between the provider and the benefit provided. By the same reasoning, the mandate does not make the employer endorse, or seem to endorse, the employee's choice to use benefits in a certain manner.[224] The mandate does not force the plaintiffs themselves to use contraceptives, nor does it prevent plaintiffs from sharing with their employees their beliefs about the use of contraceptives.[225] The burden of which the plaintiffs complain is based primarily on an increased financial cost should they choose not to provide the mandated insurance.[226] Increased cost alone is unlikely to constitute a substantial burden under RFRA.[227] This weakens the plaintiffs' claims of substantial burden as little direct action is required on their part and cost without more is unlikely to be a substantial burden under RFRA.[228]

222 *Cf.* Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. UNIV. L . REV. COLLOQUY 151, 158–59 (2012) (suggesting that, in the contraceptive coverage mandate cases brought by the Catholic Church and other religiously affiliated organizations, an Establishment Clause framework could be used to sever the chain of causation between the employer and employee).

223 *Zelman*, 536 U.S. at 652 (finding that the existence of a true private choice in the distribution of government benefits means that the government has not committed an Establishment Clause violation).

224 *Id.* at 654–55 (noting that "no reasonable observer would think a neutral program of private choice . . . carries with it the *imprimatur* of . . . endorsement" by the provider of the benefits).

225 *Cf.* Goehring v. Brophy, 94 F.3d 1294, 1299–1301 (9th Cir. 1996) (holding university use of student fees to fund insurance program which covered abortion did not violate student's free exercise because the burden on students who are not required to "accept, participate in, or advocate in any manner" for abortions cannot outweigh the government's interest in public health); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (9th Cir. 1988) (holding that the plaintiff's ability to share their faith is not wholly eviscerated by their not be allowed to hold mandatory services for employees, and that so long as they could hold non-mandatory services there was no substantial burden).

226 This cost depends on the number of people that the corporation employs. *See, e.g.* Edward A. Morse, *Lifting the Fog: Navigating Penalties in the Affordable Care Act*, 46 CREIGHTON L. REV. 207, 244, 255–56 (2013) (computing that an organization with 3,000 employees would pay about $6 million in fines if the organization chose not to provide health insurance coverage and providing an appendix of further computations of penalties under different scenarios).

227 *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (noting that a burden which merely causes a religious exercise to be more expensive is not substantial). *But see* Rienzi, *Unequal Treatment*, *supra* note 29, at 15 (arguing that any fines for engaging in religious exercise create a substantial burden without analyzing the jurisprudence's "substantial" requirement).

228 *See Braunfeld*, 366 U.S. 599 (1961); *cf.* Wilson, *supra* note 101, at 1467 (noting a pattern in abortion decisions whereby an objector's claim weakens as less direct action is required). This Note is focused only on

Further, the plaintiffs are not being denied benefits from the government as in *Sherbert*; it is they who are denying their employees government benefits.[229] This fact makes the situation comparable to that in the procedural due process case of *Brock v. Railway Express, Inc.*[230] There, the Court noted that the statutory provision at issue reflected a balancing of employee and employer interests and so held that, even though the employee was not a direct party to the suit, the employee's interests should still be weighed in the court's interest balancing.[231]

The contraceptive coverage mandate reflects a balancing of employer and employee interests in the limited definition of "religious employer."[232] The Departments explained that this limited accommodation was meant to protect employees' access to contraception by limiting the accommodation to employers who primarily hire employees who shared their faith.[233] Similar to the procedural due process context, in which the unrepresented

claims raised by for-profit corporations, but for a brief discussion on the burdens to religious organizations such as religious hospitals or schools, see Wilson, *supra* note 101, at 1448 (discussing dire premonitions by Chicago's Cardinal George that no religious hospitals will exist two years after the mandate and by Belmont Abbey College's President saying that he and others like him would rather close their schools than comply with the mandate).

229 *Cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (finding the burden was substantial even though the denial of government benefits was only an indirect result of plaintiff's religious exercise).

230 Brock v. Ry. Express, Inc., 481 U.S. 252, 263 (1987) (adding the employee's interest into the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), balancing test). In *Brock*, a railroad company sued the Secretary of Labor claiming that the reinstatement of a terminated employee prior to an evidentiary hearing was a denial of the company's due process rights. *Id.* at 255–57. The Court balanced the company's interest in firing for cause (a property right) against both the government's interest in protecting employees from retaliatory discharge and the employee's interest in not being terminated for having alerted the company to unsafe working conditions. *Id.* at 260–63. The Court held that the lack of a judicial style pre-reinstatement evidentiary hearing was not a violation of the company's due process rights. *Id.* at 264, 268.

231 *See id.* at 263 (noting that the district court had failed to consider the interest of the employee who was also affected by the decision).

232 *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39873–74 (July 2, 2013) (to be codified at 45 C.F.R. §147.131) (defining a "religious employer" for the purposes of the contraceptive coverage mandate). *But see* Edward A. Morse, *supra* note 226, at 246–47 (arguing that the mandate "prefers the particular interests of a subset of the public—women who want contraceptive and sterilization coverage—over the interests of others—men and women who have religious . . . objections to all or part of such coverage").

233 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) ("Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive

employee's interest weighs on the government's side of the judicial balancing test, the employee's interests in not having her choices impinged on by the religion of her employer here weighs in the government's favor and counterbalances her employer's interest in denying her contraceptives on free exercise grounds.[234]

The infringement of religious belief here "afford[s] no basis for resisting" the mandate imposed on employers for the protection of the employer's employees.[235] As one court concluded, "RFRA is a shield, not a sword"; it is meant to protect one from government coercion to engage in a practice forbidden by religion but it is not meant to allow the imposition of one's religion on another.[236] A court should recognize the role of the employee's independent, personal, protected choice in creating the employer's burden and ind that the burden is not substantial under RFRA.

2. Three Compelling Government Interests Can Be Asserted When the Plaintiff is an Employer.

The government has offered only two justifications for the contraceptive coverage mandate: (1) promoting public health, especially of women and newborn children, and (2)

services and therefore are more likely to use contraceptives. *Including these employers within the scope of the exemption would subject their employees to the religious views of the employer*, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.") (emphasis added). Although this definition has changed under the rule adopted on July 2, 2013, the governmental interest in protecting employees does not seem to have been altered as the change does not change which plans, and by extension which employers and employees, are covered. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39873–74 (July 2, 2013) (to be codified at 45 C.F.R. §147.131) (stating that only the fourth requirement of the original "religious employer" definition has been maintained and noting that this has not changed which plans are covered).

234 *See, e.g.*, *Brock*, 481 U.S. at 263 (noting that a court should consider the interest of the employee who was affected by the decision in applying the due process balancing test).

235 *See* United States v. Lee, 455 U.S. 252, 260 (1982) (finding that religious exercise could not justify not paying social security taxes to benefit employees); *cf.* Wilson, *supra* note 101, at 1465–66 (noting that even in the abortion context there are some claims of religious burden that "may be so remote that it is beyond cognizance and society's willingness to protect it," and providing two examples of claims that would be too remote: nurses who would refuse to provide comfort to a patient or a pharmacist who would refuse to prepare saline solutions used in abortions). Wilson also notes that under Title VII employers must provide accommodations from religious hardship for religious employees. Wilson, *supra* note 101, at 1464–65. In the contraceptive coverage mandate context, however, it is the employer who is seeking an accommodation which will ultimately cause hardship for the employees, and not the other way around.

236 *See O'Brien I*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012); *see also Grote I*, 914 F. Supp. 2d 943, 951 (S.D. Ind. 2012) (quoting this language from *O'Brien I*, 894 F. Supp. 2d at 1159).

ensuring women's equal access to preventative health care to allow women to participate equally in American life.[237] The independent interest of the employees in not having rights impinged under the guise of religion, however, also weighs in on the side of the government due to the polycentricism of the contraceptive coverage mandate.[238]

Both of the government's stated interests are recognized as compelling in general. The government's interest in public health has been recognized as compelling numerous times by the Supreme Court and other appellate courts.[239] Contraceptive coverage is a public heath matter.[240] The IOM study explicitly noted that the most effective long acting contraceptive methods tend to be expensive up-front and that cost-sharing can pose a barrier to women who wish to gain access to contraception.[241] The resulting rule under the WHA

237 *See* discussion *supra* Part II.B.2.

238 *See* Brock v. Ry. Express, Inc., 481 U.S. 252, 263 (1987) (noting that when statutes reflect a balancing of interests then all of those interests should factor into the balancing test in the procedural due process context); Brief for ACLU as Amici Curiae Supporting Defendants at 5, 7, *O'Brien I*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-CV-476(CEJ)) (pointing to the need to protect employees from discrimination by employers). *See generally* Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 550 (1998) (suggesting that the existence of a commercial context and of third party interests should weigh in on the state's interest side of the RFRA balancing).

239 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) ("[T]he importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. . . . Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."); Jacobson v. Mass., 197 U.S. 11, 13, 26, 30 (1905) (finding a compelling interest in mandatory vaccination because it was necessary for the public good); Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 498 (10th Cir. 1998) ("[P]ublic health is a compelling governmental interest."); Goehring v. Brophy, 94 F.3d 1294, 1299–1301 (9th Cir. 1996) (holding that the government had a compelling interest in providing student health plan which included coverage of abortion).

240 Contraceptive coverage is one of the most widely used services among women. *See* THE HENRY J. KAISER FAMILY FOUND., FOCUS ON HEALTH REFORM; IMPACT OF HEALTH REFORM ON WOMEN'S ACCESS TO COVERAGE AND CARE 6 (2012) (noting the wide use of contraceptives). In 2000, the Center for Disease Control and Prevention named family planning and contraceptive as "one of the top ten greatest public health achievements of the [Twentieth] Century." Chad Booker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 169 (2012) (citations omitted) (discussing the importance of contraceptives).

241 *See* IOM STUDY, *supra* note 96, at 108–09. The IOM Study also found that fourty-nine percent of pregnancies each year in the United States are unintended and that women with unintended pregnancies are less likely to receive proper pre-natal care while children born from unintended pregnancies have increased odds of preterm birth and lower birth weights. *See id.* at 102–03. The study found that, in 2008 alone, approximately

relied on evidence that elimination of cost sharing in insurance plans would increase use of contraceptives and decrease the public health risks for women and children associated with unintended pregnancies.[242] This interest in decreasing public health risks by lowering the barriers to access contraception should be found to be compelling.

The government's second interest in decreasing the disparity between men and women by allowing women to control their reproductive choices should also be found to be compelling. As the Court stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[243] Many women pay higher insurance fees and are charged more by their insurers if not protected by prohibitions on cost sharing—most of these extra costs can be tied to reproduction-related expenses.[244] These extra costs are detrimental to a woman's ability to achieve equality with her male counterparts.[245] The inability to choose when to get pregnant can also have negative effects on a woman's ability to balance her work and other aspects of her life.[246] Like the state's interest in public health, the interest in ending discrimination against women has already been found to be a compelling interest by the Supreme Court.

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thirty-six million American women were in need of reproductive family planning services. *See id.* at 103. In addition, the study noted that some women should not become pregnant because it is dangerous for their health, that pregnancy spacing is important for the health of the baby, and that contraceptives can have other health benefits beyond preventing pregnancy including treatment of menstrual disorders, acne, pelvic pain, reduction of chance of endometrial cancer, and protection against inflammatory pelvic diseases. *See id.* at 103–04, 107.

242 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726–28 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (explaining the evidentiary basis of the rule); IOM STUDY, *supra* note 96, at 109 (finding that the elimination of cost-sharing would increase the use of contraceptives); *see also* John Aloysius Cogan, Jr., *The Affordable Care Act's Preventative Services Mandate: Breaking Down the Barriers to Nationwide Access to Preventative Services*, 39 J.L. MED. & ETHICS 355, 356 (2011) (discussing that use of preventative service declines when cost-sharing is imposed).

243 *Casey*, 505 U.S. at 856 (sustaining Roe v. Wade, 410 U.S. 113 (1973)).

244 *See* IOM STUDY, *supra* note 96, at 18 (discussing disparate costs of health care based on gender); *see also* Booker, *supra* note 240, at 170 (citations omitted) (same).

245 *See* IOM STUDY, *supra* note 96, at 19–20 (discussing the negative impact of increased healthcare costs on women's equality).

246 *See, e.g.* Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) ("[T]he importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. . . . Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.").

Finally, because the plaintiffs in these cases are employers, there is an additional set of interests to consider under the rubric of the governmental interest: the interests of the employees.[247] The Supreme Court stated succinctly in *United States v. Lee* that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees,"[248] and the same is true here. An objecting employer would control the employee's access to contraceptive coverage.[249] Fifty-eight percent of women, or approximately fifty-six million non-elderly women, are covered by employer-sponsored insurance in the United States.[250] These employees have a strong interest in not having their choices, whether it be the choice to access contraceptive services or how to exercise their religious beliefs, interfered with by the religious beliefs of their employers. Employee interest in maintaining coverage equivalent to that of her counterparts employed by non-religious corporations is a strong factor that adds weight to the government's compelling interest.

The exemptions to the contraceptive coverage mandate do not render the government's interest less compelling. In *Lee*, the Court found that even though the social security system had an exception, allowing another for Lee was of a different order of magnitude because an employer exemption would have the effect of imposing Lee's religion on his employees.[251]

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247 *Cf.* Markey, *supra* note 238, at 550 (suggesting that the existence of a commercial context and of third party interests should weigh in on the state's interest side of the RFRA balancing when applied to landlord-tenant relationships).

248 United States v. Lee, 455 U.S. 252, 261 (1982); *see also* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that that the federal government's interest in making minimum wages and equal pay a reality under the Fair Labor Standards Act outweighed a religious school's interest in supplying a "head of household" supplement to men only); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (noting that a landlord could not discriminate against unmarried couples on the basis of religion because "voluntary commercial activity does not receive the same status accorded to directly religious activity"); Minnesota *ex rel* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) ("[W]hen appellants entered into the economic arena . . . , they . . . subjected themselves to the standards the legislature has prescribed . . . for the benefit of prospective and existing employees [and] of the citizens of the state as a whole in an effort to eliminate pernicious discrimination.").

249 *Cf.* Wilson, *supra* note 101, at 1485 (arguing that, in the same-sex marriage context, there is not as strong an interest in requiring for-profit companies with religious objections to nonetheless provide services for same-sex weddings because those companies do not provide "access to the status of marriage"; in the marriage context, only the State controls such access).

250 *See* THE HENRY J. KAISER FAMILY FOUND., FACT SHEET: WOMEN'S HEALTH INSURANCE COVERAGE 1 (2012) [hereinafter KAISER FACT SHEET] (analyzing data on women covered by employer vs. other forms of health insurance).

251 *See Lee*, 455 U.S. at 258–61 (finding that there was a substantial burden but that it was outweighed by

This holding suggests that there is a balancing of interests at work between the government, the employer, and the employees akin to the procedural due process context.[252] Just as under the substantial burden prong, a polycentric understanding of the contraceptive coverage mandate should be used in order to balance the government's compelling interests in public health and gender equality along with the employee's compelling interests in personal choice and free exercise against the employer's compelling interest in free exercise.[253]

The current ACA exemptions, for grandfathered plans[254] and for small employers,[255] do not in terms permit employers to impose religion on their employees. The exemption requested by the plaintiffs is different in kind from these secular exemptions; the conduct requested to be permitted is dissimilar to the conduct already exempted.[256] While these exemptions could suggest that the government's interests are not compelling, these exemptions do not change the compelling nature of the employees' interest.

The exemption for religious employers does have the potential to infringe employees' rights. The exemption as written allows for conduct similar to the requested exemption, but reduces as much as possible the chance that an employee will have his or her free exercise infringed by limiting the exception to non-profit houses of worship and their auxiliaries or associations.[257] The accommodation is admittedly not perfect; some employees may still

the government's compelling interest).

252 *See, e.g.*, Brock v. Ry. Express, Inc., 481 U.S. 252, 263 (1987) (adding the employee's interest into the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), balancing test).

253 *See Lee*, 455 U.S. at 258–61 (focusing on the effect of an exemption on employees regardless of the existence of other exemptions); *see also Brock*, 481 U.S. at 263 (noting that a court should consider the interest of the employee who was affected by the decision in applying the due process balancing test).

254 42 U.S.C. § 18011 (2010).

255 26 U.S.C. § 4980H(c)(2) (2011) (exception for employers with less than fifty employees).

256 *Cf.* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 432–33 (2006) (determining that because the statute allowed exemptions for use of narcotics in Native American ceremonies, the government did not have a compelling interest in refusing another exception for sacramental use).

257 *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874 (July 2, 2013) (to be codified at 45 C.F.R. §147.131) (stating that only the fourth requirement of the original "religious employer" definition has been maintained, thereby limiting the exemption to an organization that is "organized and operates as a nonprofit entity" and which "holds itself out as a religious organization," and noting that this has not changed which plans were covered); *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147) (defining a "religious employer" for the purposes of the contraceptive coverage mandate; this is the definition that was in

have their free exercise infringed because they may not exercise their religion in exactly the same ways as their religious employers.[258] The solution to this infringement of employee rights, however, is not to allow for-profit employers to infringe on the fundamental rights of their numerous employees.

A polycentric understanding of the interests in play counsels a finding that the three interests on the government's side of the balance are compelling. Further, while the exceptions may affect a court's understanding of the government's interests, they do not weaken the employee's compelling interests in her right to choose contraceptive healthcare, an interest that the government also represents in these lawsuits. A court's understanding of the government's compelling interests should not be tempered by the exemptions to the ACA and to the mandate because those exemptions do not affect the employees' compelling interests.

3. The Contraceptive Coverage Mandate Is the Least Restrictive Means

The mandate is the least restrictive means given the employee access concerns and the administrative concerns.[259] These two concerns work in tandem to counter proposed alternatives to the contraceptive coverage mandate. One central benefit of using employer insurance as the foundation for the contraceptive coverage mandate is the number of women who already have employer insurance and who know how to use it and where to access it.[260] The cost and difficulties of putting in another, government-sponsored system only for contraceptive coverage may be prohibitive not only for the government but also

use when most of the cases referenced were decided).

258 For example, the Guttmacher Institute did a study in which it found that ninety-nine percent of all women, including ninety-eight percent of Catholic women, of reproductive age who had ever had sex had at some point used a contraceptive method other than family planning. *See* RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST. MEDIA CTR., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 4 (2011), http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf. This suggests that there could be women who share the faith of a religious organization for which they work but who would still be interested in having their healthcare cover contraceptives. An exploration of the weaknesses of the religious employer exemption is beyond the scope of this Note, as is an analysis of whether the religious employer exemption has the effect of implicitly restricting the scope of RFRA as applied to the contraceptive coverage mandate (akin to an implicit preclusion for any employers that are not covered by the religious employer exemption).

259 The least restrictive means test is limited to assessing the specific other means presented by the plaintiffs, which makes it difficult to address this factor in the abstract. *See* United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011) (explaining least restrictive means inquiry). This section will be cursory at best.

260 *See* KAISER FACT SHEET, *supra* note 250, at 1 (noting that fifty-eight percent of women are covered by employer-sponsored health insurance).

for the employees who will have to learn a new system. The three compelling interests protected by the mandate can only be served if women have easy access to contraceptives as a practical matter. For example, the financial benefits of a lack of cost-sharing will decrease if women have to travel long distances or engage in time-intensive research to figure out where to get contraceptives. Once access difficulties as well as administrative costs are considered, a court should find that the contraceptive coverage mandate is the least restrictive means of achieving the government's compelling interests and protecting the employee's interest in being able to choose contraceptive healthcare.

C. Does the Contraceptive Coverage Mandate Violate the Free Exercise Clause of the First Amendment in its Application to For-Profit Corporations?

The contraceptive coverage mandate does not violate the Free Exercise Clause of the First Amendment in its application to for-profit corporations because the mandate is neutral and generally applicable. The mandate is neutral because its object is not to "restrict practices because of their religious motivation."[261] Instead, the mandate aims to prevent any restriction placed by a woman's employer on her ability to choose government-promised contraceptive coverage.[262] The mandate applies regardless of whether the restriction is a result of an employer's religious beliefs or secular opinions.[263] The mandate is also generally applicable because the exemptions to the mandate do not create a scheme of individualized government assessment; employers are subject to the mandate unless they fall into one of three defined exemptions.[264] None of the exemptions suggest a disfavoring

261 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (finding that a law that fails the neutrality test is one which explicitly targets religions or which has the object of restricting practices because of their religious motivations).

262 *See, e.g.*, Am. Family Ass'n, Inc. v. FCC, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (finding convincing proof of neutrality in the fact that the FCC's system for allocating broadcast licenses disadvantaged both religious and secular groups alike); United States v. Amer, 110 F.3d 873, 879 (2d Cir. 1997) (holding that a father's conviction for international parental kidnapping did not violate the Free Exercise Clause because the statute under which he was convicted punished conduct "without regard to whether the conduct was religiously motivated" but "solely for the harm [the targeted actions] cause").

263 *See* Stormans's Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009) ("The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct.").

264 *See* Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012) (noting that when a system of exemptions starts to look individualized then strict scrutiny will apply); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006) (holding that a system involving routinely made individualized government assessment would trigger strict scrutiny).

of religion; the employers subject to the mandate are both religious and secular in an effort to protect the interests of as many employees as possible. The new Free Exercise test was adopted in order to prevent "permitting [a man], by virtue of his beliefs, to become a law unto himself."[265] To allow a for-profit employer to claim an exemption from a neutral, generally applicable, national mandate in order to deny its employees the ability to choose government-promised contraceptive coverage would be to permit just that.

CONCLUSION

The cases covered by this Note are primarily in the earlier, injunctive relief stages of litigation, and yet already the courts have reached opposing outcomes. It seems likely that the Supreme Court will address the question of corporate religious rights and their relationship to the contraceptive coverage mandate in the future.[266]

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265 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (internal quotation marks and citation omitted) (justifying the new free exercise test).

266 There are fourteen appeals currently pending in the circuit courts, with the Seventh, Eighth, Tenth, and D.C. Circuits having granted preliminary injunctions in two, two, three, and one case(s) each respectively, the Third and Sixth Circuits having denied preliminary injunctions in one and two cases each respectively. In two of its three decisions, the Tenth Circuit remanded to the district court for further consideration on two remaining preliminary injunction factors. *See Newland II*, No. 12-1380, 2013 WL 5481997, at *2–3 (affirming district court's grant of preliminary injunction in light of *Hobby Lobby IV*, 723 F.3d 1114); *Conestoga III*, 724 F.3d at 389 (denying preliminary injunction), *petition for cert. filed*, *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013); *Autocam III*, No. 12-2673, 2013 WL 5182544, at *9 (6th Cir. Sept. 17, 2013) (affirming district court's denial of preliminary injunction); Armstrong v. Sebelius, No. 13-1218, 2013 WL 4757949, at *1 (10th Cir. Sept. 5, 2013) (granting preliminary injunction and remanding to the district court in light of *Hobby Lobby IV*, 723 F.3d 1114); *Eden Foods III*, No. 13-1677, slip op. at 3 (6th Cir. June 28, 2013) (denying preliminary injunction pending appeal); *Gilardi II*, No. 13-5069, slip op. at 1 (D.C. Cir. Mar. 29, 2013) (per curiam) (granting preliminary injunction pending appeal); Triune Health Grp., Inc. v. Sebelius, No. 13-1478 (7th Cir. filed Mar. 5, 2013) (no decision); Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 13-1395 (8th Cir. filed Feb. 25, 2013) (no decision); *Annex Med II*, 2013 WL 1276025, at *3 (granting preliminary injunction pending appeal); *Grote II*, 708 F.3d 850 (7th Cir. 2013) (granting preliminary injunction pending appeal); Legatus v. Sebelius, No. 13-1093 (6th Cir. filed Jan. 24, 2013) (no decision); *Korte II*, 2012 WL 6757353, at *1 (granting preliminary injunction); *Hobby Lobby II*, 2012 WL 6930302, at *3 (denying preliminary injunction), *application for injunction denied by Circuit Justice*, *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, 2013 WL 3869832, at *1–2 (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *O'Brien II*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting preliminary injunction pending appeal). On December 26, 2012, Justice Sotomayor denied Hobby Lobby's application for an injunction pending appeal. *Hobby Lobby III*, 133 S. Ct. at 643, *rev'd and remanded*, *Hobby Lobby IV*, 723 F.3d at 1147 (en banc) (reversing the district court's denial of preliminary injunction and remanding for the district court to address two remaining preliminary injunction

This Note has argued that for-profit corporations do not have religious rights under either RFRA or the First Amendment and that the contraceptive coverage mandate does not violate RFRA or the Free Exercise Clause in its application to for-profit corporations. This Note suggests that the key to reaching these conclusions is to recognize the polycentric nature of the contraceptive coverage mandate and to take into serious consideration the interests of the employees in having the ability to choose to access government-promised contraceptive healthcare.

To find that the contraceptive coverage mandate violates either RFRA or the Free Exercise Clause would go far beyond Justice Scalia's prediction that all-encompassing free exercise protections would allow every man "to become a law unto himself."[267] It would allow every corporation to become a government unto itself, dispensing rights and benefits to its employees and restricting others at will. It would go far beyond *Citizens United*[268] in changing the relationship between the American citizen-employee, the corporation, and the government by extending protections for speech to protections for actions that have broader direct effects on employees. The religion clauses of the First Amendment were meant to protect the minority from the tyranny of the majority. Religious protections like RFRA and the Free Exercise Clause should not now be used to bind the powerless to the will of the powerful under the guise of freedom of religion.

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factors), *granting preliminary injunction on remand*, *Hobby Lobby V*, 2013 WL 3869832, at *1–2 (granting preliminary injunction), *petition for cert. filed*, *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013). There are currently two petitions for certiorari pending before the Supreme Court on this issue. *Hobby Lobby VI*, No. 13-354 (U.S. Sept. 19, 2013); *Conestoga IV*, No. 13-356 (U.S. Sept. 19, 2013).

267 *Smith*, 494 U.S. at 885 (internal quotation marks and citation omitted) (justifying the new free exercise test). Although there are other factors to consider in thinking about the effect of a court finding in the affirmative on any of these questions, a full review of such factors is beyond the scope of this Note.

268 558 U.S. 310 (2010).