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# The William Mitchell Law Raza Journal

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# **The William Mitchell Law Raza Journal**

**-ARTICLE-**

## **RELIGIOUS VICTORY OVER THE AFFORDABLE CARE ACT?**

**Possible recourse for the employee of the religious employer**

*By Jacqueline Prats\**

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In June of 2012, the United States Supreme Court upheld the Patient Protection and Affordable Care Act,<sup>1</sup> commonly called the Affordable Care Act (ACA) or Obamacare. This new law was meant to be a sweeping reform of the nation's healthcare system and was fiercely opposed in many corners of the country. One of the most contentious elements of the ACA continues to be its requirement that employers' insurance coverage include, with no cost-sharing,<sup>2</sup> a concise list of preventive health services for women.<sup>3</sup> These controversial services deal specifically with women's reproductive health: any FDA-approved sterilization, contraception, or counseling procedure must be covered.<sup>4</sup> As of October 2013, more than seventy lawsuits have been filed challenging the "contraception mandate" and seeking to stop the enforcement of the ACA.<sup>5</sup> Of these, thirty-five active lawsuits have been filed by for-profit companies.<sup>6</sup> This distinction is important. For comparison, some of the other organizations that have filed suit include Catholic dioceses, Christian schools, and an evangelist television station.<sup>7</sup>

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<sup>1</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>2</sup> Cost-sharing includes any method by which an employee contributes money to his or her own healthcare in conjunction with his or her insurance company, including deductibles (payment of a certain total dollar amount out of pocket before an insurance plan begins to cover services), copayments (flat fees paid for each service), and co-insurance (percentages of each service's fee). Small Business Majority, *Cost-Sharing*, <http://healthcoverageguide.org/reference-guide/benefits-providers-and-costs/cost-sharing/#Deductibles> (last visited Oct. 14, 2013).

<sup>3</sup> These include screenings for sexually transmitted diseases, domestic violence counseling, and more. For a complete list of services, see U.S. Dep't of Health and Human Servs., *Women's Preventive Services Guidelines*, <http://www.hrsa.gov/womensguidelines> (last visited Oct. 14, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> The Becket Fund for Religious Liberty, *HHS Mandate Information Central*, <http://www.becketfund.org/hhsinformationcentral> (last visited Oct. 14, 2013).

<sup>6</sup> *Id.*

<sup>7</sup> *E.g.*, *Eternal World TV Network, Inc. v. Sebelius*, 935 F. Supp. 2d 1196 (N.D. Ala. 2013) (a religious television network); *Colo. Christian Univ. v. Sebelius*, No. 11-CV-03350-CMA-BNB,

In other words, many of the organizations wanting to stop the enforcement of the contraception mandate are organizations whose purposes are inherently religious. However, these thirty-five for-profit plaintiffs are varied: for example, there is an air conditioner manufacturer, a natural food seller, and a scrap metal recycler, to name a few.<sup>8</sup> Each hires employees of diverse faiths, and each has a secular purpose. Of these thirty-five lawsuits, thirty of them have won injunctive relief while the cases on the merits are pending.<sup>9</sup>

Most of the plaintiffs have requested preliminary injunctions, although a few have requested other measures.<sup>10</sup> A preliminary injunction, considered an “extraordinary remedy,” requires four-prongs to be met: (1) that the moving party is likely to succeed on the merits; (2) that it will suffer irreparable harm in the absence of the injunction; (3) that the balance of equities tips in the moving party’s favor; and (4) that the injunction would serve the public interest.<sup>11</sup> The fact that so many injunctions have been granted is not necessarily a death knell for the contraception mandate. A preliminary injunction is not a decision on the merits. While the precise standard for deciding this test varies somewhat circuit to circuit,<sup>12</sup> these decisions

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2013 WL 93188 (D. Colo. Jan. 27, 2013) (a Christian school); Roman Catholic Archdiocese of N.Y. v. Sebelius, 907 F. Supp. 2d 310 (E.D. N.Y. 2012) (a Catholic diocese).

<sup>8</sup> Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (a heating and air conditioning manufacturer); Eden Foods, Inc. v. Sebelius, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013) (a natural food seller); Am. Pulverizer Co. v. U.S. Dep’t of Health & Human Servs., 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (a scrap metal recycler).

<sup>9</sup> The Becket Fund, *supra* note 5.

<sup>10</sup> *See, e.g.*, Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013) (denying the plaintiff’s request for a temporary restraining order, whose requirements mirror those for a preliminary injunction).

<sup>11</sup> Winter v. Nat’l Res. Def. Council Inc., 555 U.S. 7, 20, 22 (2008).

<sup>12</sup> The precise standard for evaluating a motion for a preliminary injunction has, not surprisingly, come up in several recent decisions. For example, the Tenth Circuit is among several circuits that applies a “sliding scale,” where a movant’s strong showing on some prongs can lend weight to a weaker showing on others. Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health

merely hold the enforcement of the mandate at bay while the merits of the claims are debated. It is true that as time progresses, as more and more injunctions are granted, and as the weight of the decisions begins to accumulate, it looks worse and worse for supporters of the contraception mandate.<sup>13</sup> However, this controversy was still very much alive as of October of 2013. At the time of this writing, there was a pronounced split among the federal courts of appeal;<sup>14</sup> this issue is destined to arrive at the Supreme Court.<sup>15</sup>

This Comment examines the types of religiously motivated challenges that these businesses are bringing and, recognizing that the federal courts of appeal have split down the middle on the issue, suggests a solution for employees of the religious employers in the event that the plaintiffs prevail. Part I begins with a discussion of why this issue is important to the public. Then, Part II of this Comment provides a brief overview of several important cases that have laid the foundation for modern religious freedom jurisprudence. Having laid that groundwork, Part II then predicts that while each challenge will fail on its First Amendment claim, the claims brought under RFRA have a much better chance at succeeding. Assuming that the claims under RFRA do succeed, Part III of this Comment will examine one of the ways that women left holding a prescription may be able to challenge their employers by using Title VII of

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& Human Servs., 724 F.3d 377, 394–95 (3d Cir. 2013) (Jordan, J., dissenting), *cert. granted*, 134 S. Ct. 678 (2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1285–1286 (W.D. Okla. 2012). Other circuits, notably the Third Circuit, have declined to apply this methodology, instead denying injunctions when the movant fails to make a strong enough showing on all four prongs. *Conestoga*, 724 F.3d 377 at 393.

<sup>13</sup> *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); 42 AM. JUR. 2D *Injunctions* § 245 (2013).

<sup>14</sup> *See infra* Part II.A.

<sup>15</sup> Lyle Denniston, *U.S., business appeal on birth-control mandate (UPDATED)*, SCOTUSBLOG (Sep. 19, 2013, 2:29 PM), <http://www.scotusblog.com/2013/09/birth-control-mandate-issue-reaches-court/> (announcing that two petitions for writs of certiorari have been filed with the Supreme Court, one from the Tenth Circuit and one from the Third Circuit).

the Civil Rights Act, which prohibits workplace discrimination on the basis of sex. This Comment predicts that while a contest under Title VII is not a guaranteed victory by any means, it may offer the most likely path.

## **I. INTRODUCTION: WHY DOES THIS MATTER?**

At first glance, it may seem like the controversy over the mandate is a source of artificial outrage; after all, those affected are only a small subset within a small subset (female employees of non-exempt religious employers<sup>16</sup>). However, for them (of whom there are thousands—Hobby Lobby alone employs 13,000 full time workers, and it is only one of the companies fighting the contraception mandate<sup>17</sup>) cost-free access to reproductive care could be life-changing.

In general, preventive health services have the potential to change the way the country lives. Around half of Americans die as result of “modifiable health behaviors;” this means that with preventive care, these Americans may have lived much longer. In fact, a 2010 study found

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<sup>16</sup> “Non-exempt religious employers,” in this context, refers to employers with more than fifty employees (thus coming under the larger insurance mandate’s purview), or who otherwise offer comprehensive coverage, but who do not qualify for the ACA’s religious-employer exemption from the contraception mandate. Healthcare.gov, *What if My Business Has 50 or More Employees?* <https://www.healthcare.gov/what-do-large-business-owners-need-to-know/> (last visited Oct. 14, 2013). Final regulations released in July of 2013 allow a religious employer who “(1) [h]as 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 nonprofit organization” to be free from the responsibility of providing contraceptive coverage to its employees. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-1, 39873–39874 (July 2, 2013). This means that the population that could be affected by the challenges discussed in this Comment are the female employees (or female dependents of male employees) of secular, for-profit employers that employ more than fifty full-time employees.

<sup>17</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012); see also U.S. Dep’t of Labor, *Labor Force Statistics from the Current Population Survey*, <http://www.bls.gov/cps/cpsaat03.htm> (last visited Oct. 14, 2013) (showing that women make up slightly less than half (about 46%) of the labor force).

that “an increase in the use of clinical preventive services in the United States could result in the saving of more than two million life-years annually.”<sup>18</sup> Insurance co-payments, co-insurance, and deductible payments (collectively, “cost sharing”) reduce the likelihood that these preventive services will be used.<sup>19</sup> Women are especially vulnerable to this problem; due to “reproductive and gender-specific conditions,” women require more preventive care than men.<sup>20</sup> Further, women are less likely to be able to afford the preventive care they need; they have “disproportionately low wages” and suffer from a persistent wage disadvantage.<sup>21</sup> Studies have shown that “even moderate copays for preventive services . . . result in fewer women obtaining this care.”<sup>22</sup>

More specifically, in the realm of reproductive care, the United States has a dismal infant mortality rate: although it has been falling, this country still has the “highest first-day death rate in the industrialized world.”<sup>23</sup> In terms of sheer numbers, the United States loses fifty percent

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<sup>18</sup> Inst. of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 17, [http://www.nap.edu/catalog.php?record\\_id=13181](http://www.nap.edu/catalog.php?record_id=13181) (2011) (emphasis added).

<sup>19</sup> U.S. Dep’t of Health and Human Servs., *Affordable Care Act Rules on Expanding Access to Preventive Services for Women* (Aug. 1, 2011), <http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html>.

<sup>20</sup> Inst. of Medicine, *supra* note 18, at 19. Conditions that are of specific concern to women are not limited to pregnancy- and reproduction-related problems, although these are the focus of this Comment. Other conditions that disproportionately affect women include, for example, autoimmune disorders and certain forms of mental illness like depression. *Id.* at 20. Additionally, other serious conditions such as heart disease and diabetes affect both sexes at comparable rates, but different treatments or practices are implicated depending on the sex of the patient. *Id.*

<sup>21</sup> Inst. of Medicine, *supra* note 18.

<sup>22</sup> U.S. Dep’t of Health and Human Servs., *supra* note 19.

<sup>23</sup> Maggie Fox, NCBNews.com, *More US Babies Die on Their First Day than in 68 Other Countries, Report Shows*, (Apr. 30, 2013 6:47 p.m. ET), <http://www.nbcnews.com/health/more-us-babies-die-their-first-day-68-other-countries-6C9700437>.



more day-old infants than “all other industrialized countries combined.”<sup>24</sup> Partially to blame for this unlikely phenomenon is the high rate—*half*—of pregnancies that are not planned.

Accidental mothers are less likely to get good prenatal care and take good care of themselves.<sup>25</sup>

Additionally, the rate of maternal mortality (that is, women dying from pregnancy or pregnancy-related conditions) has been steadily on the rise for twenty-five years.<sup>26</sup> In 2008, the United States was ranked fiftieth in the world for maternal mortality.<sup>27</sup> In 2010, this country’s estimated maternal mortality rate (maternal deaths per 100,000 live births) was comparable to the rates in Bahrain and Iran, and was well above the rates in Kuwait, Bosnia, and the Former Yugoslav Republic of Macedonia.<sup>28</sup>

From a more economic perspective, mothers who are able to plan their families for when they are financially stable produce much healthier children in the long run.<sup>29</sup> Additionally, good family planning leads to better economic prospects for both the mothers and their children.<sup>30</sup>

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<sup>24</sup> Save the Children, *Surviving the First Day: State of the World’s Mothers 2013* at 8, (May 2013), <http://www.savethechildrenweb.org/SOWM-2013/files/assets/common/downloads/State%20of%20the%20WorldOWM-2013.pdf>.

<sup>25</sup> Fox, *supra* note 23; Ctrs. for Disease Control and Prevention, *Unintended Pregnancy Prevention*, (Feb. 12, 2013), <http://www.cdc.gov/reproductivehealth/unintendedpregnancy>.

<sup>26</sup> Ctrs. for Disease Control and Prevention, *Pregnancy Mortality Surveillance System*, (July 18, 2013), <http://www.cdc.gov/reproductivehealth/MaternalInfantHealth/PMSS.html#5>.

<sup>27</sup> Face the Facts USA, *Maternal Mortality a Big Issue for Women’s Health in US*, (July 14, 2013), <http://www.facethefactsusa.org/facts/more-us-mothers-dying-despite-expensive-care>.

<sup>28</sup> United Nations Population Fund, *Trends in Maternal Mortality: 1990 to 2010* at 32–36 (2012), [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Trends\\_in\\_maternal\\_mortality\\_A4-1.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Trends_in_maternal_mortality_A4-1.pdf).

<sup>29</sup> See Martha J. Bailey, *Fifty Years of U.S. Family Planning: Lessons and Implications* 3–4, (Mar. 21, 2013), [http://www.brookings.edu/~media/Projects/BPEA/Spring%202013/2013a\\_bailey.pdf](http://www.brookings.edu/~media/Projects/BPEA/Spring%202013/2013a_bailey.pdf) (summarizing the body of research that links childbearing in poor households with diminished long-term health and economic prospects).

<sup>30</sup> *Id.*

Employers also stand to reap economic benefits. Evidence, although inconclusive, suggests that while premiums may have to be adjusted to accommodate contraception coverage, paying for contraception is still cheaper than paying for a pregnancy carried to term.<sup>31</sup>

Despite the potential benefits to be reaped, there are still a number of secular, for-profit companies whose religious owners have filed lawsuits seeking to stop the enforcement of the ACA's requirement to cover contraception. In general, they object on the grounds that contraceptives, or at least certain forms of them, "[violate] the sanctity of human life" and are therefore "'intrinsically evil.'"<sup>32</sup> Each business or business owner has so far brought at least two challenges: one under the First Amendment's Free Exercise Clause, and one under a statute passed by Congress in 1993 called the Religious Freedom Restoration Act (RFRA).<sup>33</sup>

## II. THE RELIGION ANGLE

To understand the religious challenges to the ACA, it is helpful to undertake a basic survey of the history of free-exercise law in America. Most of the parties with complaints

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<sup>31</sup> See Cynthia Dailard, *The Cost of Contraception Coverage*, 6 GUTTMACHER RPT. ON PUB. POL. 12 (Mar. 2003); FactCheck.org, *Cloudy Contraception Costs*, (Feb. 24, 2012), <http://www.factcheck.org/2012/02/cloudy-contraception-costs> (Two Guttmacher Institute studies showed that the per-person cost of contraceptive coverage was much lower than the per-person cost of pregnancy. However, this article points out that although a number of studies have been conducted comparing the costs of increased contraception coverage and pregnancy coverage, no study has been able to *definitively* prove the issue one way or the other. For example, studies from Pennsylvania and Connecticut produced ambiguous or inconclusive results, a Hawaii study suggested that contraceptive coverage would result in savings, and a Texas study suggested that coverage would result in losses. Compounding the problem is the fact that many of the studies cited by both proponents and opponents of expanded contraception coverage were conducted almost fifteen to twenty years ago—in that time, the health care market has changed so much that the publishers of the Texas study warned “in the strongest possible language” against the use of such dated material.)

<sup>32</sup> John K. DiMugno, *The Affordable Care Act's Contraception Coverage Mandate*, 25 NO. 1 CAL. INS. L. & REG. REP. 1 (Feb. 2013).

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

against the health care law are not actually seeking relief on constitutional grounds, although they are bringing constitutional challenges.<sup>34</sup> Because the Free Exercise Clause is a part of the First Amendment, one might assume that it is entitled to the fiercest protection possible from the courts. While that was true at one point, it is no longer;<sup>35</sup> therefore, most complaints also include claims under the RFRA statute. Although this statute imposes a much more rigorous standard (as will be discussed below), a statute is not as heavy a weight as the United States Constitution.<sup>36</sup>

#### A. A PRIMER ON FREE-EXERCISE JURISPRUDENCE

Modern American free-exercise jurisprudence can be divided roughly into two eras: pre-1990 and post-1990. In 1990, a Supreme Court decision dramatically relaxed the standard for evaluating claims of infringement on religious freedom.<sup>37</sup> But before that case, the Supreme Court used a much stricter standard first articulated in *Sherbert v. Verner*, a 1963 challenge to a South Carolina unemployment law.<sup>38</sup>

*Sherbert* was a landmark case that expanded a well-established principle that called for state infringement of religious freedom to be both justified by a compelling interest and narrowly tailored to suit the state's goal.<sup>39</sup> The *Sherbert* decision broadened this strict scrutiny

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<sup>34</sup> See *infra* Part II.B.

<sup>35</sup> See *infra* Part II.A.

<sup>36</sup> See *infra* Part II.A.

<sup>37</sup> *Emp't. Div. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

<sup>38</sup> 374 U.S. 398 (1963).

<sup>39</sup> *Id.* at 406; Destyn D. Stallings, Comment, *A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligates Catholic Organizations to Cover Their Employees' Prescription Contraceptives*, 48 TULSA L. REV. 117, 126–128 (2012).

requirement to apply to burdens that were only incidental or indirect.<sup>40</sup> In this case, a South Carolina Seventh-Day Adventist was fired from her job because she would not work on Saturdays, a holy day for her faith.<sup>41</sup> She applied for work with several other employers, but none of them offered work that did not include Saturdays.<sup>42</sup> She then applied for unemployment, but the South Carolina Unemployment Compensation Act required applicants to accept suitable work, if offered, unless the applicant had “good cause.”<sup>43</sup> The state’s Employment Security Commission found that a religious restriction prohibiting work on Saturdays was not good cause, and her application was denied.<sup>44</sup> Applying strict scrutiny, the Supreme Court found that the plaintiff’s exercise of religion was unmistakably burdened: she was forced to choose between following her faith and forfeiting benefits on one hand, and abandoning part of her faith and receiving benefits on the other.<sup>45</sup> Further, the Court found that requiring a conscientious objector to work on holy days was not narrowly tailored to serve the government interest of preventing unemployment fraud, which interest was unlikely to be compelling in the first place. The State was not allowed to apply the law “so as to constrain a worker to abandon his [or her] religious convictions.”<sup>46</sup>

In *Wisconsin v. Yoder*,<sup>47</sup> the Court further refined the position articulated in *Sherbert*. In violation of Wisconsin’s compulsory-school-attendance law, which required children to attend

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<sup>40</sup> *Sherbert*, 374 U.S. at 404.

<sup>41</sup> *Id.* at 399.

<sup>42</sup> *Id.* at 399–400.

<sup>43</sup> *Id.* at 401.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 404.

<sup>46</sup> *Id.* at 410.

<sup>47</sup> 406 U.S. 205 (1972).

private or public school until the age of sixteen, a pair of Amish parents refused to send their high-school-aged children to school.<sup>48</sup> While the parents did not object to schooling their children outside the home up through the eighth grade, they believed that exposure to a high school environment would imperil their children's salvation.<sup>49</sup> The Supreme Court found that requiring the Amish to send their children to school until they reached the age of sixteen would indeed substantially burden the free exercise of their religion, as it threatened to "[undermine] the Amish community and religious practice as they exist today; [the Amish] must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."<sup>50</sup> The Court acknowledged that Wisconsin had a substantial interest in compulsory school attendance by the general population of children;<sup>51</sup> however, the State's interest was not sufficient to justify a restraint on the rights of the Amish to raise their children in the Amish religious tradition.<sup>52</sup> Echoing *Sherbert*, the Court warned that although "religiously grounded conduct must often be subject to the broad police power of the State . . . there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."<sup>53</sup>

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<sup>48</sup> *Id.* at 208–209.

<sup>49</sup> *Id.* at 210–212.

<sup>50</sup> *Id.* at 218.

<sup>51</sup> *Id.* at 228–229.

<sup>52</sup> *See id.* at 234–235 (holding that Wisconsin could not compel the Yoders to send their children to school until the age of sixteen).

<sup>53</sup> *Id.* at 220. After *Yoder*, the Court saw several more. *See, e.g.* *Hobbie v. Unempl. App. Comm. of Fla.*, 480 U.S. 136, 138, 146 (1987) (holding that a Seventh-Day Adventist could not be denied unemployment after she was discharged for refusing to work on the Saturday Sabbath); *Thomas v. Rev. Bd. of Ind.*, 450 U.S. 707, 710, 719 (1981) (holding that a Jehovah's Witness could not be denied unemployment benefits when he quit his manufacturing job for religious reasons); *but see, e.g.* *U.S. v. Lee*, 455 U.S. 252, 254–56 (1982) (holding that an Amish

These cases meant that any law, including those neutral towards religion and applicable to the general public, which placed even an incidental or indirect burden on a plaintiff's religious exercise, would be subject to strict scrutiny.<sup>54</sup> The Court's position was that "(o)nly the gravest abuses, endangering paramount interest," could sufficiently justify restraints on the "highly sensitive constitutional area" of religious freedom.<sup>55</sup>

Then, after thirty years of moving in one direction, the Supreme Court performed an about-face. In 1990, it "rewrote First Amendment jurisprudence," rejecting *Sherbert* and its line of cases, and the standard of strict scrutiny along with them.<sup>56</sup> Instead, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court "declared that a neutral law of general applicability represent[ed] no free exercise violation."<sup>57</sup>

In *Smith*, two Native American employees of a drug rehabilitation center were fired after they consumed the hallucinogen peyote, which they used for sacramental purposes during a ceremony at a Native American Church.<sup>58</sup> Their unemployment benefits were denied because Oregon's Department of Human Resources found that they had been fired for "misconduct:" the possession of peyote, a Schedule One controlled substance, was a Class B felony under Oregon

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employer had to pay social security taxes for his employees, even though he had a religious objection to the social safety net).

<sup>54</sup> Stallings, *supra* note 39, at 127–28. To clarify, "neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

<sup>55</sup> *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>56</sup> Robyn Cheryl Miller, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 167 A.L.R. Fed. 663, abstract (2001).

<sup>57</sup> 494 U.S. 872; Miller, *supra* note 56, at § 2[a].

<sup>58</sup> *Smith*, 494 U.S. at 874.

law.<sup>59</sup> The Court refused to apply the *Sherbert* balancing test to an “across-the-board criminal prohibition on a particular form of conduct” like Oregon’s drug law, and declared that the test was inapplicable to such religion-neutral and otherwise constitutionally permissible laws; to rule otherwise would allow any person to disobey nearly any law “[not in] coincidence with his religious beliefs” and “to become a law unto himself.”<sup>60</sup> The Court’s ruling in *Smith* meant that a person’s religious beliefs do not exempt him or her from having to follow an “otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>61</sup>

A few years later, the Supreme Court had occasion to consider both the *Smith* and *Sherbert* tests for the same controversy.<sup>62</sup> First, the Court asked whether the offending law was “neutral and generally applicable as defined in *Smith*”—if so, then it would only have to withstand rational basis scrutiny; if *not*, then the government would have to show that the law was “narrowly tailored to further a compelling [state] interest, as defined in *Sherbert*.”<sup>63</sup>

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>64</sup> the city of Hialeah passed ordinances that placed heavy restrictions on animal killing, in direct response to the establishment of a Santeria church in the area.<sup>65</sup> The Santeria religion, somewhat famously,

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<sup>59</sup> *Id.* at 875.

<sup>60</sup> *Id.* at 885–886, 890.

<sup>61</sup> *Id.* at 878–79.

<sup>62</sup> Craig Mandell, *Tough Pill to Swallow: Whether Catholic Institutions Are Obligated under Title VII to Cover Their Employees’ Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 209 (2008).

<sup>63</sup> *Id.*

<sup>64</sup> 508 U.S. 520, 526–527 (1993).

<sup>65</sup> *Id.*

includes animal sacrifice in its rituals.<sup>66</sup> Among the practices banned by the ordinances were killing animals in public or private ceremonies and keeping such animals for food purposes; however, slaughterhouses large and small were exempted from the ordinances.<sup>67</sup> The Court found that the ordinance's broad exemptions for slaughterhouses and specific sacrifice-related language equated to a targeting of the Santeria church and its religious practice; thus, the ordinances were neither religion-neutral nor generally applicable.<sup>68</sup> In other words, the government could not rest on the newer, less-rigorous rational basis standard, laid out in *Smith*, to justify a burden on religious exercise. Since Hialeah's ordinance targeted a religious practice, and on a practical level applied only to the church, the city's government had to carry the heavy burden of passing the *Sherbert* test: once it was determined that the law burdened religious exercise, it had to pass strict scrutiny.<sup>69</sup> The Court found that Hialeah's ordinances failed strict scrutiny and were declared unconstitutional.<sup>70</sup> While the state may have had a compelling interest in protecting animal welfare, the law was not at all narrowly tailored. It was therefore an example of a law that was neither neutral nor generally applicable, and on top of that did not pass strict scrutiny.

The new standard for free-exercise challenges did not last long. Congress was unhappy with the ruling in *Smith*, finding that it had “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”<sup>71</sup> In

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<sup>66</sup> *Id.* at 525.

<sup>67</sup> *Id.* at 528.

<sup>68</sup> *Id.* at 542.

<sup>69</sup> *Id.* at 547.

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

<sup>71</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(4) (2012).



1993, with the explicit purpose of “[restoring] the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,”<sup>72</sup> it passed the Religious Freedom Restoration Act (RFRA), which states:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

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 governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.<sup>73</sup>

The passage of RFRA meant that while the *Smith* decision still applied to constitutional challenges, parties alleging burdens on their religious exercise were much more likely to succeed than before. The key that made *Smith* such a drastic change was that it saved religion-neutral laws from being subjected to strict scrutiny. This lower standard is still in place for challenges brought only under the First Amendment. In practice, however, plaintiffs can avail themselves of the much higher statutory standard established by RFRA. The result is that *any* law burdening religion, neutral or not, may still be required to pass strict scrutiny.

The first major application of RFRA occurred four years later in a small Texas town. A Catholic Archbishop in Boerne applied for a building permit, planning to enlarge his church, which was situated within the town’s historic district. The city’s Historic Landmark

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<sup>72</sup> *Id.* at § 2000bb(b)(1) (citations omitted).

<sup>73</sup> *Id.* at § 2000bb-1.

Commission denied the permit request.<sup>74</sup> The Archbishop challenged the decision under the newly passed RFRA, claiming that the city's denial of the permit was an unlawful restraint on his religious exercise.<sup>75</sup> The Supreme Court did not address whether the Archbishop had a cognizable claim under RFRA; instead, it found that the enforcement of RFRA at the state level was beyond Congress's constitutional authority.<sup>76</sup> As written, the Court pointed out, RFRA permitted "any law [to be] subject to challenge at any time by any individual who [alleged] a substantial burden on his or her free exercise of religion."<sup>77</sup> The result of the *Boerne* ruling was that RFRA remained in force, but only against laws at the federal level.

In a stroke of symmetry, RFRA saw its next landmark application in another case involving the sacramental use of a controlled substance. A church with roots in the Amazon Rainforest used a hallucinogenic tea (called *hoasca*) brewed from the leaves of a native Amazonian plant as part of its communion ritual.<sup>78</sup> Under the Controlled Substances Act (CSA), which banned use of the hallucinogen entirely, the government moved to block the church from

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<sup>74</sup> *City of Boerne v. Flores*, 521 U.S. 507, 511–12 (1997).

<sup>75</sup> *Id.* at 512.

<sup>76</sup> *Id.* at 537.

<sup>77</sup> *Id.* at 533. Additionally, although the Court did not address it in the majority opinion, Justice Stevens in his concurrence pointed out a problematic feature of RFRA:

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

*Id.* at 537 (Stevens, J., concurring).

<sup>78</sup> *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

importing the tea and prosecuted the church for its violation.<sup>79</sup> The church challenged the government's action, relying on RFRA. Essentially conceding that a prohibition on the sacramental tea would substantially burden the church's free exercise, the government argued that it had a compelling interest in the "uniform application of the Controlled Substances Act" sufficient to justify such a burden.<sup>80</sup> Referencing both *Smith* and a statutory exemption in the CSA allowing Native Americans to use sacramental peyote, the Supreme Court found that allowing an exemption for the small church's use of *hoasca* would not undermine the government's (admittedly) strong interest in enforcing the CSA.<sup>81</sup> The Court concluded by pointing out that "under RFRA[,] invocation of general interests, standing alone, is not enough."<sup>82</sup>

The state of free-exercise jurisprudence after *O Centro* is somewhat complicated, since there are two standards at work. Federal laws may be challenged using either a First Amendment claim or a RFRA claim (or both, as many of the ACA litigants have done). The *Smith* test is still applicable for First Amendment claims, but RFRA allows for a much stricter test. However, because of *Boerne*, the challenge of *state* laws under the federal RFRA is not permitted. A plaintiff seeking to challenge a state law for infringing on religious exercise may be able to rely on a state-level mini-RFRA, but only half of the states in the nation have such a law.<sup>83</sup>

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<sup>79</sup> *Id.* at 426.

<sup>80</sup> *Id.* at 430, 423.

<sup>81</sup> *Id.* at 432–35.

<sup>82</sup> *Id.* at 438.

<sup>83</sup> Mandell, *supra* note 62, at n. 198 (listing the twenty-five states that have, by various means, required a strict scrutiny standard for analyzing burdens on religious exercise: twelve by

## B. ONGOING CHALLENGES TO THE ACA

The plaintiffs in the ongoing challenges to the ACA are using both of the standards discussed above; however, while all of them “raise free exercise issues [under the First Amendment], they seek recovery under [RFRA].”<sup>84</sup> In any case, the two analyses are closely related because of their shared ancestry. Since the number of cases addressing this issue has multiplied, it would be impractical to address every case. Instead, what follows is a brief summary of some of the more important decisions that have been made.<sup>85</sup>

One of the first injunctions to be denied was in *O’Brien v. U.S. Department of Health and Human Services*.<sup>86</sup> Plaintiffs were Frank O’Brien and his company, O’Brien Industrial Holdings (OIH).<sup>87</sup> O’Brien filed a complaint alleging that the ACA violated both OIH’s and his personal rights under the Free Exercise Clause, RFRA, and others. The government filed a motion to dismiss the entire case.<sup>88</sup> The court first addressed O’Brien’s RFRA claim (since if the challenge could not survive the RFRA analysis, it would be unable to withstand the lower standard of the First Amendment analysis). A *prima facie* case under RFRA requires a plaintiff to allege a “substantial burden” on his or her religious exercise, even if the burden results from a generally

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legislation, twelve by court interpretation of that state’s constitution, and one (Alabama) by constitutional amendment).

<sup>84</sup> DiMugno, *supra* note 32.

<sup>85</sup> The included cases were chosen based on several factors, including (a) the detail of the decision’s reasoning (some courts’ opinions are quite short); (b) the authority of the deciding court (circuit court decisions were chosen over district court decisions, if possible); and (c) the age of the decision (which was related to the number of times it had been cited in later decisions).

<sup>86</sup> 894 F.Supp.2d 1149 (E.D. Mo. 2012) (stayed pending appeal with no discussion. Case No. 12-3357 (4:12-CV-00476-CEJ) (8th Cir. Nov. 28, 2012)).

<sup>87</sup> *Id.* at 1154.

<sup>88</sup> *Id.*

applicable law. If the plaintiff establishes this, then the burden shifts to the government to show that the law serves a “compelling governmental interest, [and that it] is the least-restrictive means of furthering that compelling governmental interest.”<sup>89</sup> O’Brien asserted that not only his, but his company’s, rights to religious freedom were substantially burdened by the requirement that his company arrange for insurance coverage that included contraception.<sup>90</sup>

The court did not address whether OIH was able to exercise religion, because it concluded that there was no substantial burden. Substantiality is “a difficult threshold to cross,” and must be “more than insignificant or remote.”<sup>91</sup> In this case, the court characterized the burden on O’Brien as even more remote than *de minimis*:

The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by OIH’s plan, subsidize *someone else’s* participation in an activity that is condemned by plaintiffs’ religion. This Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff’s religious exercise.<sup>92</sup>

Finding no substantial burden, the court held that O’Brien had failed to state a claim under RFRA; it thus never addressed whether the government’s interest was compelling or its

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<sup>89</sup> *Id.* at 1157. The *O Centro* decision also strongly emphasized this burden. In that case, the district court granted the church’s preliminary injunction after finding that the evidence from both sides was evenly balanced; therefore, it said, the government had failed to carry its burden. *O Centro*, 546 U.S. at 426–427. The government argued that evidence in equipoise was not enough to justify a preliminary injunction for the plaintiff, but the Court countered that once the church’s prima facie RFRA case had been established, the government could only succeed by demonstrating “that the application of the burden to the [church] would, more likely than not, be justified by the asserted compelling interests.” *Id.* at 428.

<sup>90</sup> *O’Brien*, 894 F.Supp.2d at 1154.

<sup>91</sup> *Id.* at 1158.

<sup>92</sup> *Id.* at 1159.

means narrowly tailored.<sup>93</sup> The court then addressed O’Brien’s First Amendment free-exercise claims. Citing the *Smith* decision, it stated that “a neutral law of general applicability that incidentally burdens religious exercise need only satisfy rational basis review, not strict scrutiny.”<sup>94</sup> The court found that the ACA was neutral—it did not target religion, it targeted the “disparity between men’s and women’s healthcare costs”—and it was generally applicable—it did not selectively infringe upon religious conduct.<sup>95</sup> The court also pointed out that the exemptions to the mandate did not mean a lack of general applicability; they would have to be exemptions that “[tended] to suggest disfavor of religion.”<sup>96</sup> Thus, the court concluded simply that the ACA “[did] not offend the First Amendment’s Free Exercise Clause.”<sup>97</sup>

Taking a different track but reaching the same result, the Third Circuit Court of Appeals denied an injunction for a Mennonite family’s business.<sup>98</sup> In *Conestoga Wood Specialties Corporation v. Sebelius*, the Third Circuit focused entirely on the threshold issue of whether a for-profit corporation could exercise religion, and came to the conclusion that it could not.<sup>99</sup> The court engaged in a lengthy discussion about the history of the interpretation of the various clauses within the First Amendment, and decided that the Free Speech Clause (held to apply to corporations in the recent *Citizens United* decision) was fundamentally different from the Free

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<sup>93</sup> *Id.* at 1160.

<sup>94</sup> *Id.* at 1160 (citing *Smith*, 494 U.S. at 872).

<sup>95</sup> *Id.* at 1161.

<sup>96</sup> *Id.* at 1162 (discussing *Lukumi*, 508 U.S. at 542-46 in which the law exempted virtually every type of animal killing *except* for religious sacrifice).

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

<sup>98</sup> *Conestoga*, 724 F.3d at 381.

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

Exercise Clause; it confessed that it “simply [could not] understand how a for-profit, secular corporation—apart from its owners—[could] exercise religion.”<sup>100</sup>

Without the corporation’s ability to exercise religion, the plaintiffs were unable to assemble a prima facie case of a violation of RFRA; since the corporation was not an entity capable of religious expression; the only parties with freedom to be infringed upon were the members of the Mennonite family who owned the business.<sup>101</sup> But as the court pointed out, it was not *their* freedom being restrained, it was the corporation’s. The court cautioned against “[eliding] the distinction between [owners] and the companies they own,”<sup>102</sup> and said that corporate owners must “respect the corporate form, on pain of losing the benefits of that form should they fail to do so.”<sup>103</sup> Having decided this threshold issue in favor of the government, the court easily disposed of the plaintiffs’ RFRA claims:

Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a “person” under the RFRA.<sup>104</sup>

So far, four circuit court decisions and numerous district court decisions have denied the plaintiffs’ injunctions.<sup>105</sup> However, several of these district court decisions have been reversed,

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<sup>100</sup> *Id.* at 385.

<sup>101</sup> *Id.* at 388.

<sup>102</sup> *Id.* (internal quotation marks omitted) (quoting *Grote v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting)).

<sup>103</sup> *Id.* (quoting *Grote*, 708 F.3d at 858).

<sup>104</sup> *Id.*

<sup>105</sup> The four circuit courts include the Third Circuit, deciding *Conestoga*, 724 F.3d 377; the Sixth Circuit, deciding *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013), and *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); and the Tenth and D.C. Circuits—which both first denied injunctions in *Hobby Lobby Stores, Inc. v. Sebelius*, Case No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) and *Gilardi v. U.S. Dep’t of Health and Human Servs.*, 733

and of the four appellate courts issuing decisions that denied relief, two have reversed *themselves*; this has resulted in a total nationwide tally of four circuit court decisions granting injunctive relief to the religious employer plaintiffs.<sup>106</sup>

After a protracted battle, the Tenth Circuit recently issued a “fractured decision” that resulted in injunctive relief protecting the retail chain Hobby Lobby from enforcement of the mandate; the court, rather than granting the injunction itself, reversed and remanded the case back to the lower court (which did grant the injunction).<sup>107</sup> The plaintiffs in *Hobby Lobby* include two retail chains, Hobby Lobby craft stores and Mardel Christian bookstores, and the Greens, the family that owns them.<sup>108</sup> They objected to the use of emergency contraception and intrauterine devices because ““they [believed] those drugs could prevent a human embryo ... from implanting;”” they further opposed “participating in, providing access to, paying for,

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F.3d 1208 (D.C. Cir. 2013), respectively, then reversed themselves and the courts below to grant injunctions to the same plaintiffs, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (U.S. 2013); *Gilardi*, 733 F.3d 1208 (D.C. Cir. 2013). The other two circuits to make decisions on the issue have been the Seventh and Eighth Circuits. The Eighth Circuit granted an injunction in *O'Brien*, 894 F. Supp. 2d 1149, that consisted of one sentence: “Appellants’ motion for stay pending appeal has been considered by the court, and the motion is granted.” The other injunction from that circuit acknowledged the lack of reasoning in that decision, but granted the injunction for the sake of consistency. *Annex Med., Inc. v. Sebelius*, 13-1118, 2013 WL 1276025 at \*3 (8th Cir. Feb. 1, 2013).

<sup>106</sup> See *Conestoga*, 724 F.3d at 377 n. 10 (compiling a detailed list of contraception mandate cases that ended in an injunction being granted). See also Becket Fund, *supra* note 5 (maintaining an interactive list of all challenges to the contraception mandate).

<sup>107</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013) (en banc); ACLU, *Tenth Circuit Rules on Craft Store’s Challenge to Contraception Coverage Rule*, (June 27, 2013), <http://www.aclu.org/reproductive-freedom/tenth-circuit-rules-craft-stores-challenge-contraception-coverage-rule>.

<sup>108</sup> *Hobby Lobby*, 723 F.3d at 1122.



training others to engage in, or otherwise supporting’ the devices and drugs that yield these effects.”<sup>109</sup>

The Tenth Circuit’s decision started from the position that corporations such as Hobby Lobby are persons capable of exercising religion.<sup>110</sup> It drew parallels between for-profit businesses and the churches in *Lukumi* and *O Centro*, reasoning that “the Supreme Court [had] affirmed the RFRA rights of corporate claimants, notwithstanding the claimants’ decision to use the corporate form.”<sup>111</sup> It also reasoned that if the Constitution guarantees for-profit companies the right to free political speech, then it also guarantees their right to religious expression.<sup>112</sup> Further, the court listed a number of attributes possessed by the companies—they were “closely held family businesses with an explicit Christian mission as defined in their governing principles,” among others—which collectively differentiated them from large, publicly held corporations that would not be “eligible for RFRA’s protections.”<sup>113</sup>

Once the court determined that the plaintiff corporations were entities capable of religious exercise, it quickly concluded that the corporations’ free exercise was substantially burdened.<sup>114</sup> The court decided the compelling interest prong just as quickly. Drawing on *O*

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<sup>109</sup> *Id.* at 1140.

<sup>110</sup> *Id.* at 1128.

<sup>111</sup> *Id.* at 1129.

<sup>112</sup> *Id.* at 1134-35.

<sup>113</sup> *Id.* at 1137.

<sup>114</sup> *Id.* at 1151. As Judge Hartz pointed out in his concurrence, the court may have misinterpreted the plaintiff’s burden argument. The majority opinion focused on the heavy fines that a non-complying company would have to face. *Id.* (Hartz, J., concurring). Other parties have made this argument, e.g. *Beckwith Elec. Co., Inc. v. Sebelius*, 8:13-CV-0648-T-17MAP, 2013 WL 3297498, at \*15 (M.D. Fla. June 25, 2013), but it mischaracterizes exactly what the burden is. The burden is related not to the dollar amount of fines, but to the provision of coverage itself: “[t]he law . . . compels the corporations to act contrary to their religious beliefs” *by providing*

*Centro*, the court held that the exemptions already in place for religious institutions and small employers showed that the government's interest, while strong, was not strong enough to meet the high standard of "compelling."<sup>115</sup> Finally, because of the government's failure to "articulate why accommodating such a limited request fundamentally [frustrated] its goals," the court spent a bare three sentences disposing of the "least restrictive means" prong.<sup>116</sup>

In another decision, the Seventh Circuit consolidated two cases involving religious family-owned businesses and granted injunctions staving off the enforcement of the contraception mandate.<sup>117</sup> The Kortzes owned K & L Contractors and provided for the company's nonunion employees with a group health insurance plan.<sup>118</sup> The Grotes owned Grote Industries, and provided a self-insured plan for their roughly twelve hundred employees.<sup>119</sup> The court did not find that either party's use of the corporate form was dispositive, since in both cases the corporations' owners were also plaintiffs; in order to comply with the mandate, each owner would have to violate his religious beliefs.<sup>120</sup> The court also rejected the government's argument, which had been successful in several district courts,<sup>121</sup> that the connection between the objectionable action and the plaintiffs was too attenuated: "the religious-liberty violation at issue

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*coverage. Hobby Lobby*, 723 F.3d at 1151. There is "no need to examine how damaging the sanctions for noncompliance would be" in order to analyze the substantiality of the burden. *Id.*

<sup>115</sup> *Hobby Lobby*, 723 F.3d at 1128.

<sup>116</sup> *Id.* at 1144.

<sup>117</sup> *Grote*, 708 F.3d at 852.

<sup>118</sup> *Id.* at 854.

<sup>119</sup> *Id.* at 852.

<sup>120</sup> *Id.*; *Korte v. Sebelius*, 735 F.3d 654, 659 (7th Cir. 2013).

<sup>121</sup> *E.g.*, *Grote v. Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012); *O'Brien*, 894 F. Supp. 2d 1149; *Hobby Lobby*, 870 F. Supp. 2d 1278.

here inheres in the *coerced coverage* of contraception, abortifacients,<sup>122</sup> sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.”<sup>123</sup> The Seventh Circuit did not address whether the government was likely to satisfy strict scrutiny, as the government made no effort to do so in either case; the court granted injunctions for both plaintiffs.<sup>124</sup>

### C. ANALYSIS: CONSTITUTIONAL CLAIMS<sup>125</sup>

Complaints about laws violating a plaintiff’s right to free exercise are analyzed using the test laid out in *Smith*: if a law is (1) religion-neutral and (2) generally applicable, then it only violates the Free Exercise Clause if it fails to satisfy rational basis scrutiny.<sup>126</sup> Since the ACA facially has nothing to do with religion, the only way to argue that it is not religion-neutral is to

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<sup>122</sup> One of the most commonly objected-to provisions of the ACA is the requirement that emergency contraception be covered, because religious employers consider it an “abortifacient.” This is frustrating for supporters of the mandate because it demonstrates a lack of understanding of the concepts at work. Emergency contraception *does not cause abortions*. Research shows that it does not affect the “developing embryo or pre-embryo” of an already-pregnant woman, and the most effective types of emergency contraception do not even affect implantation. Emergency contraception prevents fertilization from happening in the first place by inhibiting ovulation, like any other hormonal birth control. Fertilization commonly takes as long as a week after the act of intercourse, which is why it is possible to take emergency contraception several days after an incident of unprotected sex. For a quick but thorough explanation of these details, see Planned Parenthood’s page explaining the differences between medication abortion and emergency contraception. Planned Parenthood, *The Difference Between Emergency Contraception And Medication Abortion*, <http://www.plannedparenthood.org/resources/research-papers/difference-between-emergency-contraception-medication-abortion-6138.html> (last visited Nov. 12, 2009).

<sup>123</sup> *Korte*, 735 F.3d at 685.

<sup>124</sup> *Grote*, 708 F.3d at 855.

<sup>125</sup> A detailed analysis of whether the corporate plaintiffs in these cases have the ability to exercise religious freedom would double the length of this Comment. The Author acknowledges that this is a very complicated issue, but it is largely outside the scope of this Comment. The following Parts will proceed under the assumption that the corporate plaintiffs cannot practice religion, unless it is otherwise noted in the text.

<sup>126</sup> DiMugno, *supra* note 32.

argue that the requirement to provide contraception coverage was somehow written to target religion.<sup>127</sup> The First Amendment is effectively a “dead letter in cases challenging mandatory benefit laws,” and no First Amendment challenge to a contraceptive coverage mandate has ever failed the *Smith* test.<sup>128</sup> As the courts have pointed out, the ACA allows for exemptions from the contraception mandate; if an employer fulfills all of the following requirements:

- (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,

then it is relieved of having to cover contraceptives for its employees.<sup>129</sup> These exemptions to the mandate clearly show that the law not only fails to target religious activity, but in fact actively tries to accommodate religious activity. The ACA cannot be equated with the city ordinance in *Lukumi*, where virtually every type of animal slaughter was exempt from the ordinance, leaving only ritual or sacrificial killings to be forbidden.<sup>130</sup> The ACA has a small, concise exemption for religious organizations.

Furthermore, despite its exemptions, it is generally applicable. If the contraception mandate were not generally applicable, there would be little point to it, given that its purpose is

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<sup>127</sup> See Stallings, *supra* note 39, at 130 (laying out the test for determining neutrality in this context: a law is neutral if it (1) does not facially target a religious practice; (2) does not have a discriminatory purpose; and (3) does not have a discriminatory effect).

<sup>128</sup> DiMugno, *supra* note 32.

<sup>129</sup> 45 C.F.R. § 147.130(1)(vi)(B)(1)–(4) (2013).

<sup>130</sup> Stallings, *supra* note 39, at 131 (“[T]he law . . . allowed the killing of animals by other religions, such as kosher slaughtering of animals, as well as those that allowed the killing of animals for nonreligious purposes, such as hunting. Because the ordinances were designed to proscribe animal killings for religious sacrifice, but to exclude virtually all secular killings, the Court noted that the ordinances constituted a ‘religious gerrymander.’”).

*widespread* access to affordable healthcare. It applies to all organizations that would otherwise be subject to the health care mandate, without regard to religious affiliation. As the court pointed out in *O'Brien*, the exemptions themselves do not equate to a lack of general applicability; they would have to be exemptions that “[tend] to suggest disfavor of religion,” when in fact these exemptions do the opposite.<sup>131</sup>

#### D. ANALYSIS: CLAIMS UNDER RFRA

Challenges under RFRA stand on much stronger ground, because while the First Amendment challenges must only pass rational-basis muster, RFRA challenges must satisfy strict scrutiny. To build a *prima facie* RFRA case, a plaintiff must show that it faces a substantial burden on its sincere religious exercise.<sup>132</sup> Since it is difficult for the courts to pass judgment on what is and is not sincere religious belief, in practical terms, building a case means showing a substantial burden.<sup>133</sup>

Because RFRA was passed with the explicit intention of restoring the tests laid out in *Sherbert* and *Yoder*,<sup>134</sup> it is helpful to examine cases from that line for guidance as to what is and is not a substantial burden.

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<sup>131</sup> *O'Brien*, 894 F. Supp. 2d at 1162.

<sup>132</sup> *O Centro*, 546 U.S. at 428.

<sup>133</sup> See *Smith*, 494 U.S. at 887 (reaffirming that “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of the particular litigants’ interpretations of those creeds,” and warning that “courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” (quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989))). In an opinion concurring in the judgment, Justice O’Connor reminded the Court that courts were permitted to “make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, [a] challenged law.” *Id.* at 907.

<sup>134</sup> 42 U.S.C. § 2000bb(b)(1) (2013).

In *Sherbert* itself, the burden faced by the plaintiff was the violation of her religious beliefs by having to work on her Sabbath day.<sup>135</sup> In *Yoder*, the Amish parents were faced with exposing their children to an immersive and harmful environment by forcing their children to attend high school in violation of their beliefs.<sup>136</sup> In *O Centro*, churchgoers were faced with not only the loss of their holy communion, but also with criminal prosecution.<sup>137</sup> In each of these cases, the Court rightly found that the plaintiffs' religious exercise was substantially burdened.

In the ACA cases, however, the burden faced by the employers is significantly lower. Each of the three above plaintiffs were faced with having to directly violate their personal religious tenets.<sup>138</sup> The *O'Brien* court effectively explained the contrast between those burdens and the ones at hand:

The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [a health] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion.<sup>139</sup>

In other words, without even reaching the issue of whether the plaintiff corporations can exercise religion, the burden on their religious exercise is minimal because of the extreme

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<sup>135</sup> 374 U.S. at 404.

<sup>136</sup> 406 U.S. at 205.

<sup>137</sup> 546 U.S. at 418.

<sup>138</sup> Also worth mentioning is the fact that in these cases, there are third parties with rights at stake: the female employees of the plaintiffs. None of the cases in the *Sherbert* line seriously involved the rights or interests of anyone but the plaintiffs and the government. *See supra* Part II.A. To be sure, although the corporate plaintiffs' employees do not have a guaranteed right to *contraception*, they do have the right to bodily autonomy and, as Part III, *infra*, will discuss in greater detail, the right to be free from sex-based discrimination.

<sup>139</sup> *O'Brien v. U.S. Dep't of Health and Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (stayed pending appeal with no discussion. Case No. 12-3357 (4:12-CV-00476-CEJ) (8th Cir. Nov. 28, 2012)).

attenuation. If one grants the premise that a corporation cannot exercise religion, the burden becomes more attenuated still.

On the other hand, some courts have framed the burden a different way. The courts granting injunctions have found that the religiously objectionable conduct is not the use of contraception, but the facilitation of access to contraception.<sup>140</sup> In these cases, the fact that the employers are not, themselves, forced to use or promote contraception has not factored into the analysis—it is enough that the employers must participate in the possibility that their employees will use contraception. Because religious belief itself is so nebulous, “[c]laims that a law substantially burdens someone’s exercise of religion will often be difficult to contest.”<sup>141</sup>

If this view is ultimately favored, then the government will have to prove that it has a compelling interest in uniform enforcement of the contraception mandate. Few cases to date have addressed in depth whether the government’s interest would be considered compelling.<sup>142</sup>

One instructive example may be found in *United States v. Lee*.<sup>143</sup> In that case, an Amish employer refused to pay payroll taxes, because the subsidization and receipt of public welfare

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<sup>140</sup> *E.g.* *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013); *Tyndale House Pubs., Inc. v. Sebelius*, 904 F. Supp. 2d 106, 121–22 (D.D.C. 2012).

<sup>141</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

<sup>142</sup> *See, e.g., Beckwith*, 2013 WL 32977498 at \*17 (going into some detail in analyzing the compelling interest prong and finding that the number of exemptions to the government’s health plan severely undermined the government’s argument that its interest was compelling); *Tyndale House Pubs.*, 904 F. Supp. 2d at 126–27 (finding no proof that exclusion of *emergency* contraception—as opposed to conventional contraception—would hinder the government’s interest, and also finding that the number of exemptions from the ACA undermined the government’s position). Most decisions *denying* injunctive relief have done so based on the plaintiffs’ failure to establish their *prima facie* cases under RFRA, so the courts do not analyze whether the government would be able to prove a compelling interest. *E.g., Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1117–18 (D. Colo. 2013); *Annex Med. v. Sebelius*, 2013 WL 1276025 at \*5 (8th Cir. Feb. 1, 2013).

<sup>143</sup> 455 U.S. 252 (1982).

funds violated his religious beliefs.<sup>144</sup> The Court decided that the social security system is dependent on mandatory, near-universal participation; the system would quickly start to fray if religious objectors were allowed to exempt themselves.<sup>145</sup> In this case, the government's interest was so compelling that it outweighed the individual's interest in complete religious freedom. The court noted that "[w]hen 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>146</sup>

That said, the cleanest victory for supporters of the mandate lies in showing that the religious employers do not face a substantial burden. As the *Boerne* court warned, such claims are difficult to disprove, and the government faces a heavy burden in proving that it has a compelling interest at stake.<sup>147</sup> As each new court decides to grant a preliminary injunction, which cannot be done unless the court finds a likelihood of success on the merits, it seems less and less likely that the ultimate decision by the Supreme Court will be in favor of the government.

### **III. POSSIBLE RECOURSE: TITLE VII**

What possible recourse, then, for a woman employed by one of these religious employers? If the controversy favors the religious employers, it will be because they

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<sup>144</sup> *Id.* at 257. The Amish believe that failure to provide for one's *own* elders is sinful; therefore, the national social security system is sinful because it supplants the Amish as the bearer of that responsibility. *Id.*

<sup>145</sup> *Id.* at 258–259.

<sup>146</sup> *Id.* at 261. The Court did not address in detail whether Wisconsin's law was narrowly tailored to serve the State's interest. *Id.*

<sup>147</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).



successfully used RFRA to win exemptions. Knowing what they had to prove to win their challenges allows the employers' interest in religious freedom to be placed in a hierarchy: while the government's interest in promoting the health of female employees by ensuring access to reproductive services was indeed strong, the individual employers' interest in religious freedom was deemed stronger. If female employees, or male employees with female dependents, find themselves deprived of access to contraception because of an employer's religious beliefs, the key to restoring access will have to be identifying an interest higher in the hierarchy. Because of the *Smith* decision, and the low likelihood of any plaintiff winning on its Free Exercise Clause challenge, the employers' *constitutional* interests are unlikely to enter into the ensuing discussion; therefore, it would be the employers' *statutory* interests bestowed by RFRA that the employees would have to top in the hierarchy. One possible route to recourse could be Title VII.

Title VII is shorthand for the sections of the 1964 Civil Rights Act that prohibit discrimination in the workplace. Its passage is surrounded by a certain amount of lore: “conventional wisdom” says that, while Congress had planned all along to protect the classes of race, color, religion, and national origin, it only decided at the last minute to include sex as one of the protected categories.<sup>148</sup> In fact, one myth claims that the sex discrimination provision was added as a political ploy to stop the Civil Rights Act altogether—its sponsors thought that a prohibition against workplace sex discrimination would be thought of as so ridiculous that such a provision would stop the entire bill in its tracks.<sup>149</sup> As a result of its hurried addition to the law, the sex discrimination provisions have presented some challenges in interpretation—there is very

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<sup>148</sup> Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997).

<sup>149</sup> *Id.*

little Congressional discussion to help guide the courts in the law's application.<sup>150</sup>

Unfortunately, one of the areas that suffers somewhat from these murky waters is the provision of insurance that covers contraception.

#### A. TITLE VII AND CONTRACEPTION

One of the first major cases to explore the boundaries of the prohibition of sex discrimination was *General Electric Company v. Gilbert*.<sup>151</sup> General Electric (GE) offered its employees a disability plan that covered non-occupational illnesses and injuries.<sup>152</sup> When two female employees became pregnant and applied for benefits to cover their pregnancy-related absences from work, however, their claims were “routinely denied” because GE’s plan did not cover pregnancy-related disabilities.<sup>153</sup>

At the trial level, the court found that the exclusion of pregnancy from the otherwise-comprehensive plan constituted sex-based discrimination, noting that a normal, uncomplicated pregnancy “was disabling for a period of six to eight weeks.”<sup>154</sup> The result of GE’s policy was that while men and women paid roughly the same amount<sup>155</sup> for insurance, the male employees enjoyed full coverage while the female employees did not.<sup>156</sup>

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<sup>150</sup> See *id.* at 142–43 (discussing numerous cases in which the sex discrimination provision’s lack of legislative history led to restrictions on protections for women).

<sup>151</sup> 429 U.S. 125 (1976).

<sup>152</sup> *Id.* at 127.

<sup>153</sup> *Id.* at 128–29.

<sup>154</sup> *Id.* at 130, 132.

<sup>155</sup> In fact, the cost of insurance, *without* the pregnancy coverage, to GE’s female employees was sometimes “substantially more” than the cost to its male employees. And in any case, the district court specifically rejected the “cost differential” defense, saying that even if the pregnancy-inclusive cost was higher than the pregnancy-exclusive cost, Title VII required its coverage. *Id.*

<sup>156</sup> *Id.* at 130–32.

The Supreme Court thoroughly disagreed. It found that there was “no risk from which men [were] protected and women [were] not,”<sup>157</sup> and found evidence of neither an attempt “invidiously to discriminate on the basis of . . . impermissible classification” nor even a “gender-based discriminatory effect.”<sup>158</sup> As far as the Court was concerned, GE offered all of its employees comprehensive coverage regardless of gender; thus, there was no discrimination.<sup>159</sup>

The dissent pointed out that for the Court to reach this conclusion, it had to classify the non-covered individuals as pregnant *women*, and the covered individuals as non-pregnant *persons*—even though women exclusively made up one side, men and women were on the other side. Justices Brennan and Stevens took issue with this logic.<sup>160</sup>

Justice Brennan, stating that “the Court’s assumption that General Electric engaged in a gender-neutral risk-assignment process [was] purely fanciful,”<sup>161</sup> divided the classes differently:

First, the plan covers all disabilities that mutually afflict both sexes. Second, the plan insures against all disabilities that are male-specific or have a predominant impact on males. Finally, all female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy.<sup>162</sup>

In other words, Justice Brennan argued that the majority’s conceptual framework was wrong. The opposing classes were not pregnant women and non-pregnant people, but rather men, who enjoyed full comprehensive coverage, and women, who did not.

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<sup>157</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

<sup>158</sup> *Id.* at 137-38 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>159</sup> Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 375-76 (1998).

<sup>160</sup> *Gilbert*, 429 U.S. at 147-48, 155 (Brennan & Stevens, J.J., dissenting).

<sup>161</sup> *Id.* at 148.

<sup>162</sup> *Id.* at 155 (citation omitted).

Congress was displeased by the Supreme Court's decision. The Court had ignored the guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), decisions by eighteen federal district courts, and the decisions of all federal courts of appeal to have touched the issue.<sup>163</sup> Two years after *Gilbert*, Congress passed the Pregnancy Discrimination Act (PDA), which amended the language in Title VII to clarify the meaning of "on the basis of sex":

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.<sup>164</sup>

Essentially, Congress wrote the *Gilbert* dissent into law. It found that the "dissenting justices had correctly interpreted the act."<sup>165</sup>

It did not take long for the PDA's scope to be tested. In 1983, the male employees of Newport News Shipbuilding and Dry Dock Company took their employer to court.<sup>166</sup> Their complaint was not for themselves, but for their wives. While the company had promptly complied with the PDA's edict to add coverage of the pregnancy-related issues of its female employees, no such adjustment had been made for female dependents of male employees. This

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<sup>163</sup> H.R. Rep. 95-948 at 4750 (May 11, 1993).

<sup>164</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978).

<sup>165</sup> H.R. Rep. 95-948 at 4750.

<sup>166</sup> *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

resulted in full coverage for employees' husbands, but deficient coverage for employees' wives—in short, discrimination against male employees.<sup>167</sup>

The Supreme Court, in an opinion authored by Justice Stevens, rejected both the narrow holding and the reasoning of the *Gilbert* decision.<sup>168</sup> It pointed out that Newport's policy was the “mirror image” of GE's plan, which Congress had unequivocally declared to be in violation of Title VII; that the dependents, and not the employees directly, were the ones being discriminated against did not change the clear fact that “discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.”<sup>169</sup>

The PDA and *Newport* established that employers may not discriminate on the basis of pregnancy or pregnancy-related conditions. However, that alone does not mean that employees' access to contraceptive care is guaranteed. The legal connection between “pregnancy-related” and “contraceptive” is not entirely iron-clad. In 2000, the EEOC released a commission decision recommending that contraception *should* be covered.<sup>170</sup> The decision pointed out that the “PDA prohibits ‘discrimination on the basis of a woman's ability to *become* pregnant’”—not on the basis of a woman's actual pregnancy—which logically leads to the conclusion that contraception, as a means to prevent or plan pregnancy, should be considered “pregnancy-

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<sup>167</sup> *Id.* at 672–73.

<sup>168</sup> *Id.* at 676.

<sup>169</sup> *Id.* at 684–85.

<sup>170</sup> Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 (E.E.O.C. Guidance Dec. 14, 2000).

related” and therefore covered by the PDA.<sup>171</sup> Agency policy positions, however, are not always entitled to deference in court.<sup>172</sup>

The first case to deal with whether Title VII covered contraception was *Erickson v. Bartell*, decided in 2001.<sup>173</sup> In that case, the employer’s comprehensive health plan excluded coverage of all contraceptive drugs and devices. The company’s female employees sued under the PDA.<sup>174</sup> The court invoked the reasoning of the *Gilbert* dissent, and made a direct comparison between that case and the instant one: excluding prescription contraception coverage from an otherwise comprehensive plan discriminates against women, since it leaves women with less coverage than men.<sup>175</sup> The court also noted the EEOC’s 2000 contraception decision, which

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<sup>171</sup> *Id.* at \*2 (emphasis added).

<sup>172</sup> The question of how much deference to afford an agency’s position is a very complicated one, and one that is largely outside the scope of this Comment, except to say the following. On one hand, the Court has said that “it is axiomatic that the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility . . . need only be reasonable to be entitled to deference.” *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). On the other hand, not every decision by the EEOC is entitled to such deference. In *Re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 938 (8th Cir. 2007) (“An agency’s interpretation that is found in an opinion letter, policy statement, agency manual or enforcement guideline ‘lack[s] the force of law’ and is not entitled to deference under *Chevron*” (citing *Chevron U.S.A., Inc. v. Nat’l Resources Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984))); see also *Chevron*, 467 U.S. at 843–45 (holding that if the intent of Congress is unclear from a reading of the statute, then the reasonable opinion of the agency whose purpose is to enforce that statute is entitled to great deference); Kristine Cordier Karnezis, *Construction and Application of “Chevron Deference” to Administrative Action by the United States Supreme Court*, 3 A.L.R. Fed. 2d 25, §§ 48–49 (2005) (comparing Supreme Court cases that did and did not afford EEOC decisions *Chevron* deference).

<sup>173</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). There have been more cases since then, but not many. See *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (2003) (denying employer’s motion to dismiss on claims similar to *Erickson*).

<sup>174</sup> *Erickson*, 141 F. Supp. 2d at 1268.

<sup>175</sup> *Id.* at 1274–75.

further buttressed the court's conclusion that the company had violated Title VII, and was required to cover prescription contraceptives.<sup>176</sup>

Not every court has agreed with this reasoning. In fact, the only case to reach the appellate level went the other way. Female employees of Union Pacific Railroad sued their employer for failure to include coverage for prescription contraceptives.<sup>177</sup> The district court granted the employees' motion for partial summary judgment, but the Eighth Circuit reversed, following instead a case about infertility that found that the PDA referred "only to medical conditions associated with 'pregnancy' and 'childbirth.'"<sup>178</sup>

The Eighth Circuit found that the district court was wrong in how it framed Union Pacific's exclusion; the circuit court characterized the plan as excluding *all* kinds of contraception, not just prescription contraception.<sup>179</sup> It lumped all methods of contraception and sterilization into one equal category: neither intrauterine devices nor condoms were covered. Therefore, since contraception for neither men nor women was covered by the plan, there was no violation of Title VII or the PDA.<sup>180</sup>

Furthermore, the Eighth Circuit rejected the EEOC's 2000 decision as unpersuasive.<sup>181</sup> The court drew a distinction between the policies addressed in the decision, which covered

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<sup>176</sup> *Id.* at 1277.

<sup>177</sup> *In Re Union Pacific*, 479 F.3d at 938.

<sup>178</sup> *Id.* at 941 (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996)).

<sup>179</sup> This does not seem like a completely fair characterization, since it seems to differentiate this plan from some hypothetical prescription drug plan that covered non-prescription drugs. As the dissent pointed out, "that [Union Pacific's] policy does not provide coverage for condoms is unsurprising—Union Pacific has not identified any health insurance policy which would provide coverage for non-prescription, contraceptive devices available in drug stores and gas stations nationwide." *Id.* at 945 (Bye, J., dissenting).

<sup>180</sup> *Id.* at 944–45.

<sup>181</sup> *Id.* at 943.

sterilizations but not contraceptives, and Union Pacific’s policy, which covered none of those things.<sup>182</sup> It additionally rejected the comparison between contraception and other preventive care. Finally, it cast doubt on the EEOC’s position, stating that because the “EEOC did not issue any guidance on the issue of coverage of prescription contraception until 22 years after the enactment of the PDA. . . . [T]he consistency and persuasiveness of the EEOC’s position” was questionable.<sup>183</sup>

It is unclear the direction this issue will go in other circuits. In order to reach this conclusion, the Eighth Circuit had to reject at least one directly on-point case as well as the EEOC’s decision, and instead choose to follow the reasoning in a case that was based on fertility procedures instead of prescription contraceptive coverage.<sup>184</sup> While employees of religious employers may be foreclosed from using Title VII to fight for contraceptive coverage in the Eighth Circuit, it may still be possible in the rest of the nation.

## B. RFRA VS. TITLE VII

An employee of one of the potentially exempt religious employers could use Title VII to fight for coverage by establishing a *prima facie* case of disparate impact. To do that, he or she must:

[demonstrate] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin[,

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

<sup>183</sup> *Id.* The Eighth Circuit seems not to have considered *Erickson* in detail; that court noted that up until that point, “no court had been asked to evaluate the common practice of excluding contraceptives from a generally comprehensive health plan under Title VII.” *Erickson*, 141 F. Supp. 2d at 1275. It seems likely that the EEOC simply never had occasion to address the issue until the 2000 decision. See Law, *supra* note 159, at 386–91.

<sup>184</sup> See *Krauel*, 95 F.3d at 681 (holding that denying access to fertility procedures was not a Title VII violation).



while] the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.<sup>185</sup>

Once the *prima facie* case has been established, the burden of proof shifts to the employer to show that the practice at issue exists for a legitimate, nondiscriminatory business purpose.<sup>186</sup>

These potential arguments would echo the arguments set forth in *Erickson* and *Union Pacific* at the district level. The specific employment practice at issue would be the provision of a health insurance plan that has a disparately negative impact on women. While male employees and dependents would receive comprehensive prescription drug benefits, female employees and dependents would receive less than comprehensive coverage. As the court pointed out in *Erickson*, “Title VII is measured by evaluating the relative comprehensiveness of coverage.”<sup>187</sup>

Once this was established, the burden would shift to the religious employer to show that the exclusion of prescription contraceptives was related to a legitimate business purpose. Having won religious exemptions from the contraceptive mandate, it would be abundantly clear that the exclusion of contraception was not business-related.

At this point, the court would face a standoff between two important interests: on one hand, the religious employer’s right to free exercise; on the other, the employee’s (or dependent’s) right to be free from discrimination. There is a surprising lack of guiding caselaw that would indicate the outcome of a Title VII sex discrimination challenge facing a RFRA defense.

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<sup>185</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (2012); 45A AM. JUR. 2D *Job Discrimination* § 511 (2014) (citing *Spivey v. Beverly Enters, Inc.*, 196 F.3d 1309, 1314 (11th Cir. 1999)).

<sup>186</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i); Kristie Brooks Smith, *A Prima Facie Case of Disparate Impact Discrimination Requires Statistically Significant Evidence that a Facially Neutral Employment Policy or Practice Adversely Affected a Protected Class*, PRAC. INSIGHTS EMP. FL 0146 (2012).

<sup>187</sup> *Erickson*, 141 F. Supp. 2d at 1271.

One case is *EEOC v. Fremont Christian School*, a decision made during the *Sherbert* era, to which RFRA was intended to set back the clock.<sup>188</sup> In this case, a Christian school had an employment policy of providing health insurance for employees that qualified as heads of household.<sup>189</sup> The school interpreted “head of household” to mean only single people or married men—never married women, who as a matter of scripture could never be the head of a household, regardless of which spouse earned more money.<sup>190</sup> Therefore, Fremont’s married female employees were ineligible for health insurance.<sup>191</sup>

A married female employee filed a complaint with the EEOC, which the school answered with affirmative defenses based on, among other things, the Free Exercise Clause.<sup>192</sup> The school claimed that any enforcement of Title VII’s prohibition against sex discrimination would be a violation of its right to free exercise.<sup>193</sup>

The court stepped through the three prongs of the *Sherbert* test. It found that requiring the school to provide married women with the same health insurance as married men would not substantially burden the school’s religious exercise, since the school had previously eliminated a similar provision several years before the instant lawsuit.<sup>194</sup> Even if the burden on Fremont’s free exercise had been deemed substantial, the court found that eliminating discrimination in the

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<sup>188</sup> 781 F.2d 1362 (9th Cir. 1986); *see also* *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (almost identical facts and outcome).

<sup>189</sup> *Fremont Christian Sch.*, 781 F.2d at 1364–65.

<sup>190</sup> *Id.* at 1365.

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

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

<sup>193</sup> *Id.* at 1367.

<sup>194</sup> *Id.* at 1368. The school had a policy of paying married men a “head of household” monetary allowance, but that practice was discontinued because of concerns that the pay disparity was “possibly illegal.” *Id.* at 1364.

workplace was a highly compelling government interest: “Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.”<sup>195</sup> Finally, the court did not directly address whether the injunctive relief was actually the least restrictive means; instead it found that because the burden on the school’s beliefs was insubstantial, the third prong had been satisfied.<sup>196</sup>

Another case was *Redhead v. Conference of Seventh-Day Adventists*,<sup>197</sup> in which an employee was fired for being unmarried and pregnant.<sup>198</sup> This controversy took place in 2006, which places it in the RFRA era. The plaintiff was a primarily secular teacher at a Christian school, handling only one Bible study session per day.<sup>199</sup> The school’s administration discovered that she was pregnant out of wedlock and did not intend to marry the father, upon which knowledge it fired her.<sup>200</sup> The employee filed a complaint alleging discrimination under the PDA. Moving for summary judgment, the school defended its decision by pointing to an employment agreement, which required its employees to conduct themselves in line with Seventh-Day Adventist teachings, and pointing out that fornication is a “grievous sin.”<sup>201</sup>

While the school did not actually raise a RFRA defense, the court analyzed the case through that lens, stating that “RFRA must be deemed the full expression of Congress’ intent

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<sup>195</sup> *Id.* at 1368–69 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

<sup>196</sup> *Id.* at 1369.

<sup>197</sup> 440 F. Supp. 2d 211 (E.D.N.Y. 2006).

<sup>198</sup> *Id.* at 214.

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

<sup>200</sup> *Id.* at 214–15.

<sup>201</sup> *Id.* at 216.

with regard to the religion-related issues before [it].”<sup>202</sup> The court found that since the employee was not a member of the clergy, she was not covered by the so-called ministerial exception to Title VII.<sup>203</sup> Because she did not fall into the ministerial exception, the court found that the government’s compelling interest in eliminating discrimination was sufficient to overcome any burden on the school’s religion, and further found that Title VII’s framework was the least restrictive means of accomplishing that goal.<sup>204</sup>

Cases like *Fremont Christian School* and *Redhead* are promising for the employee of the ACA-exempted employer, since they illustrate the outcome of a controversy that pits RFRA against Title VII. Although it is true that the substantiality of the employers’ burdens will have already been established via the present debate, both of the above cases found that the government’s interest in eliminating gender discrimination was compelling enough to override the employers’ religious interests. This result was especially clear in *Redhead*, in which the court stated that without the ministerial exception,<sup>205</sup> Title VII was to be viewed as an exception to RFRA. If free-exercise burdens on two *religious* employers did not outweigh the

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<sup>202</sup> *Id.* at 218.

<sup>203</sup> *Id.* at 220. The ministerial exception protects Catholic churches, for example, from sex discrimination claims from hiring only male priests. *Id.*

<sup>204</sup> *Id.* at 221. The court denied the school’s summary judgment motion because there were issues of fact concerning whether the employee had actually been discriminated against based on her sex, or whether the school had taken similar action against other employees without regard to sex. *Id.* at 223–24.

<sup>205</sup> The ministerial exception, by definition, will be unavailable to any of the employers that are the subject of this Comment. In order to be able to invoke the ministerial exception, the organization must have positions equivalent to clergy—in which case, they would have been eligible for the religious exemptions from the ACA in the first place. See 45 C.F.R. § 147.130(1)(vi)(B)(1)–(4) (laying out the ACA’s exemptions for religious employers—which do not include for-profit, secular businesses); *Redhead*, 440 F. Supp. 2d at 217 (explaining that the ministerial exception is meant to protect churches’ selection of their clergy members: “A church must retain unfettered freedom in its choice of *ministers* because ministers represent the church to its people.” (emphasis added)).

government's compelling interest in preventing sex discrimination, it seems unlikely that similar free-exercise burdens on for-profit, secular employers would be weighed more heavily against the same interest.

#### IV. CONCLUSION

A Title VII-based victory for employees in this context would not only be good for the individual employee of the religious employer, but for *all* employees. Without widespread recognition that the PDA's scope includes contraception, it is up to the states, or even individual employers or insurance plans to cover contraception. With such recognition, the requirement to cover contraception in comprehensive prescription plans could become universal.

However, before employees arrive at this result, many "ifs" must be resolved in the right direction. First, this avenue will be completely unnecessary unless the religious employers win their challenges against the mandate—a result that is uncertain at best, given the current circuit split. *If* they win, then the employees will be able to counter with a Title VII attack *if* the Court finds that the government's interest in eliminating gender discrimination is sufficiently compelling to outweigh a substantial burden on religion and *if* the Court finds that contraception is covered under the PDA. Only after each "if" is resolved as a "yes" will the Court consider these diverse statutes together and come to a result that allows employees to claim the contraceptive benefits promised by the ACA.