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Maria Iliadis
University of Baltimore School of Law

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AN EASY PILL TO SWALLOW: WHILE THE SUPREME COURT FOUND THAT FOR-PROFIT, SECULAR COMPANIES CAN EXERCISE RELIGION WITHIN THE MEANING OF THE RELIGIOUS FREEDOM RESTORATION ACT, THE MANDATE SHOULD HAVE PREVAILED WITH RESPECT TO THOSE ENTITIES BECAUSE IT ADVANCES THE GOVERNMENT'S COMPELLING INTERESTS IN PUBLIC HEALTH AND IS THE LEAST RESTRICTIVE MEANS OF DOING SO

*Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?*¹

-Edward, First Baron Thurlow

I. INTRODUCTION

From its inception to its implementation, the Patient Protection and Affordable Care Act (the ACA), commonly known as “Obamacare,” has been no stranger to controversy.² A key component promulgated under the ACA is the so-called “contraceptive mandate” (the Mandate).³ Because women face significantly higher health care costs than men, women ultimately forego receiving necessary medical care.⁴ The Mandate was enacted to address the unique health needs of women, particularly with respect to their reproductive capacities.⁵

The Mandate seeks to provide women with greater access to preventive health services by requiring that certain employers provide

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1. Mervyn King, PUBLIC POLICY AND THE CORPORATION 1 (Richard Stone ed., Halsted Press 1977) (quoting Edward Baron Thurlow 1731–1806).
 2. Gregory Wallace, ‘Obamacare’: The Word that Defined the Health Care Debate, CNN POLITICS (June 25, 2012, 1:20 AM), http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html?_s=PM:POLITICS.
 3. 42 U.S.C. § 300gg-13(a)(4) (2012).
 4. See *infra* Part II.A.
 5. See *infra* Part II.A.

their employees with health insurance that covers approved contraceptive methods without cost-sharing.⁶

While the Mandate may be the greatest piece of legislation for women's health in a generation,⁷ it received opposition from religious groups, who perceive the Mandate as an attempt by the government to force them into violating their religious beliefs.⁸ In response to this opposition, the Obama Administration made certain concessions for certain groups, while simultaneously permitting women's access to these services.⁹ Despite these attempts to compromise, the opposition stands strong. Nearly 100 companies, nonprofits, and religious groups challenged the contraception requirement on constitutional and federal law grounds.¹⁰ Until recently, courts were split on these issues.¹¹ As of November 26, 2013, the Supreme Court agreed to review the religious challenges of a government case¹² and

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6. 42 U.S.C. § 300gg-13(a)(4). Cost-sharing is defined as "any expenditure required by or on behalf of an enrollee with respect to essential health benefits; such term includes deductibles, coinsurance, copayments, or similar charges, but excludes premiums, balance billing amounts for non-network providers, and spending for non-covered services." 45 C.F.R. § 155.20 (2013).
 7. See, e.g., NAT'L WOMEN'S LAW CTR., DENYING COVERAGE OF CONTRACEPTIVES HARMS WOMEN 1-2, available at http://www.nwlc.org/sites/default/files/pdfs/denying_covg_of_cont_harms_women_081312_pdf.pdf.
 8. See, e.g., Letter from Anthony R. Picarello, Jr. & Michael F. Moses, Assoc. Gen. Sec'y & Gen. Counsel, U.S. Conference of Catholic Bishops, to the Dept. of Health & Human Servs. 1-4 (May 15, 2012), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf>.
 9. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,870 (July 2, 2013) (codified at Treas. Reg. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156).
 10. HHS Mandate Information Central, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Jan. 11, 2015).
 11. Compare *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 417 (E.D. Pa. 2013), *rev'd sub nom.* *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs.*, 2014 WL 4467879 (3d Cir. Aug. 5, 2014) (holding that the ACA exemption regarding women's contraception as applicable to religious employers does not violate the Establishment Clause), and *Grote Indus., L.L.C. v. Sebelius*, 914 F. Supp. 2d 943, 954 (S.D. Ind. 2012) (holding that there was a substantial likelihood that the ACA religious employer exemption did not violate the Establishment Clause), with *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114, 1121 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the companies' rights had been substantially burdened by the ACA's contraceptive-mandate requirement), and *Tyndale House Publishers Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) (holding that the employer would likely succeed on his ACA challenge).
 12. *Hobby Lobby*, 723 F.3d at 1120-21.

a private business case.¹³ On June 30, 2014, the Supreme Court announced its decision in *Burwell v. Hobby Lobby*, finding, in a 5-4 decision, that the Mandate, as applied to closely held corporations, violates the Religious Freedom Restoration Act (RFRA).¹⁴

This Comment will discuss the background of the ACA's contraceptive mandate and the religious claims against the Mandate made under the RFRA. Part III.A will argue that for-profit businesses should not assert the same claims of religious freedom as individuals and religious nonprofits under the RFRA.¹⁵ Part III.B will argue that even though the Court found that for-profit corporations may assert the same claims of religious freedom as individuals and religious nonprofits,¹⁶ any burden on employers does not rise to a "substantial" burden,¹⁷ and the Mandate is the least restrictive means of furthering a compelling government interest.¹⁸

II. THE MANDATE, THE CONTROVERSY, AND THE OPPOSITION

A. *Addressing the Inequities and Amending the ACA*

The ACA "expands access to [health insurance] coverage [for] millions of uninsured women, ends discriminatory practices such as gender rating, . . . eliminates exclusions for preexisting conditions, and improves women's access to affordable . . . care."¹⁹ However, when the bill was initially presented, it was devoid of essential women's *preventive* health services.²⁰ Senator Barbara Mikulski, recognizing the pitfalls of such a plan, sponsored the Women's Health Amendment (WHA).²¹ The WHA proposed "requir[ing]

13. *Conestoga Wood*, 917 F. Supp. 2d at 402.

14. *Hobby Lobby*, 134 S. Ct. at 2759.

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. *See infra* Part III.C.

18. *See infra* Part VI.

19. COMM'N ON PREVENTATIVE SERVS. FOR WOMEN, INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 18 (2011), available at <http://www.iom.edu/reports/2011/clinical-preventive-services-for-women-closing-the-gaps.aspx> [hereinafter CLOSING THE GAPS].

20. *See Patient Protection and Affordable Care Act*, H.R. 3590, 111th Cong. (2009).

21. Brief for the Nat'l Women's Law Ctr. & Sixty-Eight Other Orgs. as Amici Curiae in Support of the Gov't at 6, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333895, at *6.

coverage of women's preventive services developed by women's health experts to meet the unique needs of women."²²

After Congress passed the WHA, the Health Resources and Services Administration (HRSA) commissioned the Institute of Medicine (IOM) to develop comprehensive and evidence-based guidelines on the issue.²³ The IOM's Report, conducted by a committee of independent experts in the relevant subjects, reiterated the need for women's preventive health services.²⁴ The report indicated that although "women have longer life expectancies than men, women suffer from chronic disease and disability at rates disproportionate to those of men, with consequences for their own health and the health of their families."²⁵ The IOM's report also indicated that women need more preventive care than men, due to their reproductive and gender specific conditions, which cause significant out-of-pocket expenditures for women.²⁶ However, despite their obvious need for preventive care, many women forego receiving preventive services such as mammograms and Pap smears because of their associated costs.²⁷

The IOM identified multiple gaps in women's health services that needed to be addressed, and subsequently made recommendations to address those gaps.²⁸ The committee recognized that contraception and contraceptive counseling were not in the array of health care services available to women.²⁹ The committee concluded, based on available evidence, that contraception and contraceptive counseling are effective at reducing unintended pregnancies, which have very real, detrimental costs to the public.³⁰ Thus, the committee recommended that the full range of Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity become available under the ACA.³¹

22. 155 Cong. Rec. S12265-02 (daily ed. Dec.3, 2009) (statement of Sen. Stabenow).

23. CLOSING THE GAPS, *supra* note 19, at 1–2.

24. *See id.* at 18.

25. *Id.*

26. *Id.* at 19.

27. *Id.*

28. *See id.* at 79–134, 157–68.

29. *Id.* at 109–10.

30. *See infra* Part IV.A.

31. *See* CLOSING THE GAPS, *supra* note 19, at 109–10.

B. *Rectifying The Inequities*

On August 1, 2011, HRSA adopted and released guidelines for women's preventive health services based on the IOM's recommendations.³² The HRSA's guidelines include all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.³³ Following an administrative tug-of-war, the Departments of Health and Human Services (HHS), Labor and the Treasury (the Departments) issued final rulings for women's preventive health services on July 2, 2013, encompassing the HRSA's guidelines.³⁴ As a result, employers and insurers were mandated to provide coverage consistent with the HRSA's guidelines beginning on or after January 1, 2014.³⁵

C. *Exemptions and Accommodations*

Prior to the promulgation of the Final Rules, there was significant opposition to the Mandate from some religious groups and religiously affiliated employers.³⁶ The breadth of the opposition to the Mandate comes from churches and synagogues, religious nonprofit businesses, and for profit, secular businesses owned by religious individuals.³⁷ While many religious sects do not generally oppose contraception, they do generally object to "abortifacient drugs."³⁸ An abortifacient is defined as a drug or device causing an abortion.³⁹ Because the Mandate provides coverage for "emergency contraceptives" and intra-uterine devices, some religious groups object to the Mandate on the basis that these contraceptives avoid pregnancy by preventing a fertilized egg from implanting in the womb and are thus, abortifacients.⁴⁰

32. See 78 Fed. Reg. 127,39870 (July 2, 2013) (codified at Treas. Reg. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. 147, 156).

33. *Id.*

34. *Id.*

35. *Id.*

36. See *HHS Mandate Information Central*, *supra* note 10.

37. *See id.*

38. See *Colo. Christian Univ. v. Burwell*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/ccu/> (last visited Jan. 11, 2015).

39. BLACK'S LAW DICTIONARY 6 (9th ed. 2009).

40. See Julie Rovner, *Morning-After Pills Don't Cause Abortion*, *Studies Say*, NPR (Feb. 21, 2013, 5:04 PM), <http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say> (discussing whether emergency contraceptives cause abortions). There is no consensus among the medical community about whether these drugs actually cause an abortion. *See id.* However,

Taking these religious beliefs into consideration, the Departments have delineated exemptions and accommodations for some religious organizations.⁴¹ The Final Rules provide exemptions for religious employers and “accommodations with respect to . . . group health plans established or maintained by eligible organizations . . . as well as student health insurance coverage arranged by eligible organizations that are institutions of higher education.”⁴²

1. Exemptions for Churches, Integrated Auxiliaries and Associations

Prior to the Final Rule, the interim exemption was limited to non-profit, religious employers whose purpose was the “inculcation of religious values” and primarily employed and served people of their own faith.⁴³ Some objected to this rule on the grounds that it was too narrow because churches can serve others outside of their faith.⁴⁴ The Departments responded by allowing the exemption to apply to all churches.⁴⁵

The Mandate defines a religious employer as one meets the following criteria: “(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 described in section 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Code.”⁴⁶

These code sections refer “to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.”⁴⁷ The Departments justify this exemption because

[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are

religious subscribers are entitled to believe that emergency contraception operates as an abortifacient and thus, as a matter of faith, coverage of such drugs would impose a substantial burden on religion.

41. See generally 78 Fed. Reg. 39,870, 39,873–78 (July 2, 2013) (providing details regarding exemptions and accommodations for certain religious organizations under the Affordable Care Act).

42. *Id.* at 39,873.

43. See *id.* at 39,873–74 (providing the definitions of religious employer for exemption under the Affordable Care Act, prior to the final rule).

44. See *id.* at 39,874 (describing feedback on the definition of religious employer under the Affordable Care Act and the Department’s response).

45. *Id.*

46. *Id.* at 39,873–74.

47. *Id.* at 39,874.

more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use such contraceptive services, even if such services were covered under their plan.⁴⁸

2. Accommodations for Nonprofit Religious Organizations

Groups that fall within the aforementioned religious employer exemption are entirely excused from complying with the Mandate. However, if an organization does not meet the definition's requirement, they are subject to the Mandate but may be eligible for an "accommodation" provided for in the Final Rules.⁴⁹ The accommodation provides that an eligible organization be relieved of their obligation to cover the mandated contraceptives, but ensures that the contraceptives are still provided for without cost-sharing.⁵⁰ An eligible organization is one that:

- (1) [o]pposes providing coverage for some or all of the contraceptive services required to be covered for under section 2173 of the PHS Act and the companion provisions of ERISA and the Code on account of religious objections;
- (2) is organized and operates as a nonprofit entity;
- (3) holds itself out as a religious organization; and
- (4) self-certifies that it satisfies the first three criteria⁵¹

The process of self-certification merely requires that an organization that seeks to be eligible for an accommodation complete and execute a form provided by HHS representing the religious nonprofit's satisfaction of the eligibility criteria and maintain a record of the self-certification form.⁵² The religious nonprofit must notify its health plan insurer that it objects to some or all of the mandated contraceptives.⁵³ The insurer administrator is then required to pay for

48. *Id.*

49. *See* 78 Fed. Reg. at 39,874. The initial rule did not provide for an accommodation for any religiously sponsored hospitals, social service organizations, higher education institutions, or other nonprofit entities not exempt as churches. *See id.* at 39,871.

50. *See id.* at 39,874.

51. *Id.*

52. 45 C.F.R. § 147.131(b)(4) (2013); *see* 78 Fed. Reg. at 39,875.

53. 45 C.F.R. § 147.131(b)(1).

the cost of the contraceptives without cost-sharing by plan participants or the objecting religious employer.⁵⁴

The Departments maintain, based on numerous studies, that the accommodation is cost-neutral because insurers would be insuring the same set of individuals under both the group health insurance policies and the separate individual contraceptive policies.⁵⁵ As a result, insurers “would experience lower cost[] from improvements in women’s health, healthier timing and spacing of pregnancies, and few[] unplanned pregnancies.”⁵⁶

D. *Opponents to the Mandate*

Despite the exemptions and accommodations provided in the final rule, there was still significant opposition from groups that do not qualify for relief from complying with the Mandate. If a non-exempt, non-eligible employer fails to comply with these regulations, it faces harsh penalties.⁵⁷ The penalty for a non-exempt employer that fails to provide health coverage for contraceptives is \$100 per day per employee.⁵⁸ There are also annual penalties in place for employers who fail to provide coverage altogether for each employee.⁵⁹

1. Nonprofit Religious Organizations

Although most claims brought by churches have been dismissed or have otherwise gone inactive, there are still religious nonprofit organizations that are dissatisfied with the accommodation. For example, in *Little Sisters of the Poor v. Sebelius*, a temporary

54. 45 C.F.R. § 147.131(c)(2)(B)(ii). As of August 2014, in light of the Supreme Court’s recent interim order in a case involving Wheaton College, interim final regulations were published to allow an eligible organization to notify HHS in writing of its religious objection to contraception coverage. *Women’s Preventative Servs. Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, CMS.GOV, <http://cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Jan. 11, 2015).

HHS will then notify the insurer for an insured health plan, or the Department of Labor will notify the [third-party administrator] for a self-insured plan[] that the organization objects to providing contraception coverage and that the insurer or [third-party administrator] is responsible for providing enrollees in the health plan” mandated coverage at no separate cost.

Id.

55. 78 Fed. Reg. at 39,877.

56. *Id.*

57. I.R.C. § 4980D(a)–(b)(2012).

58. *Id.* at § 4980D(b)(1).

59. *Id.* at § 4980H(a).

injunction was issued before the Mandate was to take effect.⁶⁰ Little Sisters of the Poor Home for the Aged is a nonprofit corporation comprised of Roman Catholic nuns who serve needy elderly people.⁶¹ Although the nuns qualify for the self-certification accommodation, they refuse to fill out the self-certification form because they believe that the accommodation burdens their religious beliefs by triggering the Mandate, with the assistance of their third-party administrator.⁶² The suit is a class action lawsuit, not only for the Little Sisters but also for other Catholic organizations that provide health benefits consistent with their religious faith through the Christian Brothers Employee Benefit Trust and Christian Brothers Services.⁶³

2. For-profit, Secular Businesses

Leading up to the Court's recent decision in *Hobby Lobby*, for-profit, secular businesses were at the front lines of the contraceptive mandate war. These companies object on the basis of the Religious Freedom Restoration Act of 1993 (RFRA), among other First Amendment objections.⁶⁴ The Supreme Court granted certiorari on two cases: *Hobby Lobby* and *Conestoga*.⁶⁵ Hobby Lobby is a \$3 billion dollar, for-profit corporation that sells arts and crafts supplies.⁶⁶ The owners of Hobby Lobby and its sister company Mardel, the Greens, objected to the mandate because they believe that certain types of birth control devices and emergency contraceptives are "abortifacients."⁶⁷

60. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius, 134 S. Ct. 893, 893 (2013).

61. Little Sisters of the Poor v. Burwell, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/littlesisters/> (last visited Jan. 11, 2015).

62. See *id.* Their third-party administrator, Christian Brothers Employee Benefit Trust, is also opposed to the Mandate since it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients. See *id.*; see also Aamer Madhani & Doug Stanglin, *Justice Department Opposes Block on Contraceptive Mandate*, USA TODAY (Jan. 3, 2014, 3:58 PM), <http://www.usatoday.com/story/news/nation/2014/01/03/justice-department-sotomayor-block-contraceptive-mandate-obamacare-aca/4303277/>.

63. See Little Sisters of the Poor v. Burwell, *supra* note 61.

64. Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 1 (Jan. 23, 2014), http://columbialawreview.org/contraception-mandate_garfield/. For the purposes of this Comment, the Mandate will only be analyzed under the RFRA.

65. Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (mem.).

66. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

67. *Id.* at 1124–25.

The District Court ruled against Hobby Lobby, finding that Hobby Lobby does not fit into any of the government's exemptions and that the RFRA does not extend to for-profit corporations.⁶⁸ However, the Court of Appeals for the Tenth Circuit reached a different conclusion and issued Hobby Lobby a preliminary injunction.⁶⁹ Notably, the appellate court found, as a matter of statutory interpretation, that the RFRA includes for-profit corporations such as Hobby Lobby.⁷⁰

Further, the court found that there was a substantial burden to Hobby Lobby because it would either have to (1) violate its religious beliefs and provide contraceptive coverage or (2) face steep penalties by failing to provide the contraceptive coverage.⁷¹ With 13,000 employees and fines of \$100 per employee per day, Hobby Lobby would have to pay penalties close to \$475 million a year.⁷²

Furthermore, the appellate court did not find that the contraceptive mandate was the "least restrictive means" of furthering the government's interest.⁷³ While the court did not deny the public interest that may be served through the Mandate, the court noted that there are already exemptions that allow numerous other entities to avoid the Mandate.⁷⁴ Remarkably, the court also rebutted the government's assertion that Hobby Lobby was imposing its views on its employees.⁷⁵

Conversely, in *Conestoga*, the Third Circuit reached a different result than in *Hobby Lobby*.⁷⁶ *Conestoga* is a closely held, for-profit corporation that manufactures wood cabinets and wood specialty products, with approximately 950 full-time employees.⁷⁷ The corporation is owned and operated by the Hahns, who are practicing

68. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

69. 723 F.3d at 1147.

70. 723 F.3d at 1129; 1 U.S.C. § 1 (2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include[s] corporations . . .").

71. 723 F.3d at 1141.

72. *Id.* at 1140–41.

73. *Id.* at 1144.

74. *Id.* at 1143–44.

75. *Id.* at 1144.

76. *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *rev'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

77. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *rev'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Menonite Christians.⁷⁸ The Hahns’ “faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles.”⁷⁹ “Conestoga provides employees with a health insurance plan that covers a number of women’s preventive health expenses, such as pregnancy-related care, routine gynecological care and testing for sexually transmitted diseases.”⁸⁰ However, Conestoga, through its owners, refused to provide coverage for contraceptives and any drugs used to “abort” pregnancy.⁸¹

In *Conestoga*, the court held that corporations are inherently incapable of exercising the sort of free exercise of religion that the RFRA protects.⁸² The court noted that there has not been any legal precedent where a for-profit, secular corporation was itself found to have free exercise rights.⁸³

In granting consolidated review of *Conestoga* and *Hobby Lobby*, the Supreme Court reviewed whether the mandate violated the sincerely held religious beliefs of owners of closely held for-profit corporations under the RFRA.⁸⁴

III. APPLYING THE RFRA TO THE MANDATE

A. *Background of The RFRA*

The RFRA was enacted by Congress to reinstate the compelling interest test of the Free Exercise Clause of the First Amendment, as set forth in *Sherbert v. Verner*⁸⁵ and *Wisconsin v. Yoder*.⁸⁶ In *Sherbert v. Verner*, the Court overruled the state’s denial of

78. *Id.*

79. *Id.* at 402–03.

80. *Id.* at 403.

81. *Id.*

82. *Conestoga Wood*, 724 F.3d at 388 (“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.”).

83. *Id.* at 384–85.

84. *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014).

85. 374 U.S. 398 (1963).

86. 406 U.S. 205 (1972). Congress enacted the RFRA as a response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, where the Supreme Court declined to apply the compelling interest test in favor of a rational basis test when deciding whether a former employee, terminated after using peyote for religious purposes, could legally be denied unemployment benefits. 494 U.S. 872, 874, 882–85 (1990), *superseded by statute*, 42 U.S.C. § 2000bb–1 (2012), *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

unemployment benefits to a Sabbatarian who refused to work during the Sabbath.⁸⁷ The Court refused to apply a rational basis test and instead applied a compelling state interest test.⁸⁸ In *Wisconsin v. Yoder*, Wisconsin state law required children to attend public or private school until the age of sixteen.⁸⁹ However, some Amish families refused to let their children attend school past the age of fourteen.⁹⁰ The Court reaffirmed the compelling interest test from *Sherbert* and found that although the law was a neutral law of general applicability, the law “unduly burdens the free exercise of religion.”⁹¹

Congress enacted the RFRA as a response to the Supreme Court’s decision in *Employment Division v. Smith*.⁹² In *Smith*, the Supreme Court refused to apply the compelling interest test and instead applied a rational basis test to an employee who was denied unemployment benefits after being fired for using peyote for religious purposes.⁹³ The Court’s decision in *Smith* drew significant criticism from the public, which prompted Congress to pass the RFRA in an attempt to squash the Court’s decision in *Smith*.⁹⁴ The RFRA provides that the “[g]overnment shall not substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability,”⁹⁵ unless the government can demonstrate that the application of the burden to the *person* is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.⁹⁶

B. Corporations as “Persons” under RFRA

In a world where “anything is possible,” it is hard to fathom, even in the twenty-first century, that an amorphous, *for-profit* entity can exercise religion; however, that is precisely what the Court found in *Hobby Lobby*.⁹⁷ Prior to the Court’s recent decision in *Hobby Lobby*,

87. *Sherbert v. Verner*, 374 U.S. 398, 399–401, 409–10 (1963).

88. *Id.* at 405–06 (“[C]ondition[ing] the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”).

89. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

90. *Id.*

91. *Id.* at 215, 220.

92. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

93. *Smith*, 494 U.S. at 884–90.

94. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)–(b) (2012).

95. *Id.* § 2000bb-1(a).

96. *Id.* In *Flores*, the Supreme Court added the “least restrictive means” prong to prior free exercise jurisprudence. *Flores*, 521 U.S. at 515–16.

97. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014).

it had yet to extend the RFRA to corporations.⁹⁸ Thus, as a threshold issue, the *Hobby Lobby* and *Conestoga* cases hinged on whether secular, for-profit corporations can exercise religion within the meaning of the RFRA.⁹⁹ Previously, the courts encountered difficulty reconciling this issue in light of varying statutory interpretation and the absence of definitive case law.¹⁰⁰

While other federal statutes, such as Title VII and the American with Disabilities Act, specifically carve out exceptions for employers that are “religious corporation[s], association[s], educational institution[s], or societ[ies],” the RFRA solely mentions “persons.”¹⁰¹ The aforementioned federal statutes indicate that if Congress intended the RFRA to encompass secular, for-profit organizations, it may have drafted the RFRA accordingly.¹⁰² However, the Court in *Hobby Lobby* found that because the RFRA does not define the term “person,” the Court must defer to the Dictionary Act, in order to identify a meaning.¹⁰³ The Dictionary Act provides that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include

98. *See id.*

99. *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) and *rev’d and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120, 1146 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) and *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *see supra* Part II.D.2.

100. The Supreme Court has yet to explicitly address the non-profit/for-profit distinction in determining whether for-profit activity precludes an organization from claiming religious protection under the RFRA. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Brennan, J., concurring) (stating that it is “conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases”); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (holding that a faith-based humanitarian organization was eligible to receive the Title VII exemption, in part because it did not engage in for-profit activity).

101. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (2012) (stating that the prohibition on discrimination on the basis of religion does not apply to an employer that is “a religious corporation, educational institution, or society” under Title VII); 42 U.S.C. § 12113(d)(1)–(2) (providing that the ADA does not prohibit a “religious corporation, association, educational institution, or society” from giving preference in employment to individuals of a particular religion under the ADA); *Cf.* 42 U.S.C. § 2000bb-1(a) (“[G]overnment shall not substantially burden a *person’s* exercise of religion . . .”) (emphasis added).

102. *See Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting).

103. *Id.* at 2768–69 (majority opinion).

corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”¹⁰⁴

As a result of this interpretation, the Court decided that the RFRA includes corporations.¹⁰⁵ However, the Court should not have deferred to the Dictionary Act for a meaning of the word “person” in the RFRA because when read in context, the Court could discern an alternate meaning.¹⁰⁶ As the *Hobby Lobby* dissent points out, there is no pre-*Smith* “free exercise” or RFRA case law to lend on the notion that free exercise rights pertain to for-profit corporations because the exercise of religion is characteristic of natural persons, not artificial entities.¹⁰⁷

C. *The Contraception Mandate Does Not Substantially Burden the Free Exercise of Religion*

Although the Court found that for-profit entities may exercise religion within the meaning of the RFRA,¹⁰⁸ the next step of the analysis required a determination as to what extent the contraceptive mandate burdened the entities’ sincerely held religious beliefs.¹⁰⁹ When conducting an analysis under the RFRA, courts tend to defer to Free Exercise cases decided prior to *Employment Division v. Smith* for guidance on the “substantial burden” standard under the RFRA.¹¹⁰

The Supreme Court has explained that a substantial burden exists if the receipt of an important benefit is conditioned upon conduct proscribed by a religious faith, or where the benefit is denied because of conduct mandated by a religious belief.¹¹¹ For example, in

104. 1 U.S.C. § 1 (2012).

105. 134 S. Ct. at 2768–69.

106. The Dissent notes that “[w]hether a corporation qualifies as a person capable of exercising religion is an inquiry [that] cannot [be] answer[ed] without reference to the ‘full body’ of pre-*Smith* ‘free-exercise caselaw.’” *Id.* at 2794 (Ginsburg, J., dissenting).

107. *Id.* at 2793–94 (Ginsburg, J., dissenting).

108. *Id.* at 2768–69 (majority opinion).

109. *Id.* at 2775–76. Only “substantial” burdens on the exercise of religion trigger the RFRA. See 42 U.S.C. § 2000bb-1(a) (2012).

110. Pre-*Smith* cases embody the same standard as that codified by Congress in the RFRA. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (finding that disqualification of unemployment benefits based on religious beliefs imposed a “[substantial] burden on the free exercise of appellant’s religion”); see also *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a [substantial] burden upon religion exists.”).

111. *Thomas*, 450 U.S. at 717–18 (finding a substantial burden when an employee had to choose between adhering to his religious beliefs or stop working).

Sherbert v. Verner, the Court found it to be a substantial burden to deny a Sabbatarian, who was fired for not working on the Sabbath, unemployment benefits.¹¹²

Similarly, in *Wisconsin v. Yoder* the Supreme Court found that the law impermissibly forced Amish parents to choose between sending their children to school in violation of their religious tenets and criminal prosecution.¹¹³

Unlike the aforementioned cases, the Mandate does not coerce those who object to the Mandate to personally participate in the use of contraceptives, and the burden should be construed narrowly. Those who claim that the Mandate poses a substantial burden on their exercise of religion do so on the basis that the funds that they contribute to a group health plan may ultimately subsidize someone else's participation that is condemned by the corporation's religious beliefs.¹¹⁴

However, it has long been recognized that the private and personal decision to use contraceptives rests solely with the employee, not the employer.¹¹⁵ An employee must decide to seek contraceptives, a doctor must exercise their best judgment and prescribe the most appropriate contraceptive, and a pharmacist must ultimately decide to dispense the contraceptives.¹¹⁶ Thus, there are a series of independent events that must occur for a person to ultimately receive contraceptives, in which the employer does not participate. This series of events renders any burden to the employer too attenuated to result in a substantial burden.¹¹⁷

In addition, when an employer did not provide contraceptive care under the pre-mandate health insurance system, employees had to pay for contraceptive care, including supposed "abortifacient[s]," out-of-

112. 374 U.S. at 404.

113. 406 U.S. at 218–19.

114. See *United States v. Lee*, 455 U.S. 252, 260 (1982) (making a metaphor about paying taxes that may subsidize war); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013), *aff'd*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *remanded to Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2014 WL 4467879 (3d Cir. 2014).

115. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (recognizing that intervening choices of third parties separate the employer from the conduct the employer wishes not to endorse); see *Hobby Lobby*, 134 S. Ct. at 2779–80.

116. *Birth Control Pills*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-info/birth-control/birth-control-pill> (last visited Jan. 11, 2015).

117. See *Hobby Lobby*, 723 F.3d at 1175–76 (Briscoe, J., concurring in part and dissenting in part); *accord Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414–16 (E.D. Pa. 2013).

pocket, most likely from the salaries they received from their employers, or chose to forego such care due to monetary constraints.¹¹⁸ An employee is not usually subjected to their employer's religious beliefs when it comes to how they choose to use the benefits they have earned through their employment.¹¹⁹ The new system was merely a substitute of one form of compensation for another as the payment source for contraceptives.¹²⁰ Therefore, the Mandate stands apart from the cases where the law imposed a penalty, because the individual refused to personally engage in the activity that ran counter to the religious belief.¹²¹ Employers are still able to exercise their religion unencumbered.

Under these circumstances there is surely a distinction between forcing individuals to use contraceptives and mandating for-profit corporations to participate in a system that ultimately provides contraceptives to someone else. However, the opponents of the Mandate have clearly made meritorious claims that the Mandate does pose a substantial burden on their exercise of religion.¹²² The *Hobby Lobby* court found that there was indeed a substantial burden placed on these corporations because of the financial penalties faced if they did not provide the mandated coverage, which violates their religious beliefs.¹²³ However, what the Court failed to recognize is that these employers are not only imposing their views on their employees, but impeding access to necessary contraceptives. Despite the Court's finding that the Mandate poses a substantial burden to the complainants' sincerely held religious beliefs, it should still have found that the Mandate is the least restrictive means of furthering a compelling governmental interest.

118. See *Conestoga Wood*, 917 F. Supp. 2d at 414.

119. See *id.*

120. *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013), *vacated*, *Autocam Corp. v. Burwell*, 124 S. Ct. 2901 (2014).

121. See *Yoder*, 406 U.S. at 207-09; *Verner*, 374 U.S. at 403-04.

122. Cf. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of scriptural interpretation.").

123. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). The Court refused to address the merits of the owners' actual claims because the reasonableness of their religious beliefs is not within the province of the Courts. *Id.* at 2778.

IV. PROTECTING THE PUBLIC HEALTH IS A COMPELLING GOVERNMENTAL INTEREST WHICH IS SIGNIFICANTLY ADVANCED BY THE MANDATE

The RFRA explicitly permits the government to “substantially burden a person’s exercise of religion” if the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”¹²⁴ As explained in *United States v. Lee*, an Amish carpenter was compelled to participate in a social security system that violated Amish religious beliefs.¹²⁵ The Supreme Court found that although a burden existed, the burden was justified by the Government’s compelling state interest.¹²⁶ Similarly, although the Court found that there may have been a substantial burden to the employers’ religion, the Government’s compelling interest in public health justifies any burden that the employers may experience.¹²⁷ Furthermore, the Government has a compelling interest in protecting individual health and social welfare.¹²⁸

Similarly, the *Hobby Lobby* Court assumed that the Government has a compelling interest in guaranteeing cost-free access to the four challenged contraceptives.¹²⁹ While the majority did not delve into specific reasons as to why the interest is compelling, the dissent did.¹³⁰ The dissent identified interests that are “concrete, specific, and demonstrated by a wealth of empirical evidence.”¹³¹ Specifically, the dissent asserted that “the mandated contraception coverage would enable women to avoid the health problems that often accompany unintended pregnancies and their children.”¹³² Most importantly, the

124. 42 U.S.C. § 2000bb-1(b)(1)–(2) (2012).

125. 455 U.S. at 256–57.

126. *See id.* at 258–60 (finding that the Government has a compelling “interest in assuring mandatory and continuous participation in and contribution to the social security system”).

127. *See id.* at 260–61; *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998).

128. *See, e.g., Olsen v. DEA*, 878 F.2d 1458, 1462 (D.C. Cir. 1989). However, it is crucial to note that the majority in *Hobby Lobby* “dismiss[ed] *Lee* as merely a tax case.” *Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting). The dissent, on the other hand, noted that “the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would ‘operat[e] to impose the employer’s religious faith on the employees.’” *Id.* (quoting *Lee*, 455 U.S. at 261).

129. *Hobby Lobby*, 134 S. Ct. at 2780.

130. *See id.* at 2799.

131. *Id.*

132. *Id.*

coverage helps safeguard the health of women for whom pregnancy may be hazardous, and the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders and pelvic pain.¹³³ While “Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives,” the compelling interests are not lessened.¹³⁴

A. Unintended Pregnancies Are Highly Prevalent in the United States

Approximately half of all pregnancies in the United States are unintended.¹³⁵ An unintended pregnancy is a pregnancy that is mistimed, unplanned or unwanted at the time of conception.¹³⁶ Although unintended pregnancy occurs among women of all incomes, educational levels and ages, it is more common in women aged 18 to 24 years who are unmarried, have low income, are not high school graduates and who are members of a racial or ethnic minority group.¹³⁷

Women who experience an unintended pregnancy tend to delay prenatal care and continue risky behaviors that could harm the developing fetus because they may not be aware that they are pregnant.¹³⁸ These women tend to have poor maternal nutrition, smoke and consume alcohol, are depressed, and experience domestic violence during pregnancy.¹³⁹ Comparatively, women who experience planned pregnancies are more likely to seek prenatal care and take affirmative steps to have a healthy pregnancy, such as changing their diets to increase the likelihood of a healthy child and discontinuing risky behaviors.¹⁴⁰

133. *Id.*

134. *Id.* at 2799–80.

135. *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Dec. 2013), <http://guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

136. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, CONTRACEPTION (Aug. 24, 2011), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3338192/#__ffn__sectitle.

137. See CLOSING THE GAPS, *supra* note 19, at 102.

138. *Id.* at 103.

139. Denise D’Angelo et al., *Preconception and Interconception Health Status of Women Who Recently Gave Birth to a Live-Born Infant: Pregnancy Risk Assessment Monitoring System (PRAMS)*, CTNS. FOR DISEASE CONTROL & PREVENTION (Dec. 14, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5610a1.htm>.

140. See Office of Women’s Health, U.S. Dep’t of Health and Human Servs., *Preconception Health Pregnancy: Why Preconception Matters*, WOMENSHEALTH.GOV (Sept. 27, 2010), <http://www.womenshealth.gov/pregnancy/before-you-get-pregnant/preconception-health.html>.

In addition, there are also very adverse outcomes for the children of unintended pregnancies. Births stemming from unintended pregnancies can result in birth defects and low birth weight.¹⁴¹ Children from unintended pregnancies are also more likely to experience poor mental and physical health during childhood, have more behavioral issues in their teen years, and lower educational attainment.¹⁴² Aside from the negative health and economic consequences that unintended pregnancies have on women and their children, there is also a burden on the public. The public costs of births resulting from unintended pregnancies were \$11 billion in 2006.¹⁴³

B. Contraceptive Use Is Critical In Reducing Unintended Pregnancies

Effective family planning, through the use of contraceptives, is critical in mitigating the adverse individual and societal outcomes of unintended pregnancies. Approximately 43 million, or approximately 70 percent, women nationwide are at risk of unintended pregnancy.¹⁴⁴ Nearly all sexually active women, across all religious denominations, use contraceptives at some point.¹⁴⁵ However, many women misuse or fail to use them consistently due in part to their inability to continuously fund contraceptives.¹⁴⁶ The high costs associated with contraceptive care and limited access to insurance coverage has been cited as one of the greatest barriers to effective and consistent contraceptive use.¹⁴⁷ Approximately one-third of women would change their contraceptive method if costs

141. Office of Disease Prevention and Health Promotion, *Family Planning: Healthy People 2020*, HEALTHYPEOPLE.GOV, <http://www.healthypeople.gov/2020/topics-objectives/topic/family-planning> (last visited Jan. 11, 2015).

142. *Id.*

143. *Id.* These costs include prenatal care, labor and delivery, post-partum care, and 1 year of infant care. *Id.*

144. Jo Jones et al., CTRS. FOR DISEASE CONTROL & PREVENTION, CURRENT CONTRACEPTIVE USE IN THE UNITED STATES, 2006–2010, AND CHANGES IN PATTERNS OF USE SINCE 1995, at 16 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf>. Childbearing years are between the ages 15 to 44. *Id.*

145. See *Contraceptive Use in the United States*, GUTTMACHER INST. (June 2014), http://www.guttmacher.org/pubs/fb_contr_use.html.

146. *Id.*

147. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, GUTTMACHER INST. (2011), <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html>.

were not a factor.¹⁴⁸ For example, the cost of an IUD, one of the contested contraceptives, is nearly a month's full-time pay for workers earning minimum wage.¹⁴⁹ As a result of the high cost of IUDs, women are 11 times less likely to obtain an IUD than women who had to pay less than \$50.¹⁵⁰

In light of these troubling issues, the government established federal health and insurance programs, which aim to increase the amount of planned pregnancies by including contraceptive care among covered preventive services without costs.¹⁵¹ For example, *Healthy People 2020*, which sets health goals for the nation, included a national objective of increasing the proportion of pregnancies that are intended from 51 to 56 percent by 2020.¹⁵² In addition, *Healthy People 2020* set a goal to increase the number of insurance plans that offer contraceptive supplies and services.¹⁵³ Eliminating cost barriers to contraceptives would ultimately reduce the prevalence of unintended pregnancy in the United States. Therefore, the Mandate furthers the government's compelling government interest in public health by knocking down the cost barriers of contraceptive coverage and thus, making it more accessible to those who are most at risk.

V. ERADICATING GENDER DISCRIMINATION IS A COMPELLING GOVERNMENTAL INTEREST WHICH IS SIGNIFICANTLY ADVANCED BY THE MANDATE

The Supreme Court has held that where a state action burdens First Amendment interests, the law may be justified if it promotes gender equality, which is a compelling state interest, through the least restrictive means possible.¹⁵⁴ The Court has recognized that the

148. Jennifer E. Frost & Jacqueline E. Darroch, *Factors Associated with Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 94, 98 (2008).

149. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2800 (2014) (citing Brief for Guttmacher Inst. & Professor Sara Rosenbaum as Amici Curiae in Support of Gov't, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (Nos. 13-354, 13-356), 2014 WL 333890, at *5).

150. *Id.* (citing David Eisenberg et al., *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH S59, S60 (2013)).

151. *See, e.g.*, 42 U.S.C. § 254(b)(1)(A)(i)(III)(gg) (requiring federally funded health centers to cover family planning care); *Healthy People 2020*, *supra* note 141.

152. *Healthy People 2020*, *supra* note 141.

153. *Id.*

154. *See United States v. Virginia*, 518 U.S. 515 (1996); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

“importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”¹⁵⁵

Because of women’s unique reproductive capacities, women need more health services during their childbearing years and ultimately face higher medical costs than their male counterparts.¹⁵⁶ The impact of these higher health care costs, including the costs of contraceptives, is further exacerbated by women’s lower incomes.¹⁵⁷ On average, women only earn 77 cents for every dollar earned by men.¹⁵⁸ These financial barriers to health care, coupled with gendered income disparities, lead women to forego necessary medical care at a higher rate than men.¹⁵⁹ The ACA, and the Mandate promulgated therewith, will effectively eradicate gender disparities in the health care industry. However, the war on the contraceptive mandate compromises the society-changing benefits the Mandate promotes.

VI. THE MANDATE IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THE GOVERNMENT’S COMPELLING INTERESTS

While the Court in *Hobby Lobby* did indeed find that that the Mandate advances a compelling government interest,¹⁶⁰ the Court was not persuaded by the Government’s argument that the Mandate is the least restrictive means of advancing that interest.¹⁶¹ The

155. *Roberts*, 468 U.S. at 626.

156. See Rustgi et al., *Women At Risk: Why Women Are Forgoing Needed Health Care*, COMMONWEALTH FUND (May 11, 2009), available at <http://www.commonwealthfund.org/Publications/Issue-Briefs/2009/May/Women-at-Risk.aspx>.

157. See CLOSING THE GAPS, *supra* note 19, at 19.

158. See CARMEN DENAVAS-WALT ET. AL., U.S. CENSUS BUREAU, INCOME, POVERTY & HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 11 (2013), available at <http://www.census.gov/newsroom/press-releases/2013/cb13-165.html>.

159. See CLOSING THE GAPS, *supra* note 19, at 125. A 2010 Commonwealth Fund Survey found that 44 percent of adult women (compared with 35 percent of adult men) either reported that they had a problem paying medical bills or indicated that they were paying medical debt over time. RUTH ROBERTSON & SARA R. COLLINS, THE COMMONWEALTH FUND, REALIZING HEALTH REFORM’S POTENTIAL—WOMEN AT RISK: WHY INCREASING NUMBERS OF WOMEN ARE FAILING TO GET THE HEALTH CARE THEY NEED AND HOW THE AFFORDABLE CARE ACT WILL HELP 1, 6, 21 (May 2011), available at http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf.

160. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780; see *supra* Part IV–V.

161. *Hobby Lobby*, 134 S. Ct. at 2780; see 42 U.S.C. § 2000bb-1(a)–(b) (2012).

Government was required to show that the proposed alternatives to the Mandate are more restrictive (or not viable), in order to advance its interests.¹⁶² The least restrictive means argument advanced by HHS did not prevail because the majority found that the Government could assume the cost of providing the contraceptives at issue to any women who are unable to afford them, which the Court found to be a less restrictive means.¹⁶³ Further, the Court noted that HHS already has a system in place for nonprofit organizations with religious exemptions,¹⁶⁴ however, the majority opinion failed to decide whether this approach would comply with RFRA.¹⁶⁵

The majority opinion in *Hobby Lobby* failed to address the impracticalities and ramifications of the proposed alternatives, which were highlighted in the dissent. The dissenting opinion found that the Government showed that there is “no less restrictive means that would both (1) satisfy the challengers’ religious objections to providing insurance coverage for certain contraceptives; and (2) carry out the objective of the ACA’s contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well-being.”¹⁶⁶ Importantly, the dissent noted that “[a] ‘least restrictive means’ cannot require employees to relinquish benefits accorded [to] them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.”¹⁶⁷

When Congress passed the ACA, it chose to build on the existing system of workplace-based health coverage and private insurance.¹⁶⁸ It was proposed that the “government could provide contraceptive services to all women free of charge (through Medicaid or another program), establish a government-funded health benefits program for contraceptives services, or force drug and device manufacturers to provide contraceptive drugs and devices to women for free.”¹⁶⁹ In response to these suggestions, the Departments stated that they lack

162. See 42 U.S.C. § 2000bb-1(b)(2).

163. *Hobby Lobby*, 134 S. Ct. at 2780 (“The most straightforward way [to provide access to the contested contraceptives] would be for the Government to assume the cost of providing [them] to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”).

164. *Id.* at 2782.

165. See *id.* at 2780.

166. *Id.* at 2801-02 (Ginsburg, J., dissenting).

167. *Id.* at 2802.

168. See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39,870 (Jul. 3, 2013) (codified in 45 C.F.R. pts. 147 and 156).

169. *Id.* at 39,888.

the statutory authority and the resources to implement those proposals.¹⁷⁰

The suggestion that the government should provide contraceptive coverage to employees of objecting religious employers seems like a less restrictive means than the Mandate because there are some women who receive publicly funded contraceptive care.¹⁷¹ However, this alternative is impracticable because it would be far too expansive and costly. Public expenditures for family planning totaled \$2.37 billion in 2010, 88 percent of which was federally funded.¹⁷² If the government funded contraceptives on its own, it would require an increase in federal funding. In light of the current political battles, it seems unlikely that such a proposal would pass in Congress. Nevertheless, the majority opinion in *Hobby Lobby* failed to take these factors into consideration when it considered this alternative as a “less restrictive means.”

Furthermore, the proposed alternatives would create administrative barriers for women seeking contraceptive services.¹⁷³ Interfering with women’s receipt of benefits by requiring that they take steps to become informed of the proposed alternative, separately enrolling, and ultimately making that coverage less accessible to women is not what Congress contemplated.¹⁷⁴ Another suggestion involved giving tax incentives for women to use contraceptive services.¹⁷⁵ Like the other proposals, a tax incentive would not advance the government’s compelling interest because it would place a greater burden on women seeking the benefit. Women would not only have to pay for the coverage out-of-pocket in the first instance, but they would have to file more paperwork. As Justice Ginsburg states in her dissent, this departure from the existing employer-based system of health insurance would do nothing for the woman too poor to be aided by a tax credit, again ultimately undermining the purpose of the

170. *Id.*

171. See *Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INST. (Oct. 2014), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (showing that nine million women receive publicly funded contraceptive services).

172. *Id.*

173. Coverage of Certain Preventative Services, 78 Fed. Reg. at 39,888.

174. See *id.*; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting).

175. *Hobby Lobby*, 134 S. Ct. at 2803.

mandate.¹⁷⁶ Furthermore, the Departments lack the statutory authority under the ACA to implement such a policy.¹⁷⁷

Given these considerations, the Court should have found that the Mandate is the least restrictive means of furthering the government's compelling interests in safeguarding public health and promoting gender equality. With the finalized rules carving out exemptions for religious employers and only requiring coverage of *necessary* preventive health services, there is no better way to tailor the law without compromising the government's interests.

VII. A DECISION OF "STARTLING BREADTH": REACTION TO THE COURT'S DECISION AND IMPACT ON BENEFICIARIES AND POTENTIAL FUTURE CLAIMS

Justice Ginsburg begins her poignant dissent by justifiably identifying the Court's decision as one of "startling breadth."¹⁷⁸ In fact, the dissent identifies the Court's disregard of the impact that the exemption sought by Hobby Lobby and Conestoga has on the significant interests of the corporations' employees and their dependents.¹⁷⁹ Not only does the current holding impose the corporations' owners' views on the employees, it denies them of a statutory benefit conferred upon them by Congress. Further, the dissent looks to the future implications that the Court's decision will have in future litigation, with respect to extending RFRA to for-profit corporations.¹⁸⁰

In light of the Court's startling opinion in *Hobby Lobby*, Senate Democrats introduced legislation to narrow the RFRA.¹⁸¹ The bill sought to prevent companies from using the RFRA to avoid complying with the Mandate.¹⁸² However, the Senate bill was defeated 56-43 on a procedural vote.¹⁸³ House Democrats have also introduced a similar bill to "fix the damage done by the Supreme

176. *Hobby Lobby*, 134 S. Ct. at 2803 (Ginsburg, J., dissenting).

177. *See id.* at 2787-89, 2802-04 (referencing the Food and Drug Administration, as well as the Department of Health and Human Services, Ginsburg asserts that the tax credit alternative offered by the Court in the present case and in *Conestoga* is not authorized by the statute and would actually be detrimental to the purpose of the ACA).

178. *Id.* at 2787.

179. *Id.*

180. *Id.* at 2797 & n.19 (citing Andrea Murphy, *America's Largest Private Companies 2013*, FORBES, <http://www.forbes.com/sites/andreamurphy/2013/12/18/americas-largest-private-companies-2013/> (last updated Dec. 18, 2013)).

181. Protect Women's Health from Corporate Interference Act of 2014, S. 2578, 113th Cong.

182. *Id.* §§ 2-3.

183. 160 CONG. REC. S4535 (daily ed. July 16, 2014) (cloture motion vote).

Court's decision to allow for-profit corporations to deny their employees birth control coverage."¹⁸⁴ The bill is titled "Protect Women's Health From Corporate Interference Act of 2014" and seeks to ensure that employers cannot interfere in their employees' birth control and other health care decisions.¹⁸⁵

In the interim, the Obama Administration issued its proposed new rules, open to comments, to satisfy the Supreme Court's ruling in *Hobby Lobby*.¹⁸⁶ The new rules limit the mandate as required by the *Hobby Lobby* decision, but also ensure that women who are affected by the ruling would continue to have access to coverage.¹⁸⁷ Further, the proposed rules describe two alternative approaches for defining a closely held for-profit entity that has a religious objection to providing such coverage.¹⁸⁸ "Under one approach, the entity could not be publicly traded, and the ownership of the entity would be limited to a certain number of [employers]."¹⁸⁹ Under an alternative approach, the entity could not be publicly traded, and a certain proportion of ownership would be concentrated among a certain number of owners.¹⁹⁰

The proposed new rules are also seeking comments on how for-profit entities should document their objections to the contraception coverage.¹⁹¹

VIII. CONCLUSION

Currently, the Mandate's scope remains in flux with the pending bill in the house and the proposed new rules. However, the Mandate, as it stands, strikes an appropriate balance between religious freedom

184. Protect Women's Health from Corporate Interference Act of 2014, H.R. 5051 113th Cong.; *Hobby Lobby: Murray, Udall Introduce Legislative Fix to Protect Women's Health in Aftermath of Supreme Court Decision*, U.S. SENATOR PATTY MURRAY WORKING FOR WASH. ST., <http://www.murray.senate.gov/public/index.cfm/2014/7/hobby-lobby-murray-udall-introduce-legislative-fix-to-protect-women-s-health-in-aftermath-of-supreme-court-decision> (last updated July 9, 2014).

185. H.R. 5051 §§ 1–2.

186. Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 166,51122 (Aug. 27, 2014) (to be codified as 45 C.F.R. pt. 147).

187. *See id.* at 51118, 51121.

188. *Fact Sheet: Women's Preventative Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, CTR. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Jan. 11, 2015).

189. *Id.*

190. *Id.*

191. *Id.*

and the importance of access for preventive health care for women. While this is a federal matter that implicates the RFRA, for-profit, secular corporations should not have been able to successfully object under RFRA because the practice of religion should not be able to apply to amorphous beings through their employers. Furthermore, employers should not be imposing their religious beliefs on employees who do not necessarily hold the same beliefs.

Despite the Court's finding that the secular, for-profit entities are able to bring claims under the RFRA and that there is a substantial burden to them because of the Mandate, the Court should have found that the Mandate advances the government's compelling interests in the least restrictive manner. To date nearly 45 million women have accessed these preventive health services under the ACA.¹⁹² The Court's ruling will effectively stifle the advancement of the public health and gender equality.¹⁹³

*Maria Iliadis**

* J.D. Candidate, 2015, University of Baltimore School of Law. B.A., Political Science and Labor Studies and Employment Relations, Rutgers University, 2012. This note would not have been possible without input from Professor Gregory Dolin and the *University of Baltimore Law Review* staff.

192. Jessica Arons, *Women and Obamacare: What's at Stake for Women if the Supreme Court Strikes Down the Affordable Care Act?*, CTR. FOR AM. PROGRESS (May 2, 2012), <http://www.americanprogress.org/issues/women/report/2012/05/02/11512/women-and-obamacare/>.

193. Ariane De Vogue, *Hobby Lobby Wins Contraceptive Ruling in Supreme Court*, ABC NEWS (June 30, 2014, 10:25 AM), <http://abcnews.go.com/Politics/hobby-lobby-wins-contraceptive-ruling-supreme-court/story?id=24364311&singlePage=true>; see *supra* Parts IV, V.