

# SHIELDS AND KIRPANS: HOW RFRA PROMOTES “IRRATIONAL-BASIS” REVIEW AS FOR-PROFIT COMPANIES CHALLENGE THE AFFORDABLE CARE ACT’S WOMEN’S HEALTH AMENDMENT

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## I. INTRODUCTION

In recent history, the courts have analyzed a wide array of generally applicable laws which plaintiffs claimed adversely impacted their free exercise of religion. Upon review of these claims, the courts reached conclusions including that hunters may kill endangered animals,<sup>2</sup> parents can jeopardize their children’s education,<sup>3</sup> and noncustodial parents are insulated from contempt charges when refusing to support their children.<sup>4</sup> The courts arrived at each one of these results using a strict scrutiny schema.<sup>5</sup> While these claims are often unsuccessful, when plaintiffs do

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<sup>2</sup> See *United States v. Friday*, 525 F.3d 938, 959–60 (10th Cir. 2008) (acknowledging that the Fish and Wildlife Service may issue permits allowing Native Americans to kill bald eagles to use in religious rituals). *But see* *United States v. Gonzales*, 975 F. Supp. 1225, 1230 (D. N.M. 1997) (stating that “merely because an application is submitted does not mean that an applicant automatically will receive a permit to take, possess, or transport an eagle.”).

<sup>3</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972) (noting that “Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts.”).

<sup>4</sup> *Hunt v. Hunt*, 648 A.2d 843, 854 (Vt. 1994).

<sup>5</sup> See *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting in part) (advancing that “[t]he difficulty with [a strict scrutiny approach] is that, despite the Court’s claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-aged children.”); *Gonzalez*, 957 U.S. at 1229 (holding that “requiring an applicant to name specifically the religious ceremony at which an eagle will be used and further requiring religious elder certification are not the least restrictive means by which the government can further its compelling interest.”); *Friday*, 525 F.3d at 958 (stating “when strict

prevail, the results are often illogical. Recent challenges to the Patient Protection and Affordable Care Act's Women's Health Amendment have stirred controversy as employers with sincere religious objections to certain forms of contraception, and who likewise resent subsidizing such contraception in any way, filed suit to enjoin the government's enforcement of the provision.<sup>6</sup>

This Comment will not explore whether the Patient Protection and Affordable Care Act (ACA) in itself passes constitutional muster, but will instead focus on the various arguments against the Women's Health Amendment (WHA), which the plaintiffs have raised under the Religious Freedom Restoration Act of 1993 (RFRA). The federal district courts hearing these claims have rendered conflicting decisions when determining whether the various plaintiffs have shown that the government has substantially infringed upon their free exercise of religion by requiring employer-provided healthcare, which also covers contraception.<sup>7</sup> Likewise, with these cases now reaching the courts of appeals, the circuits remain split. As the sacrosanct First Amendment clashes with modern statutory law, emotions have the potential to overcome rationality. While matters of faith "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,"<sup>8</sup> adherents litigating claims do not always prevail when trying to maintain an exception to a neutrally applicable law which they allege infringes upon their particular beliefs. Litigants challenging the ACA's provisions view the government as forcing them to choose between subsidizing a behavior that offends their religious beliefs or risk hefty penalties.<sup>9</sup> However, the entities raising these claims are structured as for-profit companies.<sup>10</sup> This Comment argues that the courts should not grant these secular companies their requested enjoinder of governmental enforcement because it is unrealistic to presume that a business entity is capable of exercising religion. Further, any injury the plaintiffs allege is too remote for a court to consider a "substantial burden" on one's free exercise. Finally, the courts should analyze all

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scrutiny is applicable the government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished."); *Hunt*, 648 A.2d at 853 (holding "the contempt order does not stand up to scrutiny under . . . the federal [system] . . . because the order has not been shown to be the least restrictive means of furthering the state's interest in parents supporting their children.").

<sup>6</sup> *E.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *rev'd and remanded*, 723 F. 3d 1114 (10th Cir. 2013); *see also* discussion *infra* Part II.

<sup>7</sup> *See id.* at 1296 (W.D. Okla. 2012) (holding that "[p]laintiffs have not shown a 'clear and unequivocal' right to injunctive relief in light of the standards applicable to their request.") (citation omitted); *see also* *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1300 (D. Colo. 2012) (noting "[t]his injunction is . . . premised upon the alleged substantial burden on Plaintiffs' free exercise of religion.").

<sup>8</sup> *Thomas v. Review Bd. of Indiana Emp't. Sec. Div.*, 450 U.S. 707, 714 (1981).

<sup>9</sup> *See* discussion *infra* Part II.

<sup>10</sup> *See* *Hobby Lobby*, 870 F. Supp. 2d at 1283; *see generally* *Newland*, 881 F. Supp. 2d 1287; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 110 (D.D.C. 2012); *see generally* *O'Brien v. U.S. Dep't. of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012); *see also* discussion *infra* Part II.

religiously neutral laws of general applicability using the standard the Supreme Court advocated in *Employment Division v. Smith* rather than that of the Congressionally mandated RFRA.<sup>11</sup> Ultimately, however, until the Supreme Court agrees to hear one of these challenges, the confusion will persist as to whether these plaintiffs even raise cognizable claims.

## II. BACKGROUND

### A. *The Patient Protection and Affordable Care Act*

On March 23, 2010, President Barack Obama signed the ACA into law.<sup>12</sup> The goal of the ACA was to “curb rising health care costs and to provide greater coverage for the more than 45 million Americans who were uninsured during 2009.”<sup>13</sup> Among the many avenues Congress constructed to achieve these goals was the “individual mandate,” requiring citizens to purchase health insurance for themselves and their dependents.<sup>14</sup> Failure to do so would result in a fixed monetary tax penalty known as the “shared responsibility payment.”<sup>15</sup> Since the ACA was implemented, one of its most controversial positions has been the WHA, a mandate requiring employers to provide “preventive care and screenings.”<sup>16</sup> Congress included contraception and sterilization services for female employees under this umbrella.<sup>17</sup> The government added the WHA to the ACA in an effort to help combat “gender inequality by equalizing men and women’s health care coverage . . . .”<sup>18</sup> Congress noted that due to the expenses associated with reproductive healthcare, women pay as much as sixty-eight percent more in out-of-pocket healthcare costs than men.<sup>19</sup> Senator Gillibrand explained, “[t]he prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.”<sup>20</sup> Moreover, the government contended that when women are unable to access contraception, they are severely disadvantaged compared to their male counterparts in the workforce.<sup>21</sup> Further, when women do have access to contraception, their social and

<sup>11</sup> See generally *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>12</sup> See 42 U.S.C. § 18001 (Supp. V 2011).

<sup>13</sup> *Mead v. Holder*, 766 F. Supp. 2d 16, 19 (D. D.C. 2011), *aff’d sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (citing CONG. BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 1 (2008), available at <http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-keyissues.pdf>).

<sup>14</sup> 26 U.S.C. § 5000A (Supp. V 2011).

<sup>15</sup> *Id.* §§ 5000A(b)(c).

<sup>16</sup> 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

<sup>17</sup> *Id.*

<sup>18</sup> Memorandum of the Am. Civil Liberties Union and the Am. Civil Liberties Union of the Nat’l Capital Area, As Amici Curiae at 3, *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-1635-RBW, 2012 WL 5903980, (D.D.C. Oct. 24, 2012).

<sup>19</sup> 155 CONG. REC. S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

<sup>20</sup> *Id.*

<sup>21</sup> 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).

economic statuses improve.<sup>22</sup> Prior to the ACA, even when women's health insurance covered contraception, the co-pays were usually so high that women ended up paying as much as if they had no coverage at all.<sup>23</sup>

In planning its proposal for the ACA, the Health Resources and Services Administration (HRSA) commissioned The Institute of Medicine (IOM) to recommend certain preventive measures to include in the ACA with respect to women's health.<sup>24</sup> The IOM is an independent non-profit organization "that works outside of [the] government to provide unbiased and authoritative advice to decision makers and the public."<sup>25</sup> The IOM's report recommended that insurance coverage include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."<sup>26</sup> The FDA approved contraceptive methods include "diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices."<sup>27</sup> The HRSA adopted the IOM recommendation in its entirety.<sup>28</sup>

As soon as President Obama effectuated the law, litigants began filing legislation to dispute its provisions.<sup>29</sup> Twenty-six states, including Florida, originally challenged the ACA on grounds that its Medicaid Expansion provision and individual mandates were unconstitutional.<sup>30</sup> In its amicus brief on behalf of the state, the American Life League contended that the contraception mandate violates the Fourteenth Amendment's Equal Protection Clause.<sup>31</sup> The amicus curiae

does not allege that money spent on women's health is wrong, but that it is a violation of The Equal Protection Clause to spend it while spending so close to zero dollars on an office of men's health and or on men's health problems,

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<sup>22</sup> *Id.*

<sup>23</sup> See Memorandum of the Am. Civil Liberties Union at 4, *Tyndale*, 904 F.Supp. 2d 106 (D.D.C. 2012) (citing INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 94 (2011)).

<sup>24</sup> *Id.*; see also *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *rev'd and remanded*, 723 F. 3d 1114 (10th Cir. 2013).

<sup>25</sup> *About the IOM*, INST. OF MED., <http://www.iom.edu/About-IOM.aspx> (last updated Nov. 4, 2013).

<sup>26</sup> See U.S. DEPT. OF HEALTH AND HUMAN SERVS., AFFORDABLE CARE ACT EXPANDS PREVENTION COVERAGE FOR WOMEN'S HEALTH AND WELL-BEING, <http://www.hrsa.gov/womensguidelines/> (last visited Mar. 21, 2014).

<sup>27</sup> *Hobby Lobby*, 870 F. Supp. 2d at 1284 (footnote omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

<sup>30</sup> *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1240 (11th Cir. 2011) *cert. granted*, 132 S. Ct. 603 (2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>31</sup> Brief Amicus Curiae of Am. Life League, in support of the Respondents on the Minimum Coverage Provision at 1–3, *U.S. Dept. of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 664935.

especially research on alleviating the early deaths which lower male life expectancy.<sup>32</sup>

Further, the amicus curiae states that the ACA, in providing additional spending for women’s health issues, continues a “long standing prejudice against men by singling out women for additional health care assistance.”<sup>33</sup> In 2012, the United States Supreme Court heard the case and decided that the ACA’s individual mandate is a valid exercise of Congress’ power to tax.<sup>34</sup> Chief Justice Roberts, writing for the majority, explained that “imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.”<sup>35</sup> Accordingly, the Court determined that Congress did not exceed its authority in passing the ACA and imposing the individual mandate.<sup>36</sup>

Since the ACA’s passage, several for-profit employers with individual religious opposition to abortion-inducing drugs have brought suit on new grounds, challenging the contraception mandate under several legal theories, including the RFRA. Failure to comply with the mandate subjects employers to fines ranging as high as 1.3 million dollars per day.<sup>37</sup> The circuits have been largely split as to whether or not these plaintiffs raise cognizable claims under the RFRA.<sup>38</sup> The Act, by its terms, provides some flexibility as it exempts certain religious employers<sup>39</sup> and grandfathered plans<sup>40</sup> from the contraception mandate. Additionally, lawmakers have allowed for a “safe-harbor provision” which temporarily prevents government enforcement of this provision against certain non-profits who do not qualify for either exception.<sup>41</sup> Further, the ACA does not apply to

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<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2600.

<sup>35</sup> *Id.* (footnote omitted).

<sup>36</sup> *Id.*

<sup>37</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2013 U.S. Dist. LEXIS 107248, at \*4 (W.D. Okla. July 19, 2013).

<sup>38</sup> *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013) (holding that plaintiffs did not state a claim under RFRA). *But see Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299–1300 (D. Colo. 2012) (holding that the plaintiffs were able to demonstrate that the mandate did substantially burden their free exercise of religion).

<sup>39</sup> *See O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1155 (E.D. Mo. 2012) (providing that “(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 [provisions of the Internal Revenue Code referring to churches, associations of churches, and exclusively religious activities of religious orders]”).

<sup>40</sup> *See Tyndale House Publishers v. Sebelius*, 904 F.Supp. 2d 106, 109 n.3 (D.D.C. 2012) (explaining that “grandfathered plans” are plans that have existed since March 23, 2010 and have continuously covered at least one person).

<sup>41</sup> *See O’Brien*, 894 F. Supp. 2d. at 1155. *O’Brien* indicates that the safe-harbor plan will remain in effect until the first plan year that begins on or after August 1, 2013. *Id.* The safe-harbor provision applies to organizations whose plans do not include contraceptive coverage due to their religious beliefs. *Id.*

employers with less than fifty employees.<sup>42</sup>

### B. RFRA

Congress enacted RFRA in 1993 in response to *Employment Division v. Smith*.<sup>43</sup> In *Smith*, the United States Supreme Court upheld an Oregon law which denied unemployment benefits to members of a Native American church after the members tested positive for peyote, an illegal substance.<sup>44</sup> The Court held that, “[t]o make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’ . . . contradicts both constitutional tradition and common sense.”<sup>45</sup> As a result, the Court concluded that laws that apply to all citizens, yet incidentally infringe on a plaintiff’s religious beliefs, should be analyzed using a rational basis test, rejecting the previously employed *Sherbert* test.<sup>46</sup> Critics harshly lambasted *Smith*. Rabbi David N. Saperstein called the decision, “the most dangerous attack on our civil rights in this country since the Dred Scott decision . . . .”<sup>47</sup> Congress further contended that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”<sup>48</sup> Believing that the Court “created a climate in which the free exercise of religion [was] jeopardized,”<sup>49</sup> Congress enacted RFRA, thus reestablishing the strict scrutiny analysis, which the Court had used in prior rulings.<sup>50</sup> The legislature stated that such a test “is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”<sup>51</sup>

Prior to *Smith*, the compelling interest test set the standard for free-exercise claims.<sup>52</sup> While *Sherbert* held that courts must employ a strict scrutiny standard of review when analyzing a free exercise claim,<sup>53</sup> the courts largely confined favorable plaintiff holdings to areas involving

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<sup>42</sup> 26 U.S.C. § 4980H(c)(2)(A) (Supp. V 2011).

<sup>43</sup> *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996); see generally *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>44</sup> *Smith*, 494 U.S. at 890.

<sup>45</sup> *Id.* at 885 (citation and footnote omitted).

<sup>46</sup> *Id.* at 884–85.

<sup>47</sup> James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1410 (1992) (quoting Ed Briggs, *Rabbi Deplores Supreme Court Trend on Freedom of Worship*, WASH. POST, Oct 26, 1991, at B6).

<sup>48</sup> 42 U.S.C. § 2000bb(a)(4) (2006).

<sup>49</sup> S. REP. NO. 103-111, at 8 (1993).

<sup>50</sup> See *Sherbert v. Verner*, 374 U.S. 398, 406, 410 (1963) (holding that “[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation,” and precluding the state of South Carolina from denying unemployment benefits to a Seventh-Day Adventist who refused to work on Saturdays for religious reasons) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>51</sup> 42 U.S.C. § 2000bb(a)(5) (2006).

<sup>52</sup> See generally *Sherbert*, 374 U.S. 398 (utilizing the compelling-interest test).

<sup>53</sup> *Id.* at 407–09.

unemployment claims.<sup>54</sup> The one notable exception was *Wisconsin v. Yoder*.<sup>55</sup> *Yoder* illustrates the Supreme Court’s analysis of free exercise claims employing a focused and fact-specific approach.<sup>56</sup> Consequently, this approach garnered individual victory over government rules of law.<sup>57</sup> The *Yoder* plaintiffs argued that Wisconsin’s compulsory school attendance laws violated their sincere Amish beliefs, which only allowed for formal schooling through the eighth grade.<sup>58</sup> The majority reasoned that not excepting the Amish from the attendance laws and forcing them to formally educate their children beyond the eighth grade served no compelling government interest.<sup>59</sup>

After *Smith*, the legislature enacted RFRA in an attempt to return to the *Yoder*-era compelling interest test.<sup>60</sup> Accordingly, RFRA prohibits the federal government from substantially burdening a person’s exercise of religion, unless the government demonstrates that the burden is the least restrictive means of furthering a compelling government interest.<sup>61</sup>

Today, a statutory RFRA challenge actually imposes a more stringent standard for analyzing a law’s impact on one’s religious beliefs than does a constitutional challenge under the Free Exercise Clause of the First Amendment.<sup>62</sup> The Free Exercise Clause requires that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>63</sup> Courts have interpreted it as proscribing the government from enacting any laws infringing upon a person’s beliefs without curtailing a legislature’s right to make laws regulating religious conduct itself.<sup>64</sup> In essence, a law cannot *target* religion. Whereas under RFRA, a law cannot place a *substantial* burden on an individual’s religious exercise without first establishing that doing so furthers a compelling government interest.<sup>65</sup> RFRA does not apply only to laws that address religion, but in accordance, to all laws, even those that apply generally to all

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<sup>54</sup> See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990) (stating “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable . . . law); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1254 (3rd ed. 2011) (citing *Smith*, 494 U.S. at 833).

<sup>55</sup> See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 207–09.

<sup>58</sup> *Id.* at 234–35.

<sup>59</sup> *Id.*

<sup>60</sup> 42 U.S.C. § 2000bb-1 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290 (W.D. Okla. 2012), *rev’d and remanded*, 723 F.3d 1114 (10th Cir. 2013).

<sup>63</sup> U.S. CONST. amend. I.

<sup>64</sup> See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990) (opining that the First Amendment prohibits the government regulating “the right to believe . . . whatever religious doctrine one desires” while also noting that religion often involves physical acts which are not absolutely protected).

<sup>65</sup> 42 U.S.C. § 2000bb(a)(3) (2006).

citizens, yet incidentally place a substantial burden on a particular individual's free exercise of religion.<sup>66</sup>

The United States Supreme Court later ruled that Congress lacked the constitutional authority to apply RFRA to the states using the enforcement powers granted in Section five of the Fourteenth Amendment.<sup>67</sup> RFRA, however, remains an appropriate avenue for challenging a federal law which infringes upon one's free exercise of religion.<sup>68</sup> In order to state a claim pursuant to RFRA, a plaintiff must demonstrate that the government's action is remedial in nature.<sup>69</sup> Furthermore, the law must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>70</sup> As a result, the principles espoused in *Smith* control when challenging a state or local law of general applicability on free exercise grounds, whereas in converse, RFRA requires that analogous federal laws meet strict scrutiny.<sup>71</sup>

### III. ANALYSIS

#### A. Religious Challenges to the ACA's Contraception Mandate

One of the first religiously motivated lawsuits against the ACA was *Mead v. Holder*.<sup>72</sup> The *Mead* plaintiffs challenged the individual mandate itself.<sup>73</sup> In *Mead*, the plaintiffs claimed that this mandate burdened their religious exercise because they believed that God would provide for their entire healthcare needs and, therefore, the government could not force them to purchase health insurance.<sup>74</sup> The *Mead* court did not consider this a substantial burden on the plaintiff's free exercise of religion, in part because the plaintiffs actually already contribute to "other forms of insurance, such as Medicare, Social Security, and unemployment taxes," all of which conflict with the belief that God, and not the government, is responsible for providing for their health and financial needs.<sup>75</sup> Further, the court noted that near-universal health insurance coverage is a legitimate government interest and that the plaintiffs could not present a less restrictive means to achieve

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<sup>66</sup> *See id.*

<sup>67</sup> *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997).

<sup>68</sup> *See Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (in which the Supreme Court upheld a lower court's ruling that the government had not shown a compelling interest for prosecuting a religious sect who ingested the illegal drug hoasca as a religious sacrament).

<sup>69</sup> *Boerne*, 521 U.S. at 519.

<sup>70</sup> *Id.* at 520.

<sup>71</sup> CHEMERINSKY, *supra* note 54, at 1258–67.

<sup>72</sup> *See generally* *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd sub nom.* *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated* by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>73</sup> *Id.* at 18.

<sup>74</sup> *Id.* at 21.

<sup>75</sup> *Id.* at 42.



that objective.<sup>76</sup> Moreover, the plaintiffs indicated that paying the shared responsibility payment in lieu of purchasing health insurance would be the “lesser of two evils.”<sup>77</sup> Since the plaintiffs had the opportunity to pay into the shared responsibility plan, their choices were not limited to either breaking the law or engaging in an activity they considered repugnant to their religious beliefs; thus, the court found that any burden on their free exercise was not substantial.<sup>78</sup>

Since *Mead*, a number of private companies have filed suits objecting to only the contraception mandate on religious grounds, including the legal assertion that the act violates their freedom of religious exercise under RFRA.<sup>79</sup> This Comment will focus on the secular for-profit companies challenging the mandate.<sup>80</sup> As secular business entities, they do not fit into any of the already existing exceptions.<sup>81</sup> However, the owner of each company cites strong objections to certain forms of contraception and seeks to run the company in accordance with his or her religious beliefs.<sup>82</sup> These employers all contend that the government is forcing them to violate their religious beliefs or face the substantial penalties that the law imposes on those who do not comply with the mandate.<sup>83</sup> Currently, twenty-one companies have petitioned the courts for injunctions against the government’s enforcement of the mandate.<sup>84</sup> Of those, the courts have granted sixteen injunctions.<sup>85</sup>

In 2012, Frank O’Brien, owner of a for-profit company called O’Brien Industrial Holdings, LLC, challenged the ACA, seeking injunctive and declaratory relief, on the grounds that its contraception mandate violates his Catholic beliefs.<sup>86</sup> The United States District Court in the Eastern

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<sup>76</sup> *Id.* at 43.

<sup>77</sup> *Id.* at 42.

<sup>78</sup> *Id.* at 43.

<sup>79</sup> See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013); see generally *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Co. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 110 (D.D.C. 2012); see generally *O’Brien v. U.S. Dep’t. of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012); see also discussion *infra* Part II.

<sup>80</sup> See *Hobby Lobby*, 870 F. Supp. 2d at 1283; see generally *Newland*, 881 F. Supp. 2d 1287; *Tyndale*, 904 F. Supp. 2d at 110; see generally *O’Brien*, 894 F. Supp. 2d 1149; see also discussion *infra* Part II.

<sup>81</sup> See *Thomas v. Review Bd. of Indiana Emp’t. Sec. Div.*, 450 U.S. 707, 714 (1981); see *Hobby Lobby*, 870 F. Supp. 2d at 1296; see also *Newland*, 881 F. Supp. 2d at 1300; see also discussion *infra* Part II.

<sup>82</sup> *E.g.*, *Tyndale*, 904 F. Supp. 2d at 116 (noting the company “maintains ‘its religious identity, beliefs, and mission’”) (citation omitted); *Hobby Lobby*, 870 F. Supp. 2d at 1283 (stating, “[a]lthough Hobby Lobby and Mardel are for-profit, secular corporations, the Green family operates them according to their Christian faith”).

<sup>83</sup> See *e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1293.

<sup>84</sup> Laura Bassett, *Contraception Mandate Likely Headed to the Supreme Court, Experts Say*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/04/05/contraception-mandate-supreme-court\\_n\\_3017451.html](http://www.huffingtonpost.com/2013/04/05/contraception-mandate-supreme-court_n_3017451.html) (last visited Mar. 21, 2014).

<sup>85</sup> *Id.*

<sup>86</sup> *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1154 (E.D. Mo. 2012).

Division of Missouri noted that, as a secular for-profit company, despite the religious beliefs of its owner, O'Brien Industrial Holdings, LLC did not fit into any of the allowable exceptions.<sup>87</sup> The plaintiffs argued that pursuant to *Citizens United*, a corporation should have the same First Amendment rights as a person.<sup>88</sup> The *O'Brien* court declined to address this question, deciding instead that the contraception mandate does not constitute a "substantial burden" under RFRA.<sup>89</sup>

In *O'Brien*, the plaintiff alleged that the contraception mandate constitutes a substantial burden on their religious rights as it would coerce them to "choose between conducting their business in accordance with their religious beliefs or paying substantial penalties to the government."<sup>90</sup> However, the federal district court opined that indirectly subsidizing their employees' possible access to contraception does not "demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs."<sup>91</sup> Thus, the court rejected the proposition that funding someone else's participation in an activity that contravenes one's religious beliefs is not a direct impact on one's free exercise of religion.<sup>92</sup>

*O'Brien* analogized the 2011 *Mead* decision.<sup>93</sup> *O'Brien* noted that the ACA imposes an even more remote burden on the plaintiff's religious exercise than *Mead's* plaintiff alleged.<sup>94</sup> *O'Brien* noted that the healthcare plan could only prove offensive to the plaintiff's beliefs if a covered employee actually purchased contraceptives.<sup>95</sup> The court further reasoned that by paying an employee's salary, the plaintiff already could be indirectly subsidizing the use of contraception.<sup>96</sup> Moreover, *O'Brien* contends that "RFRA is a shield, not a sword," functioning to protect individuals from coercive government regulations, which either mandate acts forbidden by one's religion or forbid those mandated by the religion.<sup>97</sup> RFRA is "not a means to force one's religious practices upon others."<sup>98</sup> Accordingly, the court dismissed the RFRA complaint as having only a *de minimis* burden on the plaintiffs' free exercise of religion.<sup>99</sup>

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<sup>87</sup> *Id.* at 1156.

<sup>88</sup> *See id.* at 1158 (citation omitted).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1159.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See Mead v. Holder*, 766 F. Supp. 2d 16, 19 (D.D.C. 2011), *aff'd sub nom.* *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>94</sup> *O'Brien*, 894 F. Supp. 2d at 1160.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1159.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1160.

Recent cases have reached just the opposite conclusion.<sup>100</sup> The *Newland* court decided that the plaintiffs were eligible for injunctive relief because they raised a cognizable claim and would likely succeed on the merits.<sup>101</sup> *Newland* notes that in allowing multiple exceptions, including the one for religious employers, the government has shown that the ACA neither furthers a compelling government interest nor implements the least restrictive means to achieving its desired result.<sup>102</sup> The *Newland* court’s recognition that 190 million health plan participants are currently exempt from the preventative care mandate was a major factor in its holding that forcing the plaintiffs to comply with the mandate could not possibly further any compelling government interest.<sup>103</sup> Further, the court determined that the plaintiffs were able to propose a less restrictive solution.<sup>104</sup> The plaintiffs’ proposals include that the government: (1) create its own birth control insurance plan; (2) directly compensate contraception and sterilization providers; or (3) demand that the manufacturers of such medications give them away for free.<sup>105</sup> When the government contended that solutions such as forcing contraception manufacturers to give away a fungible commodity for free were “implausible,” the court opined that the government did not sufficiently refute the plaintiffs’ proposed solutions.<sup>106</sup> Thus, the court determined that the plaintiffs were entitled to injunctive relief.<sup>107</sup>

In October of 2012, Tyndale House Publishers, Inc., a Christian publishing company that is ninety-six and a half percent owned by a non-profit religious entity, moved for an injunction that would prevent the government from enforcing the ACA’s contraception mandate against them.<sup>108</sup> The plaintiffs alleged that paying for drugs and intrauterine devices “that can cause the demise of an already conceived/fertilized human embryo” is contrary to their religious beliefs.<sup>109</sup> In its analysis the *Tyndale* court distinguished the facts from those in *O’Brien*, noting that in *O’Brien*, the plaintiffs paid into a group health insurance policy, whereas *Tyndale*’s plaintiffs paid directly for its employees’ healthcare services “thereby removing one of the ‘degrees’ of separation that the court deemed relevant in *O’Brien*.”<sup>110</sup> Unlike *O’Brien*, *Tyndale* distinguished its facts from those in *Mead*. *Tyndale* noted that the *Mead* plaintiffs had the reasonable

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<sup>100</sup> See, e.g., *Newland v. Sebelius*, 881 F. Supp. 2d. 1287, 1299 (D. Colo. 2012).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1298 n.13 (conceding that this estimate is at the “high-end” of the government’s calculations).

<sup>104</sup> *Id.* at 1298–99.

<sup>105</sup> *Id.* at 1298.

<sup>106</sup> *Id.* at 1299.

<sup>107</sup> *Id.*

<sup>108</sup> *Tyndale House Publishers, Inc. v. Sebelius*, 904 F.Supp. 2d 106, 111–12 (D.D.C. 2012).

<sup>109</sup> *Id.* at 112 (citation omitted).

<sup>110</sup> *Id.* at 123 (citation omitted).

alternative of paying the shared responsibility payment, which is considerably less coercive than the “risk of suit and enormous financial penalties” that the *Tyndale* plaintiffs faced if they did not comply with the contraception mandate.<sup>111</sup>

Moreover, *Tyndale* espoused, contrary to the holding in *O'Brien*, a court may find that requiring an individual to pay for services consumed by third parties can substantially burden the individual’s free exercise of religion.<sup>112</sup> *Tyndale* levied its harshest criticisms against *O'Brien* in declaring that whether RFRA “is not a means to force one’s religious practices on others” is entirely irrelevant when applying the appropriate analysis in deciding if the plaintiff’s free exercise is substantially burdened.<sup>113</sup> Like *Newland*, *Tyndale* also noted that the government’s creation of multiple exceptions only strengthened the argument that the contraception mandate does not further a compelling government interest.<sup>114</sup> The United States Supreme Court reasoned in *O Centro* that “a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”<sup>115</sup> Thus, *O Centro* held that since the United States Drug Code exempts ritualistic use of peyote for members of certain religions, there was no compelling government interest in completely proscribing the drug hoasca, which the plaintiffs ingested for similar purposes.<sup>116</sup> *Tyndale* reasoned that the government was likewise unconvincing in showing how the contraception mandate could serve a compelling interest if the drafters were willing to include so many exemptions.<sup>117</sup> Thus, the United States District Court for the District of Columbia granted the plaintiffs’ motion for a preliminary injunction.<sup>118</sup> In spite of the court granting the injunction, the Obama administration contended that the plaintiffs are unlikely to succeed on the merits of the claim.<sup>119</sup>

### B. *Hobby Lobby v. Sebelius*

The largest non-Catholic employer to challenge the contraception

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<sup>111</sup> *Id.* at 124.

<sup>112</sup> *Id.* at 123.

<sup>113</sup> *See id.* (criticizing *O'Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159-60 (E.D. Mo. 2012)).

<sup>114</sup> *Id.* at 129.

<sup>115</sup> *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

<sup>116</sup> *See id.* at 433-39.

<sup>117</sup> *Tyndale*, 904 F.Supp. 2d at 130.

<sup>118</sup> *Id.*

<sup>119</sup> *Judge Sides with Christian Publisher on Contraception Mandate*, 23 No. 9 WESTLAW J. OF INS. COVERAGE 2 (2012), 2012 WL 6087550.

mandate is the craft supply chain Hobby Lobby, Inc.<sup>120</sup> Hobby Lobby is a private for-profit chain of retail stores, which employs over 13,000 people.<sup>121</sup> Seeking an injunction that would prevent the government from enforcing the mandate pending appellate review, the company filed a complaint under RFRA on September 12, 2012, alleging that the contraception mandate is an infringement upon the company’s free exercise of religion.<sup>122</sup> On November 19, 2012, the Federal District Court for the Western District of Oklahoma denied the request, reasoning that the company is not a “person” under the First Amendment, nor did they meet their prima facie burden under RFRA.<sup>123</sup> RFRA requires that in order to prevail, a plaintiff must establish that the government has enacted a law, designed to promote the general welfare, which substantially burdens the plaintiff’s free exercise of religion, and there is no less restrictive means to implement the law.<sup>124</sup> On December 20, 2012, a two-judge panel of the Tenth Circuit Court of Appeals upheld the district court’s denial of the injunction.<sup>125</sup> The judges reasoned that, “plaintiffs failed to satisfy this standard on the first element of their RFRA claim, that the challenged mandate ‘substantially burden[ed] [their] exercise of religion.’”<sup>126</sup> The court opined, “[w]e do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship.”<sup>127</sup> Ultimately, the panel concluded that RFRA governs the plaintiff’s own participation in or abstinence from a specific activity whether required or prohibited by religion and does not reach so far as to allow their religious beliefs to govern the choices of others.<sup>128</sup> Therefore, since success on the merits of the RFRA claim was not likely, the court denied the injunction.<sup>129</sup> On December 26, 2012, sitting alone as the Circuit Justice for the Tenth Circuit, United States Supreme Court Justice Sotomayor also denied Hobby Lobby’s requested injunction.<sup>130</sup> Justice Sotomayor noted that pursuant to the All Writs Act,<sup>131</sup> the Supreme Court

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<sup>120</sup> The Christian bookstore chain Mardel, of which Hobby Lobby founder David Green’s son is president, is also a named plaintiff in the suit. For simplicity, I will focus only on Hobby Lobby’s claims.

<sup>121</sup> Complaint at 1, *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2012 WL 4009450 (W.D. Okla. Sept. 12, 2012).

<sup>122</sup> *Id.* at 2–3.

<sup>123</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1297 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013).

<sup>124</sup> 42 U.S.C. § 2000 bb-1 (2006).

<sup>125</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at \*3 (10th Cir. Dec. 20, 2012).

<sup>126</sup> *Id.* at \*2 (citations omitted).

<sup>127</sup> *Id.* at \*3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice, 10th Cir. 2012).

<sup>131</sup> 28 U.S.C. § 1651(a) (2006).

can only issue an injunction “when it is ‘[n]ecessary or appropriate in aid of our jurisdiction’ and ‘the legal rights at issue are indisputably clear.’”<sup>132</sup> Justice Sotomayor expressly declared that “[e]ven without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts.”<sup>133</sup> On June 27, 2013, the Tenth Circuit Court of Appeals heard the case *en banc*.<sup>134</sup> While awaiting a decision, Hobby Lobby restructured its healthcare plan to run from July-to-July in an effort to avoid fines.<sup>135</sup> Hobby Lobby also filed a motion to expedite oral arguments, as the fines were scheduled to begin accumulating by July 1, 2013.<sup>136</sup> On June 27, 2013, writing for the majority, Judge Tymkovich of the Tenth Circuit Court of Appeals issued a decision in favor of the store, granting the request for a preliminary injunction.<sup>137</sup>

The majority concluded that the provisions of the contraception mandate do substantially burden Hobby Lobby’s rights under RFRA, and that the government did not narrowly tailor the law to satisfy a compelling government interest.<sup>138</sup> Rejecting the government’s position that RFRA’s protections do not extend to for-profit corporations, the Tenth Circuit noted that the Supreme Court has extended RFRA to include corporate claimants.<sup>139</sup> After determining that the corporation may exercise religion, the court concluded that the company was able to qualify as a “person” for RFRA purposes.<sup>140</sup> In analyzing the mandate’s burden upon the plaintiffs, the court further espoused, “it is difficult to characterize the pressure as anything but substantial.”<sup>141</sup> Pursuant to the statute, the fine incurred for not providing contraception coverage is one-hundred dollars per employee, per day until the company complies.<sup>142</sup> This totals close to \$475 million per year.<sup>143</sup> Finally, in reaching the same conclusion as the district court in *Newland*,<sup>144</sup> the Tenth Circuit noted that in granting broad exemptions to private employers with grandfathered plans, companies with fewer than fifty employees, and religious employers, the government has effectively rendered the interests it attempts to protect in implementing the contraception mandate as non-compelling.<sup>145</sup> Moreover, the court declared

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<sup>132</sup> *Hobby Lobby*, 133 S. Ct. at 642–43 (citation omitted).

<sup>133</sup> *Id.* at 643.

<sup>134</sup> See generally *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

<sup>135</sup> *Hobby Lobby Asks for Expedited Appeal to Avoid Millions in Fines*, 20 No. 11 WESTLAW J. OF HEALTH LAW 2, 1 (2013), 2013 WL 1232312.

<sup>136</sup> *Id.* (however, the White House announced in the summer of 2013 that it would delay implementation of the employer mandate until 2015).

<sup>137</sup> See generally *Hobby Lobby*, 723 F.3d 1114.

<sup>138</sup> *Id.* at 1128.

<sup>139</sup> *Id.* at 1129.

<sup>140</sup> *Id.* at 1129, 1132.

<sup>141</sup> *Id.* at 1140.

<sup>142</sup> *Id.* at 1125 (citing 26 U.S.C. § 4980D(b)(1) (Supp. V 2011)).

<sup>143</sup> *Id.*

<sup>144</sup> See discussion *supra* Part III.A.

<sup>145</sup> *Hobby Lobby*, 723 F.3d at 1143.

that in forcing Hobby Lobby to sponsor health insurance plans which cover certain types of contraception, the government is not furthering its interest in the least restrictive means possible.<sup>146</sup> Hobby Lobby only seeks exemption “from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether.”<sup>147</sup> As such, the court reversed the district court’s denial of the preliminary injunction.<sup>148</sup>

### C. Legal Rights of Corporations

The courts remain divided over whether subsidizing a third party’s participation in an activity that a particular plaintiff finds religiously abhorrent constitutes a substantial burden on that plaintiff’s free exercise of religion.<sup>149</sup> However, they have overwhelmingly declined to address whether a corporation can even have “religious beliefs.”<sup>150</sup> *Hobby Lobby* is a notable exception. The district court briefly scratched the surface in proclaiming that religion is a “purely personal” matter and “not the province of a general business corporation,” before swiftly segueing into its analysis of whether the contraception mandate is a substantial burden on the plaintiff’s exercise of religion.<sup>151</sup> The district court noted, “[t]he same reasons behind the court’s conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not ‘persons’ for purposes of the RFRA.”<sup>152</sup> In overturning the district court, the Tenth Circuit provided the public with a much weightier analysis.<sup>153</sup> Noting the absence of precedent granting corporations Free Exercise rights in contrast with those granting corporations Freedom of Speech, the Third Circuit recently went as far as to state, “we simply cannot understand how a for-profit, secular corporation . . . can exercise religion.”<sup>154</sup> Accordingly, it is unlikely the courts will further expand this right to corporations that are not religious organizations.<sup>155</sup>

Historically, the courts have extended certain First Amendment

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<sup>146</sup> *Id.* at 1143–44.

<sup>147</sup> *Id.* at 1144.

<sup>148</sup> *Id.* at 1147.

<sup>149</sup> See discussion *supra* Part II.

<sup>150</sup> *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (whose analysis on this matter largely consisted of “[a]ssuming, arguendo, that OIH can exercise a religion within the meaning of RFRA, the burden on that exercise is too attenuated to state a claim for relief”).

<sup>151</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013).

<sup>152</sup> *Id.* at 1291–92 (footnote omitted).

<sup>153</sup> See discussion *supra* Part II.B.

<sup>154</sup> *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013).

<sup>155</sup> See *Hobby Lobby*, 870 F. Supp. 2d at 1291 (noting that the precedent cases the plaintiffs relied upon to argue that corporations may exercise religion involved religious organizations not “general business corporations”).

protections to corporations.<sup>156</sup> However, the courts have been more reluctant to extend “purely personal” protections.<sup>157</sup> “Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”<sup>158</sup> For instance, the Supreme Court has declined to extend the right to privacy to corporations to the extent that it has to individuals.<sup>159</sup> *Citizens United* held that the Free Speech Clause of the First Amendment does extend to corporations.<sup>160</sup> As a result, the *O’Brien* plaintiffs argued that the proposition also protects a for-profit corporation’s free exercise of religion.<sup>161</sup> Further, the plaintiffs contended that “there is no principled reason to apply one clause of the First Amendment to corporations but not another.”<sup>162</sup>

In *Hobby Lobby*, the Tenth Circuit concluded that for-profit corporations may exercise religion and cited *Gonzalez v. O Centro Espirita Uniao Do Vegetal* as precedent without acknowledging that the plaintiffs in *O Centro* were actually an incorporated religious sect wishing to practice their faith’s rituals without fear of arrest.<sup>163</sup> There are numerous distinctions between an adherent’s engaging in a sacramental rite and a company selling craft supplies in the open marketplace. The court also notes, “[a]s should be obvious, the Free Exercise Clause at least extends to associations like churches—including those that incorporate.”<sup>164</sup> Judge Tymkovich is correct in noting that the government does grant free exercise rights to churches regardless of incorporation; however, the issue is not whether incorporation alone can destroy free exercise rights. Churches, by their nature, are primarily designed as religious organizations where people of similar beliefs gather to worship. The comparison of incorporated churches and incorporated retailers is not persuasive when analyzing whether for-profit companies may claim free exercise rights. Further, the Tenth Circuit takes the reader down a rabbit-hole of possibilities, suggesting that if court finds the WHA constitutionally sound, then kosher butchers are suddenly at risk.<sup>165</sup> This argument is flawed because it is unlikely that a regulation

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<sup>156</sup> See, e.g., *Citizen’s United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (stating, “the Government may not suppress political speech on the basis of the speaker’s corporate identity”); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977) (extending Fourth Amendment search and seizure protections to a corporation); see generally *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying the Fifth Amendment’s double jeopardy protections to a corporation).

<sup>157</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

<sup>158</sup> *Id.*

<sup>159</sup> *Cal. Banker’s Ass’n v. Shultz*, 416 U.S. 21, 65 (1974).

<sup>160</sup> *Citizens United*, 558 U.S. at 342.

<sup>161</sup> *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012).

<sup>162</sup> *Id.*

<sup>163</sup> *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1133–37 (10th Cir. 2013); *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423–25 (2006). The plaintiffs in *O’Centro* used hoasca, which is banned under the Controlled Substances Act. *Id.*

<sup>164</sup> *Hobby Lobby*, 723 F.3d at 1134.

<sup>165</sup> *Id.* at 1135.



prohibiting kosher butchering practices would even withstand rational basis scrutiny. Furthermore, such a law would directly target a religious practice, whereas the contraception mandate’s infringement is purely incidental. From there, the court poses the questions, “[w]hat if Congress eliminates the for-profit/non-profit distinction in tax law?” and “[w]hat if Congress . . . declares that non-profit entities may not have more than 1,000 employees?”<sup>166</sup> The Tenth Circuit does not suggest that either of these hypotheticals are imminent but does belabor that, if Congress were to suddenly decide to act in this fashion, the results could be devastating for these non-profits.<sup>167</sup> Thus, the court concludes that corporations are “people” who may freely exercise religion under RFRA.<sup>168</sup> Judge Tymkovich does seem to concede that there is a point where RFRA does not extend to corporations as he notes that, “Hobby Lobby and Mardel are not publicly traded corporations; they are closely held family businesses . . .” and thus, “we do not share any concerns that our holding would prevent courts from distinguishing businesses that are not eligible for RFRA’s protections.”<sup>169</sup>

The United States Code defines a “person” for the purposes of determining the meaning of any Act of Congress as including “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>170</sup> In spite of this definition, the Code is explicit in delineating that if the context of the particular act indicates intentions to the contrary, this articulated definition does not apply.<sup>171</sup> *Conestoga Wood Specialties Corporation v. Sebelius* reasoned that pursuant to the Code’s definition of a person, a corporation is not capable of practicing a religion, and therefore, the context dictates that the aforementioned definition is not accurate.<sup>172</sup> Therefore, the court did not apply it when analyzing whether *Conestoga* was a “person” for RFRA purposes.<sup>173</sup> In upholding the district court’s decision in *Conestoga*, the Third Circuit considered the history of the Free Exercise Clause and decided that there is no precedent for deciding that for-profit, secular corporations may exercise religion.<sup>174</sup> “Such a total absence of caselaw takes on even greater significance when compared to the extensive list of Supreme Court cases addressing the free speech rights of corporations.”<sup>175</sup> Further, the

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1135–36.

<sup>168</sup> *Id.* at 1129.

<sup>169</sup> *Id.* at 1137.

<sup>170</sup> 1 U.S.C. § 1 (2006).

<sup>171</sup> *Id.*

<sup>172</sup> *Conestoga Wood Specialists Corp. v. Sebelius*, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013) (footnote and citation omitted).

<sup>173</sup> *Id.* at 411.

<sup>174</sup> *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013).

<sup>175</sup> *Id.* at 384–385.

court noted that, “[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely ‘human’ rights provided by the Constitution.”<sup>176</sup> As such, the court concluded, “[w]e do not see how a for-profit ‘artificial being, invisible, intangible, and existing only in contemplation of law,’ that was created to make money could exercise such an inherently ‘human’ right.”<sup>177</sup> Notwithstanding certain limited exceptions,<sup>178</sup> the federal courts have largely held that in advancing a RFRA claim, the corporation plaintiffs generally cannot claim to be “persons” capable of exercising religious beliefs.<sup>179</sup>

#### *D. How RFRA Claims Promote “Irrational-Basis” Review*

Whether a corporation may exercise religion is only the first part of the analysis. Even if the courts determine that they may, religiously motivated plaintiffs must still show that the mandate substantially burdens this free exercise. Since RFRA’s passage in 1993, RFRA individual litigants have largely not prevailed against the government.<sup>180</sup> In spite of this, in cases where plaintiffs have shown success, the courts have demonstrated an almost questionable deference to individuals’ religious beliefs as the return to *Yoder*-era jurisprudence ushered in a new age wrought with its own complexities. Courts have not defined what actually constitutes a substantial burden, leaving this area of the law ambiguous and subject to much debate. Moreover, the sum of the rulings in the wake of RFRA have bordered on absurd. Consequentially, other citizens, who are not adherents of a particular religion, have seen their own interests infringed upon because the courts have kowtowed to the complaints of the devout.

A wide array of precedent supports the premise that analyzing any infringement on an individual’s free exercise of religion using a compelling interest test, as dictated under RFRA or during the pre-*Smith* era, leads to astounding results. Such results seem to not only exempt a religious follower from a law of general applicability, but also place his interests above others in society. For instance, *Cheema v. Thompson* required that a

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<sup>176</sup> *Id.* at 385 (citation omitted).

<sup>177</sup> *Id.* (quoting *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 346 (2d Cir. 2002)).

<sup>178</sup> See generally *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

<sup>179</sup> See *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 407–10 (E.D. Pa. 2013) (holding that the regulations imposed by the ACA are directed at the company, not the individual owner).

<sup>180</sup> Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591–92 (1998). However, it is worth noting that a large number of denied RFRA claims are those of prisoners where freedoms are more curtailed in general. See generally *Brock v. Carroll*, 107 F.3d 241 (9th Cir. 1997) (holding that confiscating a prisoner’s prayer pipe was not a substantial burden); *Bowman v. Dep’t of Corr.*, No. 95-35802, 108 F.3d 336 (9th Cir. Feb. 11, 1997) (refusing to photocopy a flier about a prayer meeting is not a substantial denial); *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996) (prison officials properly confiscated a religious book which advocated violence against Jews and the government); *Karolis v. N.J. Dep’t of Corr.*, 953 F. Supp. 523 (D.N.J. 1996) (the state could require a Christian Scientist to undergo a tuberculosis test).

California school district permit Sikh children, ages seven, eight, and ten, to carry seven-inch knives to school despite the district’s no weapons policy.<sup>181</sup> Concluding that the district court abused its discretion when it denied the children’s request for a preliminary injunction enjoining the district from enforcing the ban, the Ninth Circuit upheld the injunction because the district court failed to consider a less restrictive means of enforcing the policy.<sup>182</sup> On remand, the district court implemented a compromise, allowing the children to carry the knives provided that they were securely attached under their clothing.<sup>183</sup> When the district appealed again, the Ninth Circuit reasoned that the district court did not abuse any discretion and ruled against the school, thus allowing elementary school-aged children to carry what the dissent more correctly termed “swords”<sup>184</sup> to school.<sup>185</sup> The dissent, displaying simple common-sense reasoning, stated, “[i]t is axiomatic that we owe our children a safe, and effective, learning environment. The current plan of accommodation, however, does not allow the school district to provide either . . . . We simply cannot allow young children to carry long, wieldable knives to school. Period.”<sup>186</sup>

Even *Yoder*, which allowed parents to defy compulsory education laws and cease formally educating their children after the eighth grade, effectively penalized the children for the religious views of their parents. Similarly, in disregarding the *Cheema* school district’s policy, which was in accordance with California’s Constitution guaranteeing public school children “an ‘inalienable right to attend campuses which are safe, secure and peaceful,’”<sup>187</sup> the cases illustrate that upholding a religious right of one individual can adversely impact the rights of other individuals who have chosen not to subscribe to those particular religious practices. In allowing religious employers to opt out of the contraception mandate, the courts would be, once again, forcing the religious beliefs of one entity onto another.

Further, RFRA challenges allow individuals to circumvent the law in the name of religion by permitting claimants to opt out of laws that others cannot. For instance, in *Hunt v. Hunt*, the Vermont Supreme Court insulated a father, who decided it would be against his religion to pay child support, from contempt of court charges.<sup>188</sup> The defendant insisted that “he [could not] sanction his wife’s choice to leave him without just cause in the

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<sup>181</sup> *Cheema v. Thompson*, 67 F.3d 883, 884 (9th Cir. 1995).

<sup>182</sup> *Id.* at 885.

<sup>183</sup> *Id.* at 886.

<sup>184</sup> *Id.* at 887 (Wiggins, J., dissenting) (explaining that the knives were seven inch blades called “kirpans” which literally means “sword”).

<sup>185</sup> *See id.* at 886–87 (citation omitted).

<sup>186</sup> *Id.* at 894.

<sup>187</sup> *Id.* at 887 n.1.

<sup>188</sup> *Hunt v. Hunt*, 648 A.2d 843, 854 (Vt. 1994).

eyes of the church . . . .”<sup>189</sup> Further, he contended his religion prevented him from working outside of his church community, thus precluding him from earning enough money to even pay the nominal amount of support that the law required.<sup>190</sup> When the defendant continued to not make payments, the trial court held him in contempt.<sup>191</sup> Finding that the child support order was the least restrictive means of furthering the government interest that parents support their children, the Vermont Supreme Court upheld that order.<sup>192</sup> However, the court overturned the contempt order.<sup>193</sup> Reasoning that the defendant did not meet his support payments because his religious beliefs did not allow him to seek employment outside of his church, the court determined that holding him in contempt would not be the least restrictive means of enforcement.<sup>194</sup> In consequence, as in *Yoder*, the children ultimately suffered so that their parent could freely exercise his religion. Furthermore, the courts would not have afforded other noncustodial parents the option to forgo incarceration. Even those whose philosophical ideals prohibited working or whose poverty prevented them from fulfilling their support payments likely would have been held in contempt. Similarly, employers who do not like the contraception mandate for nonreligious reasons, whether moral or pecuniary, cannot simply decide not to participate.<sup>195</sup>

Ira C. Lupu suggests that the courts hearing RFRA claims tend to disfavor individual litigants, noting that some judges view making any exemption to a general rule as a slippery slope “with bad results ultimately appearing at the bottom of the incline.”<sup>196</sup> While it is often prudent to dismiss slippery slope arguments as hysterical and ineffective, granting owners of for-profit companies the right to opt out of a generally applicable law to cover contraception does invite the contention that allowing this exemption could lead to others down the road. Despite soundly criticizing slippery slope arguments, Eugene Volokh suggests that *Sherbert* and *Yoder* actually illustrate how free exercise claims have fulfilled the slippery slope prophecy.<sup>197</sup> Both cases involved individual devotees wishing to “engage in well-established . . . traditional practices that were seen as central to their belief systems . . . .”<sup>198</sup> However, over the years, the courts have ruled that the government may not burden even “idiosyncratic, seemingly not fully

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<sup>189</sup> *Id.* at 846.

<sup>190</sup> *Id.* at 853.

<sup>191</sup> *Id.* at 847.

<sup>192</sup> *Id.* at 851.

<sup>193</sup> *Id.* at 853.

<sup>194</sup> *Id.*

<sup>195</sup> See 42 U.S.C. § 300gg-13 (Supp. V 2011).

<sup>196</sup> Lupu, *supra* note 180, at 593.

<sup>197</sup> Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1062 (2003).

<sup>198</sup> *Id.*

consistent beliefs . . . .”<sup>199</sup>

When the government grants one religious adherent an exemption from a law and no one else is affected, such as in *O Centro* or *Smith*, the exemption becomes an easier pill to swallow.<sup>200</sup> Conversely, Hobby Lobby and the other religious employers would be impacting their employees’ healthcare decisions if granted an exemption to the contraception mandate. Despite the technical logical fallacy, even the most rational minds cannot help but wonder where this could lead. Just as the Tenth Circuit led us down a rabbit-hole of “what-ifs” in *Hobby Lobby* when it suggested that the contraception mandate could eventually result in churches losing their Free Exercise rights if they became too large in number,<sup>201</sup> proponents of the contraception mandate find themselves wondering what a decision in favor of the company could eventually bring. Would Jehovah’s Witnesses argue that they should not have to cover blood transfusions? Can Christian Scientists refuse to cover vaccines? If an employer, who espoused the values of the *Mead* plaintiffs, legitimately believed that God would provide for all of his employees’ healthcare needs, would the courts exempt him from the entire piece of legislation? These examples may seem hysterical, but since American jurisprudence is structured around *stare decisis*, free exercise claims are one area of the law where the slope actually has the potential to get somewhat slippery.

#### *E. Legal Propositions and the Future of RFRA*

As espoused in *O’Brien*, “RFRA is a shield, not a sword.”<sup>202</sup> *O’Brien* specifically notes that, “the challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs.”<sup>203</sup> Moreover, the court determined that the plaintiffs were free to practice their religious rituals and, more relevantly, not use contraception in accordance with their religious values.<sup>204</sup> Furthermore, the law does not prevent the plaintiffs from even discouraging employee use of contraception.<sup>205</sup> In not enjoining the government from enforcing the contraception mandate, *O’Brien* simply said that the possibility that the plaintiffs *might* subsidize another’s participation in an activity plaintiffs find abhorrent cannot be considered a substantial burden on the plaintiffs’ free exercise. Finally, in holding that RFRA protects individuals from

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<sup>199</sup> *Id.*

<sup>200</sup> *See* *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006) (involving exemption from drug laws); *see also* *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 874 (1990) (involving exemption from drug laws).

<sup>201</sup> *See generally* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

<sup>202</sup> *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

government coercion or governmental forbidding of religious practices without becoming “a means to force one’s religious practices upon others,”<sup>206</sup> *O’Brien* drew a line that RFRA proponents had seemingly ignored since its implementation: your rights end where mine begin.

Similarly, individuals are not exempted from paying taxes when they do not like where the revenue ends up. Since “[l]aws of general applicability with only an incidental effect on religion do not violate the Free Exercise Clause,” merely claiming that a law offends one’s religious beliefs, no matter how sincere, does not relieve an individual of the obligation to comply with a valid and neutral law.<sup>207</sup> Pursuant to *Tarsney v. O’Keefe*, a taxpayer lacks standing to challenge state expenditures, even if those expenditures are contrary to their religious beliefs.<sup>208</sup> In *Tarsney*, plaintiffs objected to the fact that Minnesota allowed state-funded medical programs for low-income citizens to cover abortion services.<sup>209</sup> Because they sincerely objected to abortion for religious reasons, the plaintiffs challenged the expenditures, contending that subsidizing another’s access to abortion infringed upon their free exercise of religion.<sup>210</sup> The court held that if it were to grant taxpayer-standing to Free Exercise claimants, then “plaintiffs could sue on the basis of religious beliefs to challenge state funding for executions, stem cell research, civil unions, or various civil rights laws.”<sup>211</sup> Thus, subsidization of a prohibited practice, such as insuring access to safe and legal contraception, cannot be considered a substantial burden.

Likewise, the Supreme Court has held that individuals must pay social security taxes on their employees even if they disagree with the premise of social security for religious reasons.<sup>212</sup> The Supreme Court unequivocally stated, “every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs . . . . Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”<sup>213</sup> Moreover, the Supreme Court has already upheld the ACA’s individual mandate as a valid tax.<sup>214</sup> As the courts move away from distinguishing between regulatory and revenue raising taxes,<sup>215</sup> it is further likely that the courts will

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<sup>206</sup> *Id.*

<sup>207</sup> *Tarsney v. O’Keefe*, 225 F.3d 929, 935 (8th Cir. 2000) (citation omitted).

<sup>208</sup> *Id.* at 938.

<sup>209</sup> *Id.* at 934.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 938.

<sup>212</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982).

<sup>213</sup> *Id.*

<sup>214</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2596 (2012).

<sup>215</sup> See CHEMERINSKY, *supra* note 54, at 278 (citing *United States v. Kahringer*, 345 U.S. 22, 31 (1953)) (“Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.”); see also *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599 (“More often and

uphold the contraception mandate and its noncompliance penalties as a valid exercise of Congress’ taxing power.<sup>216</sup> Accordingly, the plaintiffs currently challenging the contraception mandate have a valid alternative; as in *Mead*, they can pay the tax.<sup>217</sup>

Next, the courts should not consider the contraception mandate to be a substantial burden because the injury alleged is too attenuated. A substantial burden is one that is “more than insignificant or remote.”<sup>218</sup> In the cases involving the contraception mandate, the plaintiffs’ alleged injury is actually even more than remote, it is theoretical. The government is not mandating that these employers purchase contraception for their employees. Instead, the government is mandating that the employers purchase health insurance. However, the policies cannot omit access to certain contraceptive devices. Before an actual injury even occurs, an entire series of events must take place. For instance, an employee must actually purchase the device or medication in controversy. Therefore, there is no indication that any of the plaintiffs’ money will ultimately end up funding contraception at all. Further, payment of an employee’s wages alone theoretically could amount to subsidization of contraception if the employee decided to use her earnings to purchase the drugs herself. “If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial . . . the standard expressed by Congress under the RFRA would convert to an ‘any burden’ standard.”<sup>219</sup> After all, “religious adherents who enter the commercial marketplace do not have an absolute right to receive a religious exemption from all legal requirements that conflict with their faith.”<sup>220</sup> Thus, even if an employee used her employer-sponsored health insurance to purchase contraception, the burden on the employer’s religious exercise is *de minimus*, as it is entirely too remote to be considered an actual injury.

Moreover, the courts should hold that a corporation cannot exercise religion. The purpose of the Free Exercise Clause is “to secure religious liberty in *the individual* by prohibiting any invasions thereof by civil

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more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures.”).

<sup>216</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2596 (reasoning that the individual mandate was a tax, not a penalty, because, in part, it was assessed by the IRS using the “normal means of taxation” except criminal prosecution).

<sup>217</sup> *Id.* at 2600; see *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013); see generally *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Co. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 110 (D.D.C. 2012); see generally *O’Brien v. U.S. Dep’t. of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012). The author concedes that the penalties Hobby Lobby and other religious employers face are far greater than those faced in *Mead*.

<sup>218</sup> *O’Brien*, 894 F. Supp. 2d at 1158 (citation omitted).

<sup>219</sup> *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414–15 (E.D. Pa. 2013).

<sup>220</sup> *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 411 (3d Cir. 2013) (Jordan, J., dissenting) (citation omitted).

authority.”<sup>221</sup> Further, “[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely ‘human’ rights provided by the Constitution.”<sup>222</sup> The plaintiffs’ reliance on *Citizens United* is misplaced. While the First Amendment protects both one’s freedom of speech and the free exercise of religion, the similarities between the two end there. Through their agents and boards, one can conceive that a corporation may “speak” by issuing official reports, advertising, or endorsing particular political candidates.<sup>223</sup> However, it is almost impossible to imagine a corporation practicing religion. The district court in *Hobby Lobby*, before it was overturned by the Tenth Circuit, correctly opined, “[g]eneral business corporations . . . do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”<sup>224</sup> The courts, which have concluded that the history and purpose of the Free Exercise Clause indicates it is one of the “purely personal” rights referred to in *Bellotti*, have demonstrated logical common sense reasoning.<sup>225</sup>

Additionally, these businesses willingly chose to organize as for-profit entities. “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.”<sup>226</sup> Accordingly, this right cannot extend to a secular, for-profit corporation. Moreover, while the owner may exercise religious beliefs, those beliefs are not, and should not, be automatically imputed to the company. Assuming, *arguendo*, that a remote subsidization of another’s participation in an activity, which violates one’s religious beliefs is a substantial burden, the owners of the companies are the ones bearing the burden, not the companies themselves. Secular companies with religious owners are not permitted to discriminate against employees on the basis of religion, except with a limited exemption provided under Title VII.<sup>227</sup> A company cannot discriminate on the basis of religion in hiring, firing, or dictating employment terms and conditions unless it is organized as a “religious corporation.”<sup>228</sup> Further, a company must be organized as a “religious organization” to assert free exercise rights.<sup>229</sup> None of the twenty-one private for-profit entities are organized as

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<sup>221</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (emphasis added).

<sup>222</sup> *Conestoga*, 917 F. Supp. 2d at 408.

<sup>223</sup> *See Citizen’s United v. Fed. Election Comm’n*, 558 U.S. 310, 388–93 (2010).

<sup>224</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev’d and remanded*, 723 F. 3d 1114 (10th Cir. 2013).

<sup>225</sup> *Id.* at 1288 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)) (“Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”).

<sup>226</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982).

<sup>227</sup> *See Conestoga*, 917 F. Supp. 2d at 408.

<sup>228</sup> 42 U.S.C. § 2000e-1(a) (2000).

<sup>229</sup> *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).



“religious organizations.”

The legislature drafted the ACA to include several exceptions to the contraception mandate. First of all, the Act allows certain companies to grandfather already existing coverage plans into effect.<sup>230</sup> Secondly, the Act allows qualified religious employers to opt out.<sup>231</sup> The legislature likely included these provisions as a concession to religious employers in an effort to fairly provide religious employers with some flexibility in implementing the Act. However, as they say, “no good deed goes unpunished.” As confirmed in *Hobby Lobby*,<sup>232</sup> *Tyndale* and *Newland* acknowledge that the government’s interest in ensuring near universal healthcare coverage by mandating employer sponsored plans cannot be that compelling if the government is conceding such sweeping allowances.<sup>233</sup> *Tyndale* notes that, “[t]he very purpose of a law is undermined where it is ‘so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous.’”<sup>234</sup> While the law does exempt a large number of employers, it is somewhat disingenuous to suggest that such exemptions render an act designed to achieve near universal healthcare coverage as “woefully underinclusive.”<sup>235</sup>

The *Newland* plaintiffs proposed what they consider a less restrictive means to implement the contraception mandate.<sup>236</sup> Plaintiffs suggest that, with respect to emergency contraception, the government should provide these medications free of charge to those who cannot afford them.<sup>237</sup> Accordingly, they would not have to engage in what they believe is a violation of their sincerely held religious beliefs while still allowing women access to emergency contraceptives.<sup>238</sup> However, since this corporation and its owners undoubtedly pay taxes, this solution fails, because they would still be remotely subsidizing access to contraception. Other employers cannot shift the cost of providing these medications to the government. Therefore, the courts should not afford the complaining

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<sup>230</sup> See discussion *supra* Part II.

<sup>231</sup> See discussion *supra* Part II.

<sup>232</sup> *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013).

<sup>233</sup> *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 128 (D.D.C. 2012) (“The existence of these exemptions significantly undermines the defendants’ interest in applying the contraceptive coverage mandate to the plaintiffs.”); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) (“The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs.”) (footnotes omitted).

<sup>234</sup> *Tyndale*, 904 F. Supp. 2d at 128 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

<sup>235</sup> See *Mead v. Holder*, 766 F. Supp. 2d 16, 41 (D.D.C. 2011), *aff’d sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that the “findings demonstrate that the goal of § 5000A is . . . to achieve near-universal health care coverage . . .”).

<sup>236</sup> See *Newland*, 881 F. Supp. 2d at 1298.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

plaintiffs that privilege, especially since the end result would amount to the same injury they currently allege.

The federal courts have reached far different decisions when hearing the contraception mandate cases, even though the cases are predicated upon very similar sets of facts.<sup>239</sup> Since the Supreme Court has not defined what amounts to a “substantial burden” when analyzing a RFRA claim, confusion is bound to continue. Justice Scalia further noted in *Smith* that using the “compelling interest” test, as RFRA does, to analyze free-exercise claims “would produce . . . a private right to ignore generally applicable laws . . . .”<sup>240</sup> The impact of *Smith* has been to use the rational relationship test as opposed to the compelling interest test.<sup>241</sup> Plaintiffs challenging the contraception mandate contend that the law forces them to choose between their religious tenets and monetary sanctions.<sup>242</sup> However, the provision should be upheld because the government is not insisting that the plaintiffs actually take the contraceptives they oppose. The government is merely requiring that they provide their employees a healthcare policy that includes access to contraception should the employees choose to use it. This particular legislation involves an emotionally charged issue. Accordingly, it is easy to understand how one who sincerely believes<sup>243</sup> that these devices and medication lead to the destruction of human life would consider even indirect subsidization to be a substantial burden on his or her free exercise of religion. Fundamentally, however, the courts that have held that an employer does not have to follow the same laws as everyone else only disadvantages the employees by judicially forcing the employer’s religious beliefs onto the employee. A return to rational basis review, as proposed in *Smith*, would likely do away with some of the more irrational results the courts have reached under RFRA.

Finally, until this nation’s highest court agrees to rule on the matter, like the Sword of Damocles, it will continue to hang over the country’s head igniting passions and inflaming sensibilities. Since certain plaintiffs have prevailed while other similarly situated for-profit companies have not, without Supreme Court review, this issue will continue to perplex the legal system. The First Amendment implications are vast and the ACA is a new and sweeping piece of legislation. Thus the circuit-split over this issue continues to frustrate the judiciary and the public. Justice Scalia, who is Catholic,<sup>244</sup> noted in *Smith* that “precisely because we value and protect that

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<sup>239</sup> See discussion *supra* Part II.

<sup>240</sup> Emp’t Div., Dep’t. of Human Res. of Or. v. Smith, 494 U.S. 872, 886 (1990).

<sup>241</sup> S. REP. NO. 103-111, at 7–8 (1993); see *supra* text accompanying note 49.

<sup>242</sup> See discussion *supra* Part II.

<sup>243</sup> Only for religious reasons, as the law makes no concessions for those who believe this for other moral or philosophical reasons.

<sup>244</sup> RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 60 (1997).

religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”<sup>245</sup> In light of Scalia’s criticisms regarding employment of a strict scrutiny standard of review when analyzing laws of general applicability that incidentally burden one’s religious exercise, it will be interesting to see how he votes when the challenged law is one that is largely burdening members of his religion.<sup>246</sup> Scalia himself notes that the courts have denied similar claims involving plaintiffs seeking to be exempt, due to their religious beliefs, from Sunday-closing laws, child labor laws, income tax laws, polygamy laws, and compulsory military laws.<sup>247</sup> Thus, allowing the circuits to remain split on this issue would promulgate conflicting interpretations of the law. Given the financial magnitude of potential penalties, the weighty First Amendment repercussions, and the implications on such a comprehensive piece of legislation, Supreme Court review is paramount to settle the issues arising out of the lawsuits.

#### IV. CONCLUSION

The ACA is a law of general applicability requiring employers to offer comprehensive healthcare packages to their employees. The healthcare plans must include access to contraception as recommended by the IOM. Further, the Supreme Court has analyzed the act, finding it constitutionally valid. The for-profit companies challenging the mandate on the grounds that it violates their free-exercise of religion should not prevail because corporations cannot exercise religion. Furthermore, RFRA requires that when a law of general applicability substantially infringes upon a particular plaintiff’s free-exercise of religion, the law must serve a compelling government interest and there must be no less restrictive means to implement the law.<sup>248</sup> The possibility that an employee may use her employer-provided health insurance coverage to purchase contraception is too remote for the courts to consider a “substantial burden” on the plaintiffs’ free-exercise of religion. Naturally, when one feels his or her religion is threatened, any burden imposed seems significant. However, “[t]he First Congress rejected a draft of the First Amendment that would have barred all laws ‘touching religion,’ in favor of the more specific strictures on laws prohibiting its free exercise or respecting its establishment.”<sup>249</sup> The court has the unenviable task of determining what is or is not a substantial burden

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<sup>245</sup> *Smith*, 494 U.S. at 888 (emphasis in original).

<sup>246</sup> *See id.* at 885–86 (“The ‘compelling government interest’ requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race . . . is not remotely comparable to using it for the purpose asserted here.”).

<sup>247</sup> *Id.* at 879–80 (citations omitted).

<sup>248</sup> 42 U.S.C. § 2000bb-1(b) (2006).

<sup>249</sup> *United States v. Friday*, 525 F.3d 938, 960 (10th Cir. 2008).

on another person's religion. A litigant is not likely to concede that something he or she feels strongly enough to take to court is merely an incidental burden. Due to the emotionally charged nature of these claims, courts must employ rational common sense reasoning when deciphering where to separate *de minimus* and substantial burdens. As Judge (later Justice) Cardozo proposed, "[w]e draw an uncertain and wavering line, but draw it we must as best we can."<sup>250</sup> In the contraception mandate cases, we must clearly draw the line at the point where the ideals of the employers begin to infringe upon the health and safety of their employees.

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<sup>250</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 354 (1928).