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NONPROFIT ORGANIZATIONS, FOR-PROFIT CORPORATIONS, AND THE HHS MANDATE: WHY THE MANDATE DOES NOT SATISFY RFRA'S REQUIREMENTS

I. INTRODUCTION

In 2012, the federal government spawned an enormously divisive issue when it promulgated a regulation that requires certain employers to provide contraception coverage to their employees without cost-sharing. The mandate's supporters see it as an important step in expanding access to vital healthcare for women,¹ whereas its detractors see it as an attempt by the government to force them into violating their deeply held religious beliefs.² In a clash between values, the mandate favors access to contraception over the concerns of religious groups.

At times the debate between these conflicting viewpoints has taken on almost apocalyptic proportions. At a prominent pro-choice organization's meeting, the Secretary of the Department of Health and Human Services, Kathleen Sebelius, declared that "[w]e are in a war" over the mandate and access to contraceptives.³ On the other side, Representative Mike Kelly compared the date that the mandate went into effect, August 1, 2012, with December 7, Pearl Harbor Day, and September 11 as another "day

1. See, e.g., *Denying Coverage of Contraceptives Harms Women*, NAT'L WOMEN'S LAW CTR. 1-2 (Aug. 13, 2012), http://www.nwlc.org/sites/default/files/pdfs/denying_covg_of_cont_harms_women_081312_pdf.pdf.

2. See, e.g., Comments from Anthony R. Picarello, Jr., Assoc. Gen. Sec'y & Gen. Counsel, U.S. Conf. 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> [hereinafter Comments from Anthony R. Picarello, Jr.].

3. See William McGurn, *The Church of Kathleen Sebelius*, WALL ST. J., Dec. 13, 2011, at A19 (internal quotation marks omitted).

that will live in infamy” because of the “attack on our religious freedom.”⁴

Despite the extreme rhetoric from both sides, this comment is not concerned with which side in this debate has the better argument in a normative sense because Congress has already made that value judgment. By enacting the Religious Freedom Restoration Act (“RFRA”), Congress has already placed its finger on the side of the scale of religious freedom. Regardless of whether the mandate is good policy, it must comply with the provisions of RFRA.⁵ This comment does not argue that the mandate is unwise or unjust. Whether the mandate is wise or just are not the questions the courts will address when religious groups challenge the mandate. Instead, courts will determine whether the mandate can surmount the high hurdles placed in front of it by RFRA. Indeed, in suits to enjoin the government from enforcing the mandate, nonprofit organizations and for-profit corporations have already forced courts to grapple with whether the mandate can meet RFRA’s requirements.⁶ At this time, only one of those courts has reached the merits of a mandate challenge, so the future of those cases remains in flux.⁷ Ultimately, this comment concludes that, for better or worse, the mandate will fall short.

Section II provides background information on the mandate and the convoluted process by which the Departments of Health and Human Services, Labor, and the Treasury (“the government” or “the Departments”) promulgated it. It begins with a brief discussion of the relevant portions of the Patient Protection and Affordable Care Act (“ACA”) that relate to the mandate.⁸ Then, Section II describes the mandate’s requirements and its passage. Finally, it chronicles how various religious groups reacted to the

4. Aram A. Schvey, *Much Ado About Nothing?: Religious Freedom and the Contraceptive-Coverage Benefit*, 39 HUM. RTS. 11, 11 (2013).

5. The mandate must also satisfy the First Amendment of the Constitution and the Administrative Procedure Act; however, this comment only asks whether the mandate can meet RFRA’s requirements.

6. See *infra* notes 139, 184 and accompanying text.

7. See *infra* notes 186–89 and accompanying text.

8. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119, 131 (2010) (codified at 42 U.S.C. § 300gg-13 (Supp. V 2011)). A full discussion of the ACA is outside the scope of this comment. Nonetheless, the government promulgated the mandate pursuant to the provisions of the ACA, and provisions of the ACA provide penalties for non-compliance with the mandate. For those reasons, I introduce the ACA to the minimum extent necessary for the reader to comprehend the mandate.

mandate and the government's efforts to accommodate these objections through the advance notice of proposed rulemaking, the temporary enforcement safe harbor, and the February 1, 2013 proposed rules.

Following the introduction to the mandate in Section II, Section III analyzes RFRA-based legal challenges to the mandate that plaintiffs have brought thus far. Though litigation over the mandate remains in a preliminary stage, certain trends have appeared in the limited number of decisions issued by federal district courts and courts of appeals. Section III discusses those trends as they relate to both the nonprofit organizations and for-profit corporations that have turned to the courts for relief from the mandate.

Finally, Section IV argues that the mandate violates RFRA by placing a substantial burden on the free exercise rights of both nonprofit organizations and for-profit corporations with religious objections to it, while failing to meet the compelling interest test. That section begins by providing background information on RFRA and the compelling interest test it adopted. It then evaluates whether the government can prove that the mandate complies with the compelling interest test. It cannot. The mandate places a substantial burden on the religious exercise of both nonprofit organizations and for-profit corporations by forcing them to violate their religious beliefs by providing contraceptives coverage or pay substantial penalties.⁹ Although the Supreme Court has not yet answered the question of whether a for-profit corporation can exercise religion, the similarity between those corporations and nonprofit corporations indicates that for-profit corporations have religious exercise rights under RFRA.¹⁰ The government will not be able to prove that the mandate can satisfy the strict scrutiny RFRA requires. The mandate will founder on the shoals of RFRA's compelling interest requirement because the array of exceptions to the mandate undermine any otherwise compelling interest.

9. See discussion *infra* Section IV.B.1.

10. See discussion *infra* notes 322, 324–45 and accompanying text.

II. THE MANDATE AND THE ADMINISTRATIVE PROCESS BY WHICH THE GOVERNMENT PROMULGATED IT

A lengthy administrative sparring match between the government and religious organizations generated the current permutation of the mandate and the multitude of law suits alleging that the mandate violates RFRA. A complex series of rulemakings and amendments to those rules created the mandate that is now in effect. The evolution of the mandate and its exceptions embodied a dialogue between the government and groups opposed to the mandate over whether the mandate should apply to employers with religious beliefs opposed to the mandate.

The dialogue began after the government issued interim final rules that included contraceptives coverage as a preventive service that employers must provide their employees under the ACA.¹¹ Opposition from religiously affiliated employers led the government to amend these interim final rules to contain an exemption for certain “religious employers.”¹² However, many non-exempt employers criticized this religious employer exemption as too narrow.¹³ When the departments solidified the interim final rules into final rules, those regulations included the narrowly-defined religious employer exception; however, those final rules also promised that the government would amend the rules to accommodate a wider range of employers who opposed the mandate.¹⁴ Additionally, after finalizing the mandate, the government created a “temporary enforcement safe harbor” that would prevent the government from enforcing the mandate against non-profit organizations until the government had amended the rules as promised.¹⁵

11. See Interim Final Rules Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).

12. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

13. See, e.g., Comments from Anthony R. Picarello, Jr., *supra* note 2, at 1–4.

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

15. *Id.*

This promised amendment process failed to satisfy the mandate's detractors.¹⁶ The government initiated the process of amending the mandate to accommodate more employers with religious objections through an advanced notice of proposed rule-making ("ANPRM").¹⁷ The ANPRM requested comments on how the government should accommodate employers opposed to the mandate, but it did not include any concrete proposals.¹⁸ Almost a year elapsed after the ANPRM with no government action.¹⁹ After that long period of inaction, the government proposed new rules to formally amend the mandate.²⁰

After every step during the mandate's progression, employers unsatisfied with pace or results of the administrative process sought relief from the courts.²¹ When the government could not alleviate the concerns of employers opposed to the mandate for religious reasons, those employers sued to enjoin the mandate under RFRA.²² The process through which the government promulgated the mandate would ultimately dictate how courts decided nonprofit organizations' RFRA challenges and why courts dismissed many of those cases on procedural grounds.²³ The government's refusal to accommodate for-profit organizations during the course of the mandate's development would also affect how courts decided those RFRA cases.²⁴

A. *The Statutory Backdrop Authorizing the Mandate*

As part of its expansive statutory scheme, section 2713 of the ACA requires certain employers' health insurance plans to provide coverage for certain preventive health services without cost-sharing by the employee.²⁵ Employee health insurance plans are

16. See, e.g., Comments from Anthony R. Picarello, Jr., *supra* note 2, at 1–4.

17. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012).

18. *Id.*

19. See Coverage of Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 8456, 8458 (Feb. 6, 2013).

20. *Id.* at 8456.

21. See discussion *infra* Section III.

22. See *infra* notes 139, 184 and accompanying text.

23. See *infra* Section III.A.

24. See *infra* Section III.B.

25. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119, 131 (2010) (codified at 42 U.S.C. § 300gg-13 (Supp. V 2011)).

covered by the ACA's provisions relating to "group health plans."²⁶ Under the ACA, group health insurance plans must provide women covered by the plan with the minimum amount of preventive services included in guidelines issued by the Health Resources Services Administration ("HRSA"),²⁷ an agency within the Department of Health and Human Services.²⁸ Accordingly, employers offering health insurance plans must provide their female employees with the preventive services that HRSA enumerates in its guidelines.²⁹

Though the ACA generally requires employers' plans to cover the HRSA mandated services for women, section 2713 does not apply to all employers' plans because the ACA exempts some employers.³⁰ For example, the preventive services requirement does not apply to grandfathered plans.³¹ The government considers a plan grandfathered if at least one individual was enrolled in the plan on March 23, 2010, and the plan has maintained its grandfathered status.³²

26. See 42 U.S.C. § 300gg-91 (2006) ("The term 'group health plan' means 'an employee welfare benefit plan . . . to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise.'").

27. Patient Protection and Affordable Care Act, § 2713, 42 U.S.C. § 300gg-13 (Supp. V 2011) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

28. The HRSA is an agency within the Department of Health and Human Services responsible for improving access to healthcare for the "uninsured, isolated or medically vulnerable." *Implementing Our Strategic Plan*, HEALTH RES. & SERVS. ADMIN. 1, <http://www.hrsa.gov/about/strategicplanimplementation.pdf> (last visited Apr. 19, 2013).

29. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

30. See *FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation*, U.S. DEPT LABOR 4 (Dec. 22, 2010), <http://www.dol.gov/eb/sa/pdf/faq-aca5.pdf>.

31. See Patient Protection and Affordable Care Act, § 1251, 124 Stat. at 161-62 (codified at 42 U.S.C. § 18011(a)(2), (e) (Supp. V 2011)) ("[W]ith respect to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after such date. . . . In this title, the term 'grandfathered health plan' means any group health plan or health insurance coverage to which this section applies.").

32. See Preservation of Right to Maintain Existing Coverage, 45 C.F.R. § 147.140(a)(1)(i) (2012).

An employer can maintain the grandfathered status of its plan so long as the plan has continuously covered someone since March 23, 2010, and the employer has not modified it.³³ Modifications that eliminate a plan's grandfathered status include entering into a new plan, certificate, or contract of insurance after March 23, 2010, and effective before November 15, 2010; eliminating benefits to diagnose or treat a particular condition; increasing cost-sharing requirements such as co-payments; decreasing the employer's contribution rate; and altering certain annual limits.³⁴ In short, if the employer's plan satisfies the foregoing criteria, namely that the plan is sufficiently old and the employer has not substantially changed it, the government will grandfather the plan and exempt it from any regulations requiring that plan to provide women with the services listed in the HRSA guidelines.

Along with grandfathered plans, the government has also exempted small employers' plans because the ACA only penalizes large employer plans that fail to comply with the ACA's provisions.³⁵ The Act defines a large employer as one with at least fifty full-time employees.³⁶ Furthermore, under the ACA, the government will fine only large employers for failing to comply with its provisions.³⁷ Accordingly, the government has effectively exempted employers with less than fifty full-time employees from the requirement that employers' plans include the services in the HRSA guidelines because the government will not fine those employers if they elect to disregard section 2713.

For those employers with neither grandfathered plans nor small employer status, the penalty provisions of the ACA impose substantial fines on employers that do not comply with section 2713 and the ACA's other provisions.³⁸ If a non-exempt employer with fifty or more employees fails to provide the preventive services required by section 2713, the ACA penalizes that employer

33. *See id.* ("Grandfathered health plan coverage means coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section).").

34. *See id.* §§ 147.140(a)(1)(ii), 147.140(g).

35. *See* 26 U.S.C. § 4980H(a) (Supp. V 2011).

36. *See id.* § 4980H(a), (c)(2)(A).

37. *See id.* § 4980H(a).

38. *See id.* § 4980H(a).

by imposing a fine.³⁹ The government will assess an annual fine on the non-compliant employer of \$2000 multiplied by the number of the employer's full-time employees less thirty.⁴⁰ Thus, if an employer maintains fifty employees but fails to provide its female employees with the services outlined in HRSA's guidelines, the government will fine that employer \$40,000 per year.⁴¹ The government will also tax the employer \$100 per day per employee for each day an employee is not covered.⁴² These penalties form the basis for which plaintiffs have contested the mandate under RFRA.⁴³

The ACA created the groundwork for the mandate and, therefore, the RFRA challenges to it. Section 2713 authorized the departments to promulgate the mandate, and the ACA's penalty provisions provide the teeth that make the government's regulations truly a mandate for some employers, but not for others.

B. *The Regulations Creating the Mandate's Burden*

On July 19, 2010, the Department of Health and Human Services exercised its authority under section 2713 and issued an interim final rule with a request for comments to implement the preventive services requirement of the ACA.⁴⁴ Those interim final rules, effective September 23, 2010, stated that the Department of Health and Human Services was developing the guidelines for the preventive services that the ACA required employers to provide with respect to women.⁴⁵ While the July 19, 2010 interim final rule did not specifically state which preventive services the government required an employer to provide, it did establish that the government would determine those required services by Au-

39. See *id.* § 4980H(a), (c)(2).

40. *Id.* § 4980H(c)(1), (2)(D).

41. In equation form: $(50 \text{ [the number of full-times employees]} - 30) \times \$2,000 = \$40,000$.

42. See 26 U.S.C. § 4980D(a), (b) (2006).

43. See *infra* notes 287–90 and accompanying text.

44. Interim Final Rules Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,728 (July 19, 2010).

45. See *id.*

gust 1, 2011.⁴⁶ The guidelines HRSA eventually developed would become the basis of the mandate.⁴⁷

To determine what preventive services for women the mandate should require, HRSA commissioned a study by the Institute of Medicine (“IOM”) and ultimately adopted its recommendation that the preventive services regulations should include coverage of contraceptives.⁴⁸ The IOM is an independent organization established in 1970 under the charter of the National Academy of Sciences.⁴⁹ As part of its recommendations to HRSA, IOM suggested that the mandate cover “[t]he full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”⁵⁰ The contraception methods approved by the FDA include diaphragms, contraceptive pills, intrauterine devices, and the emergency contraceptives Plan B and Ella.⁵¹ On August 1, 2011, HRSA adopted IOM’s recommendations and included coverage for FDA approved contraceptive methods in the enumeration of preventive services for women that covered employers must provide.⁵²

Three days after HRSA adopted IOM’s recommendation that preventive services for women include access to contraceptives, the government responded to concerns from religious groups by amending the rules. The government issued an interim final rule and request for comments that amended the July 19, 2010 interim final rules to accommodate employers with religious beliefs opposed to providing access to contraceptives.⁵³ In response to

46. *Id.*

47. *See id.* at 41,727–28.

48. *See* Press Release, U.S. Dep’t of Health and Human Servs., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), *available at* <http://www.hhs.gov/news/press/2011pres/08/20110801b.html> [hereinafter Press Release].

49. *See Clinical Preventive Services for Women*, INST. OF MEDICINE 1, 4 (July 2011), http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf.

50. *Id.* at 3.

51. *See Birth Control Guide*, FOOD & DRUG ADMIN. 1–13 (Aug. 2012), <http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf>.

52. *See* Press Release, *supra* note 48; *Women’s Preventive Services: Required Health Plan Coverage Guide*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womens/guidelines/#footnote2> (last visited Apr. 19, 2013).

53. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg.

comments to the rules arguing that requiring religious group health plans sponsored by religious employers to cover contraception could impinge upon those employers' religious freedom, the August 3 amendment authorized the departments to "exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned."⁵⁴

The amended interim final rules created a narrow exemption for religious employers designed to balance the government's interest in expanding access to contraceptives with employers' religious freedom. Under the definition of a religious employer established in the amended interim rule, a religious employer must: (1) have the inculcation of religious values as its purpose; (2) primarily employ people sharing its religious belief; (3) primarily serve people sharing its religious beliefs; and (4) exist as a nonprofit organization under certain sections of the Internal Revenue Code.⁵⁵ Because of the fourth prong of that definition, essentially only churches and religious orders qualify for the exemption.⁵⁶ The government adopted this definition of a religious employer to balance its desire to extend coverage of contraceptives under the HRSA guidelines to as many women as possible with the need to recognize "the unique relationship" between religious employers and their employees in religious positions.⁵⁷

The amendment also solicited further comments concerning the definition of a religious employer.⁵⁸ The government's request for comments concerning the definition of a "religious employer" for the purposes of the mandate's religious employer exemption undoubtedly succeeded—the government received more than 200,000 comments.⁵⁹ Some commenters approved of the balance

46,621 (Aug. 3, 2011).

54. *Id.* at 46,623.

55. *Id.* ("(1) Ha[ve] the inculcation of religious values as its purpose; (2) primarily employ[] persons who share its religious tenets; (3) primarily serve[] persons who share its religious tenets; and (4) [be] a nonprofit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.")

56. The nonprofit organizations referred to in the interim final rule include "churches, their integrated auxiliaries and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A) (2006).

57. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623.

58. *See id.*

59. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725,

struck by the current definition and thought that the exemption should be left as defined in the interim final rules.⁶⁰ Others suggested that the exemption be eliminated entirely because of the importance of expanding access to contraceptives to as many women as possible.⁶¹ Still others contended that the definition of a “religious employer” should be expanded to include more religiously-affiliated employers.⁶²

Despite the massive array of comments it received, the government did not alter the interim final rules.⁶³ On February 15, 2012, the government adopted the interim final rule and the amendment creating the religious employer exemption without any change.⁶⁴ Accordingly, the religious employer exemption covered only those organizations that met the criteria the government had established in the interim final rule, notwithstanding the range of comments the government received concerning that definition.

The government finalized the rule without altering the religious employer exemption in order to accommodate religious groups while expanding access to contraceptives as much as possible. By limiting the religious employer exemption to the definition set forth in the interim final rules, the government argued that the exemption would not undermine the benefits associated with the contraception coverage mandate.⁶⁵ Under the final rule, a religious employer must primarily employ persons who share that employer’s religious tenets.⁶⁶ In the government’s view, the employees of these religious employers would not be likely to use contraception even if given cost-free access to it because, by definition, those employees would share the religious employer’s belief that the use of contraception was immoral.⁶⁷

8726 (Feb. 15, 2012).

60. *See id.* at 8727.

61. *Id.* at 8726.

62. *See id.* at 8727.

63. *See id.* at 8725.

64. *Id.* (“[F]inaliz[e]d, without change, [the] interim final regulations authorizing the exemption of group health plans and group health insurance coverage sponsored by certain religious employers from having to cover certain preventive health services.”).

65. *Id.* at 8727, 8728.

66. *See* Coverage of Preventive Health Services, 45 C.F.R. § 147.130(a)(1)(iv)(B)(3) (2012).

67. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at

Conversely, the government contended that expanding the exemption to include more employers would lessen the mandate's expansion of access to contraceptives.⁶⁸ If the religious employer exemption did not require the employees to primarily share their employer's religious tenets, a greater number of those employees would be likely to seek contraceptives. At the same time, because the mandate's limitation on cost-sharing would not apply to the exempt employer, those employees would be more likely to pay out of pocket to receive contraceptive services.⁶⁹ According to the government, expanding the definition of a religious employer could allow an employer to impose its religious belief that contraception is immoral upon employees who do not share that same belief.⁷⁰ In short, the government did not alter the definition of a religious employer because of a concern that doing so would reduce the number of employees who both had cost-free access to contraception and were also likely to use it.

Although the government did not expand the definition of a religious employer to include more religiously-affiliated employers—as some commenters suggested—the government attempted to accommodate these employers by creating a temporary enforcement safe harbor and by announcing its intent to alter the mandate's religious employer exemption in a future rulemaking.⁷¹

The final rule created a safe harbor of one year for certain non-exempt, nonprofit organizations. The departments issued this safe harbor contemporaneously with promulgation of the final regulations in an HHS bulletin.⁷² That bulletin stated that although the regulations required coverage of the recommended women's preventive services without cost sharing for plan years beginning on or after August 1, 2012, the departments would not enforce the mandate against certain non-exempt employers until the first plan year beginning on or after August 1, 2013.⁷³

8728.

68. *Id.*

69. *See id.*

70. *Id.*

71. *See id.*

72. Bulletin, Dep't of Health and Human Servs., Guidance on the Temporary Enforcement Safe Harbor 1-2 & n.1 (Aug. 15, 2012), <http://ccio.cms.gov/resources/files/prev-services-guidance-08152012.pdf> [hereinafter Bulletin].

73. *Id.* at 2-3.

To qualify for the temporary enforcement safe harbor, an employer must meet certain qualifications. Employers must (1) be organized and operating as a nonprofit entity; (2) have a plan that did not provide at least some subset of the contraceptive services required by the final rule from February 10, 2012 (the date the government promulgated the mandate) because of the employer's religious beliefs; (3) issue a notification, included in the safe harbor guidelines, that indicates that the employer's plan will not provide contraceptives coverage; and (4) self-certify to the government that it has met those previous three criteria.⁷⁴ If an employer does not meet these criteria, the safe harbor is not available, and the government will enforce the mandate against it for plan years beginning on or after August 1, 2012.

The temporary enforcement safe harbor has partially shaped the outcome of lawsuits filed by both nonprofit organizations and for-profit plaintiffs. Because the safe harbor prevented the government from enforcing the mandate against nonprofit religious organizations that followed the safe harbor guidelines' self-certification procedure, many courts dismissed nonprofit cases on the grounds that the plaintiffs did not have standing to sue because the mandate had not injured them.⁷⁵ In other words, the safe harbor provisions led many courts to dismiss nonprofit organizations' claims for procedural reasons without regard to the merits of their RFRA claims. Conversely, for-profit organizations did not face this procedural hurdle because the government has never considered exempting them.⁷⁶ The absence of this hurdle

74. *Id.* at 3. An organization is exempt if it meets all of the following criteria:

1. The organization is organized and operates as a nonprofit entity. 2. From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of contraceptive coverage otherwise required at any point . . . because of the religious beliefs of the organization. 3. As detailed below, the group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or thirdparty administrator) must provide to participants the attached notice, as described below, which states that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.[] 4. The organization self-certifies that it satisfies criteria 1–3 above, and documents its self-certification in accordance with the procedures detailed herein.

Id. See *id.* at 6, for the required notice employers must provide to plan participants. See *id.* at 7, for the safe harbor certification procedures.

75. See *infra* note 151 and accompanying text.

76. See *infra* notes 106, 184–89 and accompanying text.

helps explain why courts have granted for-profit corporations relief from the mandate, while dismissing cases brought by nonprofit organizations.⁷⁷

The final rule also established that the government would attempt to accommodate religious objections to the mandate during the safe harbor period by issuing a new rulemaking designed to “develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage.”⁷⁸ More specifically, the departments would initiate an additional rulemaking to alter the mandate to allow religious employers to avoid covering contraceptives while requiring insurers to offer preventive services coverage directly to plan participants.⁷⁹ The government further stated that the rulemaking would be informed by how state law contraceptive coverage mandates have treated religious employers.⁸⁰

C. *The ANPRM*

As promised on February 10, 2012, the government began the process of amending the mandate shortly after it promulgated it. The government took its first step by publishing an ANPRM in the Federal Register on March 21, 2012.⁸¹ Although this was a step in the right direction, an ANPRM is not equivalent to a

77. See *supra* notes 151–59, 184–89, and accompanying text.

78. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

79. *Id.* (stating that the government would “initiate a rulemaking to require issuers to offer insurance without contraception coverage to [a religious employer] and simultaneously to offer contraceptive coverage directly to the employer’s plan participants”).

80. *Id.* Twenty-eight states have some form of contraceptive coverage mandate under state law. *Id.* However, it is not clear that the federal government could simply follow the example of state contraception coverage requirements to avoid unduly infringing upon the religious freedoms of religious employers. RFRA does not apply to the states. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). However, RFRA *does* apply to the federal government. See *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Accordingly, though a state contraception requirement might be valid because RFRA does not apply to the states, an identical federal mandate might not be valid because RFRA applies to the federal government.

81. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012).

rulemaking and is not binding in and of itself.⁸² Furthermore, the ANPRM did not specify how the government would alter the religious employer exemption.⁸³ That said, the ANPRM was a preliminary step toward modifying the religious employer exemption to the mandate because it, at minimum, reiterated the government's intention to propose amendments to the mandate's regulations in order to create alternative ways for women employed by religious organizations to receive access to contraceptives without requiring those organizations to cover religiously objectionable contraceptives.⁸⁴ The ANPRM stated two goals, maintaining contraceptive coverage without cost sharing and protecting religious organizations from having to arrange for contraceptives coverage or pay for that coverage.⁸⁵

To achieve these goals, the ANPRM outlined possible options to accommodate a greater number of religious employers and requested comments on those options. These options focused on how the government could create a system whereby an independent entity would assume responsibility for providing cost-free contraceptive coverage.⁸⁶ Under the first option, for religious employers that purchase insurance coverage from a health insurance issuer, the insurance company would offer the employer a plan that did not include contraceptives coverage and would separately provide plan participants with contraceptives coverage without cost sharing.⁸⁷ Under the second option, for self-insured employers, the

82. The Administrative Procedure Act does not contain any reference to ANPRMs. See 5 U.S.C. § 553 (2006); Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 897–98 (2011). Nonetheless, “[a]gencies sometimes use an [ANPRM] to gather early feedback on regulatory issues.” *Id.* at 897; William McGeeveran, Leili Fatehi & Pari McGarraugh, *Deidentification and Reidentification in Returning Individual Findings from Biobank and Secondary Research*, 13 MINN. J.L. SCI. & TECH. 485, 504 n.97 (2012).

83. See *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at *1 (N.D. Ind. Dec. 31, 2012).

84. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. at 16,501 (“This [ANPRM] announce[d] the intention of the Departments . . . to propose amendments to regulations regarding certain preventive health services . . . [to] establish alternative ways to fulfill the requirements of section 2713 . . . when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services.”). In the ANPRM, the government referred to the ANPRM as “the first step toward promulgating . . . amended final regulations.” *Id.* at 16,503.

85. *Id.*

86. *Id.* at 16,505.

87. See *id.*

ANPRM proposed requiring third party administrators to provide or arrange for contraceptive coverage without cost sharing.⁸⁸

In short, the ANPRM was a preliminary step through which the government solicited comments on a number of possible solutions to accommodate non-exempt, nonprofit organizations with religious objections to providing contraceptive services without cost-sharing. Critics claimed the government did not go far enough by simply publishing the ANPRM because the ANPRM did nothing to bind the government—it had no legal force.⁸⁹ The government had to follow up with an additional proposed rule-making in order to amend the mandate.⁹⁰ Even though the ANPRM did not bind the government, courts that would eventually adjudicate nonprofit organizations' RFRA claims would dismiss those cases because the ANPRM began the process of amending the mandate.⁹¹ The courts had dismissed many of those cases when, after almost one year, the departments formally proposed the rule to alter the mandate that the ANPRM had anticipated.⁹²

D. *The "Next Step": The February 1, 2013 Proposed Rules*

On February 1, 2013, the Obama administration followed through on its promise to amend the mandate by issuing a notice of proposed rulemaking that would expand the number of organizations covered by the religious employer exemption.⁹³ The February 2013 proposed rules would alter the religious employer exemption, create an additional accommodation for certain "eligible organizations," and provide third party coverage for contracep-

88. *Id.* at 16,506 (providing that the employer must provide each third party administrator written notice that the employer "will not contribute to the funding of contraceptive services").

89. *See, e.g., Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864, at *14 (E.D.N.Y. Dec. 4, 2012).

90. *See supra* note 79 and accompanying text.

91. *See supra* Section III.A.1.

92. *See, e.g., Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200, at *9–13, *21 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA BNB, 2013 WL 93188, at *7, *9 (D. Colo. Jan. 7, 2013).

93. Press Release, U.S. Dep't of Health & Human Servs., Administration Issues Notice of Proposed Rulemaking on Recommended Preventive Services Policy (Feb. 1, 2013), available at <http://www.hhs.gov/news/press/2013pres/02/20130201a.html>; *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013).

tives for those organizations' insured group health plans or self-insured group health plans.⁹⁴

The government issued the February 2013 Proposed Rules to follow through on the process initiated by the ANPRM. In response to the ANPRM's request for comments on the religious employer exemption, the departments received approximately 200,000 comments from a range of individuals and organizations, including religiously affiliated educational institutions, health care organizations, charities, and associations; third party administrators and plan service providers; civil rights organizations; consumer groups; secular organizations; states; women's rights and reproductive health advocacy organizations; and private citizens.⁹⁵ Commenters expressed concern that the mandate contained too narrow a religious employer definition because many religious employers have purposes that extend beyond the inculcation of religious belief, serve people from different faiths, or hire people of different faiths.⁹⁶ Some non-exempt employers stated that they would cease to provide health insurance coverage to their employees if the mandate's religious employer definition remained unchanged.⁹⁷ Other comments argued that the mandate infringed upon religious exercise rights under the First Amendment and RFRA.⁹⁸ Conversely, some commenters supported the current definition of a religious employer or argued that the definition should be narrowed or eliminated to expand access to contraceptives.⁹⁹

After considering these comments, the departments' February 2013 proposed rules replaced the current definition of a religious employer with a new definition designed to accommodate religious employers that would qualify under the former definition, but for the fact that they provide benevolent services to people of

94. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8456–57; *Women's Preventive Services Coverage and Religious Organizations*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, <http://cciio.cms.gov/resources/factsheets/womens-preven-02012013.html> (last visited Apr. 19, 2013).

95. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8459.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

different faiths or employ persons of different faiths.¹⁰⁰ Under the new definition, a “religious employer” is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code.”¹⁰¹ Essentially, the new definition of a “religious employer” would eliminate the first three requirements of the previous definition.¹⁰²

Along with the modification to the religious employer exemption, the February 2013 proposed rules created an accommodation for “eligible organizations” designed to accommodate nonprofits that fell outside the religious employer exemption but had religious objections to the mandate.¹⁰³ Under the proposed rules, an organization would qualify as an “eligible organization” for accommodation if:

- (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under §147.130(a)(1)(iv) on account of religious objections.
- (2) The organization is organized and operates as a nonprofit entity.
- (3) The organization holds itself out as a religious organization.
- (4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services . . . indicating that the organization satisfies the [previous three] criteria.¹⁰⁴

This definition of an “eligible organization” would encompass nonprofit religious educational institutions, charities, and other religious organizations with religious objections to providing contraceptive coverage.¹⁰⁵ However, the proposed rules expressly avoided accommodating for-profit organizations.¹⁰⁶ By including a broader range of religiously affiliated nonprofit organizations, the proposed rules might alleviate some organizations’ concerns about the mandate; however, the accommodation likely does not go far enough to reduce the burden on other religious groups.¹⁰⁷

100. See *id.* at 8461.

101. *Id.* at 8474 (to be codified at 45 C.F.R. § 147.131(a)).

102. *Id.* at 8461.

103. *Id.* at 8457, 8458–59.

104. *Id.* at 8474–75. The self-certification process would be comparable to that under the temporary enforcement safe harbor. Compare *id.* at 8462, with *Bulletin, supra* note 72, at 3–5, 7.

105. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8462.

106. *Id.*

107. See *infra* Section IV.B.1.a.

The proposed rules do not accommodate for-profit organizations, and, therefore, the proposed rules do not affect those organizations' challenges to the mandate.¹⁰⁸

After defining an "eligible organization," the proposed rules attempted to accommodate eligible organizations with both insured plans and self-insured plans, while also ensuring plan beneficiaries' access to contraceptives without cost sharing.¹⁰⁹ For eligible organizations with insurance coverage provided by third-party health insurers, the proposed rules require the third-party insurer to "assume sole responsibility, independent of the eligible organization and its plan, for providing contraceptive coverage without cost sharing . . . to plan participants and beneficiaries."¹¹⁰ The eligible organization would merely deliver a copy of its self-certification to the health insurance issuer, and then the issuer would be responsible for providing plan participants and beneficiaries with contraceptive coverage without cost sharing through individual insurance policies.¹¹¹

Moreover, the contraceptive coverage provided by the insurer would not be offered by or through the group health plan, and the issuer would be directed to ensure that the contraceptive services were not reflected in the group health plan premium or any other fee charged to the eligible organization.¹¹² According to the departments, the issuers would incur minimal costs from this added contraceptive coverage burden because they would be insuring the same set of individuals under the group plans and, accordingly, would reap the benefits associated with improvements in the health of those women and fewer childbirths.¹¹³

The February 2013 proposed rules provided three less-than-clear proposals with regard to self-insured plans. Although the mechanics of each proposal differ slightly, in essence, under each proposal a qualified organization with a self-insured plan with a third party administrator would transmit a copy of its self-

108. See Lyle Denniston, *New Contraceptive Mandate Rules*, SCOTUSBLOG (Feb. 1, 2013, 2:12 PM), <http://www.scotusblog.com/2013/02/new-contraceptive-mandate-rules/>.

109. See 78 Fed. Reg. at 8462–63.

110. *Id.* at 8462.

111. *Id.* at 8462–63. Student health insurance plans arranged by nonprofit religious institutions of higher education that purchase insured coverage would be treated similarly. *Id.* at 8467.

112. *Id.* at 8462–63.

113. *Id.* at 8463.

certification to the third party administrator, which would then arrange to have a health insurance issuer provide contraceptive coverage for plan participants and beneficiaries without cost sharing.¹¹⁴ The three proposals primarily differ concerning whether the third party administrator or individual health insurance issuer would be responsible for providing the coverage.¹¹⁵

The February 2013 proposed rules did not include a specific provision with regard to an accommodation for self-insured plans without third party administrators.¹¹⁶ During the ANPRM comment period, the departments received no comments concerning those plans, and the government asserted that it believed very few eligible organizations had self-insured plans without third party administrators.¹¹⁷

Finally, the proposed rules established a notice requirement for the issuers of individual health insurance policies covering contraceptives for both insured plans and self-insured plans.¹¹⁸ The government would require the issuers to notify the plan participants and beneficiaries that the issuers provided contraceptive coverage without cost sharing.¹¹⁹

Unlike the interim final rules promulgated by the departments, the February 1, 2013 proposed rules are not binding until finalized.¹²⁰ Moreover, the ultimate effect of the proposed rules remains uncertain because the departments elicited comments on both the definition of an eligible organization and the substantive provisions concerning the proposed accommodations for eligible organizations.¹²¹ The government altered the interim final rules to include a religious employer exemption in response to comments received by stakeholders.¹²² Accordingly, it would not be unprecedented if the departments altered the proposed rules in response

114. *See id.* at 8463–64. Student health insurance plans arranged by nonprofit religious institutions of higher education that self-insure would be treated similarly. *Id.* at 8,467.

115. *See id.* at 8463–64.

116. *Id.* at 8464.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* 5 U.S.C. § 553 (2006).

121. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8462–64.

122. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

to comments they receive during the proposal's sixty day notice period. Moreover, the government's final rule must be responsive to the comments made during the notice period.¹²³ Should the government receive significant comments arguing that the eligible organization definition should be narrowed, the departments might alter the final rule to accommodate fewer nonprofit organizations. While the administrative process continues to unfold, plaintiffs' legal challenges to the mandate will likely continue because it is unclear whether the proposed rules will cure the mandate's alleged violation of rights under RFRA. Uncertainty over the mandate will remain at least until the government finalizes the proposed rules after the end of the comment period on April 9, 2013.¹²⁴

The ACA's provisions authorized the government to promulgate the mandate and created the penalty provisions for noncompliance with the mandate. Those two factors create the alleged burden on free exercise that plaintiffs claimed when they sued to enjoin the government from enforcing the mandate under RFRA. The mandate's amendment process, though possibly increasing the number of nonprofit organizations exempt from the mandate or accommodated, also prevented those organizations' RFRA claims from succeeding in the courts in most cases.

III. LEGAL CHALLENGES TO THE MANDATE

Throughout the administrative process, various individuals and organizations have opposed the mandate. Many of the more than 200,000 comments to the interim final rule argued that the religious employer exemption covered too few religious employers.¹²⁵ Religious organizations challenged the mandate even before the government finalized it.¹²⁶ For example, three months before the mandate's promulgation, Belmont Abbey College, a Catholic

123. See I RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 594 (5th ed. 2010).

124. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8457.

125. See *supra* notes 59–62 and accompanying text.

126. See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1418–19 (2012).

University, alleged that the mandate violated the First Amendment, the Administrative Procedure Act, and RFRA.¹²⁷ Similarly, one day before the departments finalized the mandate, the Eternal Word Television Network, a nonprofit organization operating a television network with programming reflecting the teachings of the Catholic Church, filed a complaint alleging similar violations.¹²⁸

Opposition to the mandate from religious organizations only increased after the government promulgated the final regulations establishing the mandate. Given the number of legal actions against the mandate that religiously-affiliated organizations filed even before the government finalized it, the explosion of legal challenges after the mandate's passage should not be surprising. The United States Conference of Catholic Bishops expressed its opposition to the mandate contemporaneously with the government's decision to finalize it.¹²⁹ The conference argued that the government should revoke the mandate in its entirety or, alternatively, expand the religious employer exemption to include a broader range of religious objectors.¹³⁰ Religiously-affiliated organizations also expressed their opposition to the mandate by submitting comments in response to the ANPRM.¹³¹ Most importantly, the number of legal challenges to the mandate that these organizations filed increased apace.¹³²

127. *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 29 (D.D.C. 2012); *see also*, e.g., Complaint at 3, *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB (D. Colo. Dec. 22, 2011), available at <http://www.becketfund.org/wp-content/uploads/2011/12/CCU-v-Sebelius-Complaint-final.pdf>.

128. *See* Complaint at 3, *Eternal Word Television Network, Inc. v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala. Feb. 9, 2012), 2012 WL 401609.

129. *See* News Release, U.S. Conference of Catholic Bishops, *Bishops Renew Call to Legislative Action on Religious Liberty* (Feb. 10, 2012), available at <http://www.usccb.org/news/2012/12-026.cfm>.

130. *See id.*

131. *See, e.g.*, Comments from Anthony R. Picarello, Jr., *supra* note 2, at 1–4.

132. *See, e.g.*, Complaint at 1–3, *E. Tex. Baptist Univ. v. Sebelius*, No. 12-3009 (S.D. Tex. Oct. 9, 2012), 2012 WL 4803647; Complaint at 1–2, 4, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207-JFC (W.D. Pa. May 31, 2012), available at <http://www.adfmedia.org/files/GenevaCollegeComplaint.pdf>; Complaint at 4, *Ave Maria Univ. v. Sebelius*, No. 2:12-CV-88-FtM-29SPC (M.D. Fla. Feb. 21, 2012), available at <http://www.becketfund.org/wp-content/uploads/2012/02/Complaint-Ave-Maria-Time-Stamped.pdf>; Complaint at 1, *La. Coll. v. Sebelius*, No. 1:12-cv-00463 (W.D. La. Feb. 18, 2012), available at <http://www.adfmedia.org/files/LouisianaCollegeComplaint.pdf>.

Although the number of cases contesting the mandate has increased, litigation remains in its infancy. A number of federal district courts have issued opinions and orders in mandate cases on plaintiffs' motions for preliminary injunctions and the government's motions to dismiss; however, only one court has ruled on the merits of a mandate challenge by dismissing the case for failure to state a claim.¹³³

A. *Courts Have Dismissed Almost All Nonprofit Cases on Procedural Grounds*

Just as nonprofit organizations expressed disapproval for the mandate during the administrative process, they were also among the first plaintiffs to challenge the mandate in court. More than any other group, the mandate arguably infringes upon the religious exercise of religiously affiliated nonprofit organizations other than churches.¹³⁴ For example, many schools, universities, hospitals, and charities expressly hold religious beliefs opposed to contraception, yet are not currently within the definition of a religious employer.¹³⁵ These organizations may not qualify under the current definition because they serve a significant number of individuals who do not share those beliefs; they have a purpose other than the inculcation of religious values; they employ significant numbers of persons who do not share their religious beliefs; or they are not organized as nonprofit entities within certain sections of the tax code.¹³⁶ The government itself recognized the degree to which the mandate's definition of a religious employer in

133. See *O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *15 (E.D. Mo. Sept. 28, 2012) (granting the defendant's 12(b)(6) motion), *stay pending appeal granted by O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012). A dismissal under Rule 12(b)(6) for failure to state a claim is a judgment on the merits. See *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (citing *Angel v. Bullington*, 330 U.S. 183, 190 (1947); *Bell v. Hood*, 327 U.S. 678 (1946)).

134. See *infra* Section IV.B.1.a.

135. See, e.g., *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 29, 30 (D.D.C. 2012), *appeal held in abeyance sub nom*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. Dec. 18, 2012) (per curiam).

136. See *Coverage of Preventive Services*, 45 C.F.R. § 147.130(B) (2012). These organizations appear to be covered under the definition of an "eligible organization" in the Feb. 1, 2013 proposed rules, see *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8474-75 (Feb. 6, 2013); however, those organizations remain non-exempt until the government promulgates a final rule accommodating them.

sufficiently protects these organizations by issuing the temporary enforcement safe harbor, announcing an intention to accommodate these organizations in the ANPRM, and proposing an accommodation for eligible organizations in the February 2013 proposed rules.¹³⁷ Though the February proposed rules purport to accommodate these organizations, they likely do not satisfy RFRA.¹³⁸

As the administrative process has unfolded, these nonprofit organizations have brought many of the lawsuits contesting the mandate. Although a pattern has emerged in the district court decisions on these motions, one important outlier exists.

1. District Court Decisions Dismissing Nonprofit Organizations' Cases

In all of the nonprofit organization cases in which courts have rendered decisions, the government moved to dismiss on the ground that either the plaintiffs lacked standing or that their claims were unripe.¹³⁹ In each case, the government argued the plaintiffs lacked standing because they did not face an imminent injury as a result of the mandate's enforcement.¹⁴⁰ In the government's view, the safe harbor provision prevents the departments from enforcing the mandate against the nonprofit

137. See *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012); *Bulletin*, *supra* note 72, at 2–3.

138. See *supra* Section IV.B.1.a.

139. See *Archdiocese of St. Louis v. Sebelius*, No. 4:12-CV-00924-JAR, 2013 WL 328926, at *6 (E.D. Mo. Jan. 29, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200, at *1 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *3 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240, at *2 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at *2 (N.D. Ind. Dec. 31, 2012); *Catholic Archdiocese of Biloxi, Inc. v. Sebelius*, Civil No. 1:12CV158-HSO-RHW, 2012 WL 6831407, at *1 (S.D. Miss. Dec. 20, 2012); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864, at *1 (E.D.N.Y. Dec. 4, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *1 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796, at *2–4 (M.D. Tenn. Nov. 21, 2012); *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102, 111 (D.D.C. 2012), *appeal held in abeyance* 703 F.3d 551 (D.C. Cir. Dec. 18, 2012) (per curiam); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 20 (D.D.C. 2012), *appeal held in abeyance sub nom* *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (per curiam); *Nebraska ex. rel. Bruning v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777, 804 (D. Neb. 2012); *cf.* *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012) (“[T]he court is not persuaded that Legatus [a nonprofit organization] has standing to bring its claim.”).

140. See, e.g., *Catholic Diocese of Nashville*, 2012 WL 5879796, at *3.

plaintiffs. Therefore, the plaintiffs have not suffered a sufficiently concrete injury upon which standing can be based.¹⁴¹ Furthermore, the departments assert that their intention to amend the regulations renders the plaintiffs' alleged injuries too speculative an injury on which to grant standing because the amendment to the regulations might relieve the plaintiffs from providing the contested coverage.¹⁴²

The government has also moved to dismiss the plaintiffs' claims as unripe in each case. The government's ripeness argument, similar but not identical to its standing argument, is that the courts should not rule on the validity of the mandate because the government has committed itself to amending the mandate to accommodate organizations like the plaintiffs.¹⁴³ Therefore, because the government's position expressed in the mandate is not yet final, the court should find that the mandate is not sufficiently final for the plaintiffs' claims to be ripe.¹⁴⁴

The nonprofit organizations have countered that they have suffered a sufficient injury to grant standing. They argue that even though the government has chosen not to enforce the mandate against them until after the safe harbor period elapses, they will face enforcement of the mandate once that period ends.¹⁴⁵ These organizations have also contended that the impending threat of that enforcement is a sufficient injury.¹⁴⁶ Moreover, one plaintiff argued that the mandate injured it by failing to afford sufficient time to prepare to comply with whatever regulation the government ultimately enforces.¹⁴⁷

In response to the government's arguments that their cases are not ripe, the plaintiffs have contended that the government promulgated the mandate in a final rule and that the ANPRM does not alter the mandate's finality.¹⁴⁸ Accordingly, their claims are ripe because the mandate is a final rule which will negatively

141. *See, e.g., id.*

142. *See, e.g., Belmont Abbey Coll.*, 878 F. Supp. 2d at 34.

143. *See, e.g., Zubik*, 2012 WL 5932977, at *8–9.

144. *See, e.g., id.* at *1, 8–9.

145. *See, e.g., Belmont Abbey Coll.*, 878 F. Supp. 2d at 35.

146. *See, e.g., id.*

147. *See, Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at *4 (N.D. Ind. Dec. 31, 2012).

148. *See, e.g., Nebraska ex. rel. Bruning v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777, 785 (D. Neb. 2012).

impact them when the government enforces it after the safe harbor period lapses.¹⁴⁹

The majority of courts have sided with the government's arguments and dismissed the plaintiffs' claims. Some courts reasoned that the plaintiffs lacked standing because their alleged injuries were too speculative.¹⁵⁰ These courts argued that there is too much speculation because the government is not currently enforcing the mandate against the plaintiffs and because the government has promised to accommodate them before the safe harbor period expires.¹⁵¹ One court concluded that even though the temporary enforcement safe harbor did not alleviate the plaintiffs' alleged injuries, the ANPRM rendered those injuries too speculative for the purposes of standing.¹⁵² Other courts held that the plaintiffs lacked standing because their plans were grandfathered and, therefore, fell outside the scope of the mandate.¹⁵³

Even if they had found a sufficient injury to grant standing, these same courts would have granted the government's motions to dismiss on the ground that the plaintiffs' claims were unripe.¹⁵⁴ These courts held that, even if the plaintiffs had standing, their claims were unripe because the government was in the process of amending the regulations to accommodate the plaintiffs.¹⁵⁵ In the

149. *But see id.* at 801–02.

150. *See infra* notes 151–52 and accompanying text.

151. *See* Archdiocese of St. Louis v. Sebelius, No. 4:12 CV 00924 JAR, 2013 WL 328926, at *7 (E.D. Mo. Jan. 29, 2013); *Univ. of Notre Dame*, 2012 WL 6756332, at *4; *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *11 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796, at *3–4 (M.D. Tenn. Nov. 21, 2012); *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102, 107–10 (D.D.C. 2012), *appeal held in abeyance* 703 F.3d 551 (D.C. Cir. 2012) (per curiam); *cf.* *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012) (footnote omitted) (“[T]he court is not persuaded that Legatus [a nonprofit organization] has standing to bring its claim.”). The *Zubik* court did not need to discuss the issue of standing because it dismissed the plaintiffs' case for lack of ripeness; however, the court discussed standing anyway. *See Zubik*, 2012 WL 5932977, at *10.

152. *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 36 (D.D.C. 2012), *appeal held in abeyance sub nom.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (per curiam).

153. *Zubik*, 2012 WL 5932977, at *11; *Nebraska ex. rel. Bruning*, 877 F. Supp. 2d at 793.

154. *See e.g.*, *Catholic Archdiocese of Biloxi, Inc. v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407, at *6–7 (S.D. Miss. Dec. 20, 2012). One court stated that it need not address ripeness arguments because of its decisions regarding standing, but then proceeded to discuss ripeness anyway. *See Belmont Abbey Coll.*, 878 F. Supp. 2d at 37.

155. *See* *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240, at *4–5 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame*, 2012 WL 6756332, at *3–4; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *4–5; *Wheaton Coll.*, 887 F. Supp. 2d at 111–13; *Ne-*

interest of judicial economy, these courts would dismiss the cases to avoid ruling unnecessarily given the government's commitment to altering the mandate to accommodate nonprofit organizations with religious objections to the mandate.¹⁵⁶

At the federal appellate level, only the D.C. Circuit has issued an opinion on a nonprofit organization's challenge to the mandate. In *Wheaton College*, the court held that while the trial court had improperly determined that the nonprofit religiously-affiliated college lacked standing, the college's claims were not ripe because of the government's planned amendments to the mandate.¹⁵⁷ The court emphasized that it based its decision on the government's statement that it would never enforce the mandate in its current form against the appellants or those similarly situated to them.¹⁵⁸ Accordingly, the court held that the government's statements were binding representations and ordered that the cases be held in abeyance subject to status reports filed by the government every sixty days.¹⁵⁹

Significantly, all of these courts dismissed nonprofit organizations' challenges to the mandate *solely on procedural grounds* and did so without prejudice. Accordingly, these district court decisions seemingly in favor of the mandate do not presage how those courts might rule should the government's promised changes to the mandate fail to materialize. Unlike other court decisions on motions for preliminary injunctions that necessarily consider a plaintiff's likelihood of success on the merits of its case, these decisions do not reflect how a court might rule on a future mandate challenge once the government has followed through with its promises. These decisions reflect more the uncertainty created by the government's promise to alter the mandate and courts' general unwillingness to decide issues that might eventually become moot than a view that the mandate satisfies RFRA's compelling interest test. In short, the courts have dismissed nonprofit organ-

braska ex. rel. Bruning, 877 F. Supp. 2d at 800, 802.

156. See, e.g., *Archdiocese of St. Louis*, 2013 WL 328926, at *6, *Roman Catholic Archbishop of Wash. v. Sebelius*, Civil Action No. 12-0185 (ABJ), 2013 WL 285599, at *2-3 (D.D.C. Jan. 25, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228220, at *15 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, Civil Action No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *6-8 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Nashville*, 2012 WL 5879796, at *5.

157. See *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam).

158. *Id.*

159. *Id.* at 553.

izations' challenges to the mandate, not because those RFRA claims lack substantive merit—they do—but because the courts cannot firmly analyze the substantive merit of those claims until the government has finalized the promised changes to the mandate. In a similar case, one court's decision to deny the government's motion to dismiss, notwithstanding these other decisions, might indicate the strength of these plaintiffs' substantive RFRA claims.

2. The Outlier: *Roman Catholic Archdiocese of New York v. Sebelius*

The court's decision in *Roman Catholic Archdiocese* signaled the extent to which the mandate burdened employers' free exercise of religion because it allowed a nonprofit organization to maintain a RFRA claim against the government, despite significant procedural issues.¹⁶⁰ While many of the courts considering nonprofit organizations' actions to enjoin enforcement of the mandate dismissed those cases on procedural grounds, the court denied the government's motion in *Roman Catholic Archdiocese of New York v. Sebelius*.¹⁶¹ Like similar cases, the government moved to dismiss the case on the grounds that the plaintiffs lacked standing and that the case was unripe for judicial review.¹⁶²

The court first addressed the government's standing argument. The court determined that two plaintiffs had failed to meet their burden of establishing that the mandate applied to them because their plans might have been grandfathered, and the court dismissed those plaintiffs' cases.¹⁶³ For the remaining plaintiffs, the court then analyzed whether the temporary enforcement safe harbor and ANPRM undermined the plaintiffs' standing, just like the other district courts which have considered the issue.¹⁶⁴

160. *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542 (BMC), 2012 WL 6042854, at *1 (E.D.N.Y. Dec. 4, 2012).

161. *Id.*

162. *Id.*

163. *See id.* at *11–12; *cf. Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *11 (W.D. Pa. Nov. 27, 2012) (dismissing a plaintiff's case because the plaintiff had a grandfathered plan); *Nebraska ex. rel. Bruning v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777, 792 (D. Neb. 2012) (same).

164. *Roman Catholic Archdiocese of N.Y.*, 2012 WL 6042864, at *12–20.

Unlike most other courts, *Roman Catholic Archdiocese* held the temporary enforcement safe harbor did not reduce the certainty that the plaintiffs would suffer an injury from the mandate, but simply postponed when that injury would occur.¹⁶⁵ For that reason, the court agreed with the decision in *Belmont Abbey* that the “temporary enforcement safe harbor d[id] not prevent [the] plaintiffs from establishing imminent injuries for standing purposes.”¹⁶⁶ Given the concrete August 1, 2013 end date to the temporary enforcement safe harbor period,¹⁶⁷ and other court decisions holding that a thirteen year gap before enforcement did not negate standing,¹⁶⁸ the court properly departed from other courts that have addressed the standing question.

After recognizing that all the other courts in similar cases had accepted the government’s argument that the ANPRM rendered the plaintiffs’ injuries too speculative, the court rejected the reasoning of those decisions.¹⁶⁹ Although the court assumed that the government had acted in good faith in publishing the ANPRM and in stating that it would amend the mandate regulations, the court concluded that the ANPRM alone was not enough to allow the plaintiffs to avoid the enforcement of the mandate.¹⁷⁰ In the court’s view, the ANPRM amounted to only a request for input on a potential change to the mandate and therefore did not prevent the mandate from taking effect.¹⁷¹ In short, the court held that the plaintiffs had standing to sue based on their future injuries, despite the ANPRM.¹⁷² In addition, regardless of the plaintiffs’ asserted future injuries, the court further stated that present injuries to the plaintiff sufficiently afforded the plaintiffs with standing.¹⁷³ The budgeting and administrative costs the plaintiffs incurred in attempting to prepare for the mandate and the “diversion of funds away from ministries, such as healthcare, in or-

165. *Id.* at *13.

166. *Id.*

167. Bulletin, *supra* note 72, at 3.

168. See, e.g., *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (citations omitted).

169. *Roman Catholic Archdiocese of N.Y.*, 2012 WL 6042864, at *14–15 (citing conflicting decisions by the *Zubik*, *Belmont Abbey College*, *Catholic Diocese of Nashville*, *Legatus*, and *Wheaton College* courts).

170. *Id.* at *15.

171. *Id.*

172. *Id.*

173. *Id.* at *16.

der to prepare for possible fines for failure to comply with the Coverage Mandate” were sufficient present harms.¹⁷⁴ Based on those future and present injuries, the court concluded that the plaintiffs had standing, and in so doing, set itself apart from the other district courts.¹⁷⁵

The *Roman Catholic Archdiocese* court then disposed of the government’s motion to dismiss on the ground that the plaintiffs’ claims were unripe. As in the other mandate cases, the government argued that the plaintiffs’ claims were not fit for judicial review because the ANPRM indicated that the government would alter the mandate before it enforced the regulations against the plaintiffs and because the temporary enforcement safe harbor protected the plaintiffs from any hardship.¹⁷⁶ Again, the court rejected the government’s argument that the case was not fit for judicial review, underscoring that the mandate was a final rule, as opposed to merely proposed rule.¹⁷⁷ Regarding the hardship prong of the ripeness test, the court concluded that the mandate caused hardship to the plaintiffs for the same reason that it created the injuries upon which the plaintiffs had standing.¹⁷⁸ For those reasons the court held that the plaintiffs had standing and that their claims were ripe.¹⁷⁹

In doing so, the *Roman Catholic Archdiocese* court was the first court to rule against the government’s procedural challenges to a nonprofit organization’s action to enjoin enforcement of the mandate. That decision placed it directly at odds with the courts that had ruled to the contrary in almost identical cases. Whereas the other courts were unwilling to find that the mandate harmed nonprofit organizations against whom the government had not yet enforced the mandate, the *Roman Catholic Archdiocese* court recognized the harm that the mandate imposed on those organizations.¹⁸⁰ The court renounced any desire to interfere with policy

174. *Id.* at *17.

175. *Id.* at *16.

176. *See id.* at *21.

177. *Id.* In the court’s view, although the ANPRM had the potential to alter the mandate, it did not amount to a “concrete’ plan,” and did not reduce the finality of the mandate because there was “no way to tell where [the ANPRM] will go.” *Id.* (internal quotation marks omitted).

178. *See Roman Catholic Archdiocese of N.Y.*, 2012 WL 6042864, at *22.

179. *Id.* at *23.

180. *See supra* notes 150–51, 178 and accompanying text.

debates within the executive branch over the mandate, but found that the risk of injury to the plaintiffs was too great to avoid adjudicating the matter while the government haltingly continued the amendment—or, more accurately, pre-amendment—process.¹⁸¹ An assessment of the district court decisions in non-profit cases remains speculative. However, even under the February 2013 proposed rules, many nonprofit organizations likely have strong claims that the mandate violates RFRA.¹⁸² The February 2013 proposed rules had no effect on for-profit corporations' legal challenges.¹⁸³

B. *Conflicting Trial Court Decisions in For-Profit Cases*

Similar to the nonprofit organizations' challenges to the mandate, as of this writing none of the for-profit corporations' cases have proceeded to trial. At this point in the litigation, courts have concerned themselves primarily with for-profit plaintiffs' motions for preliminary injunctions¹⁸⁴ and with the governments' motions to dismiss.¹⁸⁵ Unlike the decisions in the nonprofit organizations'

181. *See id.* at *22–23.

182. *See infra* Section IV.B.1.a.

183. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013).

184. *See* *Annex Med., Inc. v. Sebelius*, No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. at 1 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *1 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *1 (E.D. Mich. Dec. 30, 2012); *Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-06744-MSG, slip op. at 1 (E.D. Pa. Dec. 28, 2012); *Grote Indus. v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *1 (S.D. Ind. Dec. 27, 2012); *Am. Pulverizer Co. v. Sebelius*, Case No. 12-3459-CV-S-RED, slip op. at 1 (W.D. Mo. Dec. 20, 2012); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *3 (S.D. Ill. Dec. 14, 2012), *injunction pending appeal granted* by *Korte v. Sebelius*, 2012 WL 6757353, at *6 (7th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012), *motion for injunction pending appeal denied* by No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *and application for injunction pending appellate review denied* by *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice, 10th Cir. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *1 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *1 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1290, 1292 (D. Colo. 2012); *cf.* *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 1, 3 (6th Cir. Dec. 28, 2012) (granting plaintiffs' motion for expedited appeal and denying plaintiffs' motion for an injunction pending appeal after trial court's denial of a preliminary injunction).

185. *E.g.*, *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476-(CEJ), 2012 WL 4481208, at *1 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted* by No. 12-

challenges to the mandate, which were almost uniformly decided, the trial courts have been more evenly split in evaluating the motions by and against for-profit plaintiffs. In the limited number of opportunities in which the courts of appeals have addressed these challenges, they have also reached conflicting decisions.

As of this writing, in six cases, trial courts have preliminarily enjoined enforcement of the mandate.¹⁸⁶ One court has also issued a temporary restraining order enjoining the government from enforcing the mandate until the court has the opportunity to hear arguments and consider the plaintiffs' motion for a preliminary injunction.¹⁸⁷ Conversely, five other trial courts have denied plaintiffs' motions for a preliminary injunction.¹⁸⁸ Finally, one court adjudicated the merits of a for-profit organization's claims when it dismissed those claims for failure to state a claim.¹⁸⁹

Trial courts that have preliminarily enjoined or temporarily restrained the government from enforcing the mandate have done so for similar reasons. For a court to grant a preliminary injunction, the plaintiff must show (1) a likelihood of success on the merits; (2) irreparable harm absent preliminary relief; (3) that the balance of equities weighs in its favor; and (4) that an injunction is in the public interest.¹⁹⁰ In analyzing plaintiffs' RFRA claims, these courts have found that the plaintiffs have met all of these requirements.¹⁹¹ Most importantly, those decisions to preliminarily enjoin the government from enforcing the mandate

3357, slip op. at 1 (8th Cir. Nov. 28, 2012).

186. *Triune Health Grp. Inc.*, slip op. at 2; *Monaghan*, 2012 WL 6738476, at *1; *Am. Pulverizer Co.*, slip op. at 8–9; *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *1; *Legatus*, 2012 WL 5359630, at *1; *Newland*, 881 F. Supp. 2d at 1290.

187. See *Sharpe Holdings, Inc.*, 2012 WL 6738489, at *6–7. Another court granted a temporary restraining order, see *Conestoga Wood Specialties Corp.*, slip op. at 6, but has subsequently denied a motion for a preliminary injunction. See 2013 WL 140110, at *18 (E.D. Pa. Jan. 11, 2013).

188. *Conestoga Wood Specialties, Corp.*, 2013 WL 140110, at *18; *Annex Med., Inc.*, 2013 WL 101927, at *6; *Grote Indus.*, 2012 WL 6725905, at *1; *Korte*, 2012 WL 6553996, at *11–12; *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1296–97.

189. *O'Brien*, 2012 WL 4481208, at *15.

190. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, ___, 129 S. Ct. 365, 374 (2008) (citations omitted) (noting that plaintiff must show that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

191. *E.g.*, *Sharpe Holdings, Inc.*, 2012 WL 6738489, at *4–5, *7; *Am. Pulverizer Co.*, slip op. at 6–8; *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *9–14.

embody the trial court's conclusions that those plaintiffs are likely to succeed on the merits of their cases.

These courts have concluded that for-profit plaintiffs have shown a likelihood of success on their RFRA claims.¹⁹² Under RFRA, a law is invalid if it imposes a substantial burden on a person's exercise of religion and the government fails to prove that it is the least restrictive means of furthering a compelling government interest.¹⁹³ The courts have, thus far, reasoned that the mandate substantially burdens the plaintiffs' exercise of religion by forcing them either to provide contraception coverage or pay penalties for refusing to do so.¹⁹⁴ Under the second prong of RFRA test, courts have concluded that the plaintiffs were likely to succeed on the merits of their case because the numerous exemptions to the mandate undermine the government's purportedly compelling interest.¹⁹⁵ Only one court has addressed the plaintiffs' likelihood of success on the third prong of the test because the other courts concluded that a likelihood of success on the compelling interest prong required the courts to grant the injunctions.¹⁹⁶ However, the lone court addressing that question found that the plaintiffs were likely to succeed because the government would not be able to show that the mandate is the least restrictive means of achieving its interest.¹⁹⁷

These six decisions are significant because they embody trial courts' conclusions that those plaintiffs are likely to succeed on the merits of their cases. A decision to grant a preliminary injunction results not simply from an assessment that a plaintiff will likely succeed on the merits, but from a complex balancing of factors.¹⁹⁸ Nonetheless, courts have relied on plaintiffs' probability

192. RFRA will be discussed in depth in the following part. See *infra* Section IV.A.

193. See 42 U.S.C. § 2000bb-1(a)-(c) (2006).

194. *E.g.*, *Sharpe Holdings, Inc.*, 2012 WL 6738489, at *4-5; *Am. Pulverizer Co.*, slip op. at 6-7; *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *11-14. One court simply assumed that the mandate placed a substantial burden on the plaintiff's religion because the plaintiff had stated that providing a health insurance plan covering contraceptives would violate his beliefs and because the \$2000 penalty for non-compliance would pressure him to violate his beliefs. See *Monaghan v. Sebelius*, No. 12 15488, 2012 WL 6738476, at *4 (E.D. Mich. Dec. 30, 2012).

195. See, *e.g.*, *Am. Pulverizer Co.*, slip op. at 8; *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *16-18; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012).

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

197. See *id.* at 1298, 1299.

198. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 118-21

of success on the merits of their RFRA claims in decisions to grant preliminary injunctions.¹⁹⁹ In the context of mandate litigation, in which only one court has ruled on the merits of a case,²⁰⁰ a court's decision to grant a preliminary injunction demonstrates at least some evidence of that court's view on the merits of a mandate challenge and the likelihood the court would grant a permanent injunction after trial.²⁰¹ The cases granting preliminary injunctions indicate that courts have been somewhat receptive to arguments that the mandate violates RFRA and provide support for the argument in Section IV that the mandate likely cannot satisfy RFRA's compelling interest test.

To the same degree, five trial courts' decisions reaching opposite conclusions reflect that RFRA challenges to the mandate present unsettled legal questions. Four courts have denied motions for a preliminary injunction, and one has dismissed a for-profit plaintiff's case for failing to state a claim, either because the courts found that the plaintiffs were not likely to succeed on the merits of their cases or because the plaintiffs were unable to show a substantial burden on their exercise of religion.²⁰² Though the courts have expressed doubts that a for-profit corporation has rights as a "person" under RFRA, only one court has reached that

(1991); *supra* note 190 and accompanying text.

199. See *supra* notes 190–97 and accompanying text.

200. See *supra* note 189 and accompanying text.

201. See Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 383–84 (2005) (“[T]he right to a preliminary injunction depends in large part (under all versions of the controlling rule) on the probability that plaintiff will prevail if the case is litigated to a conclusion.”); see also LAYCOCK, *supra* note 198, at 120 (“What matters is the probability that the preliminary relief to be granted will be a part of the relief to be awarded at final judgment, or at least not inconsistent with the rights to be determined by the final judgment.”).

202. *Annex Med., Inc. v. Sebelius*, No. 12-2804 (DSD/SER), 2013 WL 101927, at *5 (D. Minn. Jan. 8, 2013); *Grote Indus. v. Sebelius*, No. 4:12-cv-00134 SEB DML, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012), *injunction pending appeal granted* by No. 13 1077, 2013 WL 362725, at * 3–4 (7th Cir. Jan. 20, 2013); *Korte v. U.S. Dep’t of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *10, *11 (S.D. Ill. Dec. 14, 2012), *injunction pending appeal granted* by No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293–96 (W.D. Okla. 2012), *motion for injunction pending appeal denied* by No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *and application for injunction pending appellate review denied* by *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___, 133 S. Ct. 641, 642–43 (Sotomayor, Circuit Justice, 10th Cir. 2012); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, No. 4:12-CV-476-(CEJ), 2012 WL 4481208, at *5–7 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted* by No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012).

issue.²⁰³ These courts concluded that the mandate did not *substantially* burden the plaintiffs' exercise of religion because its burden is indirect.²⁰⁴ In their view, the burdens on the plaintiffs were too indirect because the corporations, not their owners, were responsible for providing the contraceptive coverage and because whether the plaintiffs would actually be required to fund the contraception depended on attenuated, independent decisions by employees.²⁰⁵

C. *Conflicting Decisions By the Courts of Appeals*

Appellate courts have had only a limited opportunity to address challenges to the mandate; however, they have reached conflicting decisions in reviewing lower courts' decisions denying for-profit plaintiffs' motions for preliminary injunctions.

The Seventh and the Eighth Circuits have granted injunctions pending appeal in two cases in which the lower court refused to preliminarily enjoin enforcement of the mandate.²⁰⁶ In *Annex Medical*, the Eighth Circuit granted a for-profit plaintiff an injunction pending appeal, alleviating any doubt caused by *O'Brien*.²⁰⁷ However, that decision minimally discussed the rationale behind granting that injunction.

The Seventh Circuit granted an injunction pending appeal based on its conclusion that the *Korte* plaintiffs had shown a reasonable likelihood of success on the merits of their case.²⁰⁸ The court emphasized that the mandate likely burdened the for-profit corporation's owners' religious exercise by forcing them to operate

203. *Conestoga Wood Specialties, Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *7, *10 (E.D. Pa. Jan. 11, 2003) (declining to "act as though this difference does not exist" and holding that Conestoga cannot exercise religion); see *Grote Indus.*, 2012 WL 6725905, at *4 (expressing doubt whether a secular corporation has free exercise rights).

204. *Grote Indus.*, 2012 WL 6725905, at *5; *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1296; *O'Brien*, 2012 WL 4481208, at *6-*7.

205. *Grote Indus.*, 2012 WL 6725905, at *4-5; *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1294; *O'Brien*, 2012 WL 4481208, at *6-7; see Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151, 157-58 (2012); Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, AM. CONST. SOC'Y 9-11 (2012), <http://ssrn.com/abstract=2163631>.

206. *Annex Med., Inc. v. Sebelius*, No. 13-1118, slip op. at 5-6 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

207. *Annex Med., Inc.*, No. 13-1118, slip op. at 5-6.

208. *Korte*, 2012 WL 6757353, at *4-5; see also *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 3-4 (6th Cir. Dec. 28, 2012) (Rogers, J., dissenting).

their company in a manner that violated their religious beliefs, and accordingly granted the injunction.²⁰⁹ In granting the injunction, the court recognized its decision, while consistent with the Eighth Circuit, conflicted with the Tenth Circuit's decision in a similar case.²¹⁰ Following the Seventh Circuit's decision in *Korte*, at least one trial court has viewed that case as establishing binding precedent requiring a trial court to preliminarily enjoin the government from enforcing the mandate when a for-profit plaintiff seeks such relief.²¹¹ Likewise, in an indistinguishable for-profit plaintiff's case, the Seventh Circuit has granted an injunction pending appeal on the basis of its *Korte* decision.²¹²

As recognized by the Seventh Circuit in *Korte*, the Tenth Circuit reached a conflicting decision in the analogous *Hobby Lobby* case. In *Hobby Lobby*, the Tenth Circuit relied upon the trial court's reasoning to deny a motion for an injunction pending appeal.²¹³ However, the court provided little rationale for why it did so. The trial court distinguished the case from other RFRA cases where courts had granted injunctions to protect "a plaintiff's own participation in (or abstention from) a specific practice required (or condemned) by his religion" because the mandate did not require the plaintiff's direct participation in a practice condemned by its religion.²¹⁴ The court asserted it would not likely "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship."²¹⁵ This decision mistakes the nature of the mandate's religious burden.²¹⁶

Justice Sotomayor, as Circuit Justice for the Tenth Circuit, also denied an application for an injunction pending appellate review in *Hobby Lobby*.²¹⁷ Justice Sotomayor reasoned that the appli-

209. *Korte*, 2012 WL 6757353, at *3-4. The court also found a likelihood of irreparable harm to the plaintiffs and that the balance of harm tipped in their favor. *Id.* at *4-5.

210. *Id.* at *3-4.

211. *See Triune Health Grp. Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. at 2 (N.D. Ill. Jan. 3, 2013).

212. *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725, at *3-4 (7th Cir. Jan. 30, 2013).

213. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012).

214. *Id.*

215. *Id.*

216. *See infra* Section IV.B.1.a.

217. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___, 133 S. Ct. 641, 643 (So-

cants had failed to make the showing—a higher showing than that required for a preliminary injunction—that it was indisputably clear that they were entitled to relief given the absence of a controlling decision by the Supreme Court and the conflict among lower courts addressing similar actions.²¹⁸ However, the opinion emphasized that the plaintiffs could continue their challenge in the lower courts and file a petition for certiorari following a final judgment.²¹⁹

Following both *Hobby Lobby* decisions, the Sixth Circuit also denied a motion for an injunction pending appeal in *Autocam*.²²⁰ The Sixth Circuit first noted that neither the Supreme Court nor any court of appeals had ever considered RFRA claims made by for-profit corporations and that the district courts that had addressed mandate challenges had reached conflicting decisions.²²¹ The court then held that the plaintiffs had not shown more than a mere possibility of relief—as required to obtain the requested relief—based on the opinion of the trial court and “the Supreme Court’s denial of an injunction pending appeal in *Hobby Lobby*.”²²²

Both the trial courts and courts of appeals have issued inconsistent opinions in the seemingly analogous cases brought by for-profit corporations alleging that the mandate violates their rights under RFRA. The conflicting court decisions virtually ensure that courts will continue to struggle with mandate cases and that appellate courts will deliver opinions in those cases. Conflicting decisions by the courts of appeals suggest that when those courts ultimately consider the merits of a mandate challenge, they might also reach opposite conclusions on whether the mandate violates RFRA. If such a split in the circuits occurs, considering the high profile of the mandate even outside the legal community²²³ and the individual nature of RFRA rights,²²⁴ the Supreme

tomayor, Circuit Justice, 10th Cir. 2012).

218. *Id.* at ___, 133 S. Ct. at 643.

219. *Id.*

220. *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012).

221. *Id.*

222. *Id.*

223. See Aram A. Schvey, *Much Ado About Nothing?: Religious Freedom and the Contraceptive-Coverage Benefit*, 39 HUM. RTS. 11, 12–13 (2013); Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, at A1; Denniston, *supra* note 108.

224. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat.

Court will probably resolve the matter. As a corollary to some courts' decisions to grant plaintiffs' motions for preliminary injunctions, a substantial number of those courts have concluded that the plaintiffs are likely to succeed on the merits of their cases. Such a decision might presage how those courts, and possibly the Supreme Court, will rule when they finally reach the merits of RFRA challenges. As the next section suggests, the mandate does violate these plaintiffs' RFRA rights, as well as the rights of nonprofit organizations that the government has not exempted from the mandate.

IV. RFRA AND THE MANDATE

A. *The Compelling Interest Test*

Notwithstanding some trial court and appellate court decisions suggesting the contrary, this section argues that the mandate violates RFRA.

Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*.²²⁵ In *Smith*, the Supreme Court held that the Free Exercise Clause of the First Amendment did not prohibit the government from burdening religious exercise through generally applicable laws.²²⁶ In doing so, the Court expressly rejected the application of the compelling interest test it established in *Sherbert v. Verner*.²²⁷ Congress responded by enacting RFRA.²²⁸ Through RFRA, Congress created a statutory right to free exercise that would be more expansive than the constitutional right to free exercise that the Court explicated in *Smith* because RFRA requires the government²²⁹ to satis-

1488, 1489 (1993) (codified at 42 U.S.C. § 2000bb-1(a)-(c) (2006)) (permitting an individual to bring suit alleging that governmental action has substantially burdened that individual's religious exercise).

225. Religious Freedom Restoration Act of 1993, § 2, 107 Stat. at 1488 (codified at 42 U.S.C. § 2000bb(a)-(b) (2006)).

226. *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

227. *Id.* at 884-85.

228. See Religious Freedom Restoration Act, § 2, 107 Stat. at 1488; 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS § 5:29 (3d ed. 2012).

229. Although RFRA does not apply to the states, it applies to the federal government. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006). Scholars have debated whether RFRA is unconstitutional as applied to federal legislation as well. See, e.g., Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free*

fy the very *Sherbert* compelling interest test *Smith* rejected.²³⁰ That compelling interest test is more rigorous than the *Smith* test.²³¹ The text of section 2 of RFRA expressly states that RFRA's purpose is to restore the *Sherbert* test and to allow a person to bring suit when the government has substantially burdened a person's free exercise of religion.²³² The legislative history of RFRA also demonstrates Congress's intention to create a statutory right to free exercise more extensive than free exercise rights under *Smith* by statutorily requiring that the government satisfy *Sherbert's* compelling interest test.²³³

The compelling interest test that RFRA adopted from *Sherbert* and *Yoder* allows the government to substantially burden religious exercise only after satisfying a very exacting standard. RFRA prevents the government from placing a substantial burden on a person's exercise of religion, even though that burden might result from a rule of general applicability.²³⁴ Nevertheless, RFRA also creates a single exception. The government may sub-

Exercise Clause, 57 OHIO ST. L.J. 65, 139–40 (1996); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1967–69, 1977–78 (2001). *But cf.* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 62 (1994) (“As applied to federal agencies, RFRA is simply an exercise of Congress’ undoubted power to control the activities of the federal government.”). A further discussion of the constitutionality of RFRA is beyond the scope of this comment; however, given the Court’s decision in *O Centro*, supporters of the mandate might challenge the constitutionality of RFRA altogether if they cannot succeed in challenging RFRA’s application to the mandate.

230. Zackeree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA’s Definition of “Substantial Burden” in the Ninth Circuit—The Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al.*, 55 S.D. L. REV. 426, 451 (2010); Arnold H. Loewy, *Rejecting Both Smith and RFRA*, 44 TEX. TECH L. REV. 231, 235 (2011); Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 470–72 (2010).

231. *Compare* 42 U.S.C. § 2000bb-1(b)(1)–(2) (requiring that the government’s action be the least restrictive means of furthering a compelling interest), *with Smith*, 494 U.S. at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability”) (citations and internal quotation marks omitted).

232. Religious Freedom Restoration Act § 2, 107 Stat. at 1488 (“The purposes of this Act are— (1) to restore the compelling interest test as set forth in *Sherbert* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons [so burdened].”).

233. *See* S. REP. NO. 103-111, at 2 (1993); H.R. REP. NO. 103-88, at 1 (1993).

234. 42 U.S.C. § 2000bb-1(a) (2006).

stantially burden a person's exercise of religion if the government's action (1) furthers a compelling government interest and (2) is the least restrictive means of doing so.²³⁵ This compelling interest test is one of the most exacting standards a court will apply to evaluate the validity of a law²³⁶ and imposes an extraordinary burden on the government to prove that the law satisfies this strict standard.²³⁷ RFRA also includes a provision allowing persons to assert a claim in a judicial proceeding and to obtain relief if the government's actions violate RFRA.²³⁸

Under RFRA's first prong, the government substantially burdens religion if it exerts substantial pressure on a person to violate his beliefs. RFRA does not define what constitutes a substantial burden. That said, the Supreme Court has addressed the substantial burden prong of the compelling interest test in a number of instances.

In *Sherbert*, the Court established that the government substantially burdens a person's religious exercise when it forces that person to "choose between following the precepts of her religion and forfeiting [government] benefits . . . and abandoning one of the precepts of her religion in order to accept [the benefits]."²³⁹ The Court, in dicta, stated that imposing a fine on account of a person's religious beliefs would also impose a substantial burden.²⁴⁰ Though that decision did not concern imposing a fine upon someone on account of her religious beliefs, the Court implied that such a fine would also impose a substantial burden.²⁴¹

235. 42 U.S.C. § 2000bb-1(b) (2006).

236. RFRA's compelling interest test is considered equivalent to strict scrutiny. *See, e.g.,* SMOLLA, *supra* note 228, § 5:9. However, one court has indicated that RFRA's test is more stringent than strict scrutiny because RFRA requires the government action be the "least restrictive means" of achieving a compelling government interest, as opposed to simply "narrowly tailored" to achieving such an interest. *See United States v. Hardman*, 297 F.3d 1116, 1129-30 (10th Cir. 2002) (citations omitted) (internal quotation marks omitted) ("[The] least restrictive means is a severe form of the more commonly used narrowly tailored test.")

237. *See City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997); Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 13 (1998).

238. 42 U.S.C. § 2000bb-1(c) (2006).

239. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

240. *Id.*

241. *See id.* The Court found that forcing the plaintiff to choose between receiving a benefit and following her religion amounted to a burden on her religious exercise. In doing so, it said that "such a choice puts the same kind of burden upon the free exercise of reli-

The Court in *Wisconsin v. Yoder* further established that a law that “compels [people], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs” also substantially burdens religious exercise.²⁴² Furthermore, government compulsion “may be indirect” and still substantially infringe upon free exercise.²⁴³

Collectively, these decisions indicate that the government substantially burdens a person’s exercise of religion when it exerts substantial pressure on that person to violate his beliefs.²⁴⁴ According to Professor Rodney Smolla, courts should apply a broad definition of substantial burden because such an understanding “is more faithful to the backdrop of judicial precedent against which RFRA was enacted, and RFRA’s legislative history.”²⁴⁵

Under the second prong, RFRA requires a court to determine whether the government’s imposition of the burden is in furtherance of a compelling interest.²⁴⁶ Though the Court has yet to establish a conclusive definition of what constitutes a “compelling interest,” the Court’s decisions provide some guidance in the context of religious exercise. According to *Yoder*, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”²⁴⁷ The government’s interest must be “paramount,” and not merely “colorable.”²⁴⁸ Moreover, even if the law furthers to some degree an “interest of the highest order,” it does not further a compelling interest if “it leaves appreciable damage to that supposedly vital interest unprohibited.”²⁴⁹ Those cases establish that the government

gion as would a fine imposed against appellant for her Saturday worship.” *Id.* The Court’s conclusion that denying a benefit was a burden based on its analogousness to imposing a fine suggests that the imposition of a fine can likewise create a burden on free exercise.

242. See 406 U.S. 205, 218 (1972).

243. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (“While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

244. *Id.* at 717–18 (“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, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”).

245. 1 SMOLLA, *supra* note 228, § 5:42 (footnote omitted).

246. 42 U.S.C. § 2000bb-1(b)(2) (2006). RFRA does not define what government interests are sufficiently compelling.

247. 406 U.S. at 215.

248. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (citation omitted) (internal quotation marks omitted).

249. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547

has the burden of proving that the mandate furthers an interest that is “of the highest order” or “paramount”—not simply colorable—and that the mandate cannot “leave appreciable damage” to that interest “unprohibited.”²⁵⁰ Under the *Sherbert* and *Yoder* tests that RFRA adopted, most legitimate government interests do not qualify as sufficiently compelling.²⁵¹

Under RFRA’s third prong, the government must show that it has furthered its compelling interest through the means least restrictive on a person’s religious exercise.²⁵² In *Sherbert*, the Court stated the government must demonstrate that no other alternative regulation existed which would serve the government’s interest without infringing upon free exercise rights.²⁵³ If courts literally applied the least restrictive means test, the government would be very unlikely to prevail in any RFRA case because the government could almost always use a conceivably less restrictive means to achieve its interests.²⁵⁴ Recognizing this reality, some courts do not require the government to refute every conceivable alternative option to the government’s chosen action; however, at a minimum, they require the government to refute alternatives presented by the party challenging the government’s action.²⁵⁵ Therefore, courts will at least require the government to refute the alternatives that the mandate’s challengers provide.

(1993) (citations omitted).

250. See *id.*; *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406.

251. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 231 (1993); cf. Elizabeth C. Williamson, *City of Boerne v. Flores and the Religious Freedom Restoration Act: The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVTL. L. 107, 145 (1997) (“With RFRA in place, religious entities and citizens can rest assured that only the most necessary interests will interfere with their religious activities.”).

252. The government bears the burden of proof as to whether the application of the substantial burden to a person is the least restrictive means of furthering the government’s interest. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b)(2), 107 Stat. 1488, 1488–89 (1993) (codified at 42 U.S.C. § 2000bb-1(b)) (requiring the government to “demonstrate[] that application of the burden to the person . . . is the least restrictive means of furthering that compelling government interest”).

253. 374 U.S. at 407 (footnote omitted) (citations omitted) (stating that it is “incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights”).

254. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 195 (1995).

255. See, e.g., *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (citations omitted).

If the mandate substantially burdens the free exercise of religion—which it does²⁵⁶—RFRA’s second and third elements place a substantial hurdle in the path of the mandate by requiring the government to show that the mandate is the least restrictive means of furthering a compelling interest. Furthermore, Congress enacted RFRA while fully aware that it was creating a rigorous test for government actions burdening religion: RFRA contains express language that the Act’s purpose was to restore the more rigorous *Sherbert* and *Yoder* tests rejected by the Supreme Court in *Smith*.²⁵⁷ Individuals have a legal right to challenge the mandate as violating their statutory rights under RFRA when the mandate substantially burdens their religious exercise.

B. The Mandate Will Fail to Satisfy RFRA’s Compelling Interest Test

The mandate cannot satisfy RFRA’s compelling interest test because it (1) places a substantial burden on the free exercise of both nonprofit organizations and for-profit corporations; (2) does not further a compelling interest because of its numerous exceptions; and (3) will not likely satisfy the least restrictive means test.

1. The Mandate Substantially Burdens the Free Exercise Of Both Nonprofit And For-Profit Corporations

The mandate imposes a substantial burden on the free exercise of both nonprofit organizations and for-profit corporations under RFRA’s compelling interest test. The current form of the mandate and the proposed rules substantially burden the free exercise of those nonprofit organizations that maintain religious objections to providing their employees with access to contraceptives coverage by forcing those organizations to violate their religious be-

256. See *infra* Section IV.B.1

257. See *supra* notes 225–30 and accompanying text. Floor debates in the Senate also suggest that senators were aware of the rigors of the compelling interest test. In the debates over whether to amend RFRA to exclude prisoners, one senator expressed his concern that the compelling interest test and its least restrictive means test would force prison officials to “set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” 139 CONG. REC. S14463-64 (daily ed. Oct. 27, 1993) (statement of Sen. Alan Simpson). After the senator’s remarks, the amendment was defeated, but the Senate voted 97-3 to pass RFRA. *Id.* at S14468, S14471.

liefs.²⁵⁸ Likewise, the mandate burdens the free exercise of for-profit corporations that oppose providing access to contraceptives for religious reasons. Though neither the Supreme Court nor the courts of appeals have definitively resolved whether a for-profit corporation can exercise religion under RFRA,²⁵⁹ the courts should apply RFRA's protections to for-profit corporations.

a. Nonprofit Organizations

The current version of the mandate places a substantial burden on nonprofit organizations' exercise of religion by forcing them to either act contrary to their sincerely held religious beliefs or incur substantial fines. The mandate's substantive provisions burden the employers' free exercise by requiring covered nonprofit organizations to provide their employees with an insurance plan that guarantees that the employees will receive access to contraceptives at no cost to them. The mandate's penalty provisions make that burden substantial.

As an initial matter, courts analyzing whether the mandate burdens a nonprofit organization's religious beliefs must defer to that organization's interpretations of its own beliefs. The Supreme Court has established that it is beyond the role of the courts to determine the validity of a purported religious belief.²⁶⁰ In essence, under RFRA, a court will defer to the plaintiff's assessment that the mandate requires conduct contrary to its religious beliefs.²⁶¹ If an employer says that facilitating contraceptive coverage alone violates the employer's religious beliefs, regardless of whether an employee ever uses those contraceptives, the court must accept the employer's version of its beliefs.²⁶²

The mandate burdens employers' free exercise by requiring them to act contrary to their beliefs. Compliance with the mandate is anathema to countless non-exempt nonprofit organizations' religious beliefs that forbid them from facilitating access to

258. See, e.g., *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *4 (E.D. Mich. Dec. 30, 2012).

259. See *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. ___, ___, 133 S. Ct. 641, 642-43 (Sotomayor, Circuit Justice, 10th Cir. 2012).

260. See *United States v. Lee*, 455 U.S. 252, 256-57 (1982).

261. See, e.g., *Monaghan*, 2012 WL 6738476, at *4.

262. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714, 715 (1981).

contraceptives.²⁶³ The plaintiffs challenging the mandate believe that the tenets of their religion forbid them from using contraceptives.²⁶⁴ Furthermore, many of these nonprofit organizations not only object to paying for contraceptive use, but also to facilitating the *mere access* to contraceptives, regardless of whether an employee uses it.²⁶⁵ Unfortunately for these organizations, the mandate requires them to provide an insurance plan that provides employees with access to the contraceptives—the very conduct their religious beliefs forbid.²⁶⁶ That requirement that the employer act contrary to its beliefs is a burden on the employers' free exercise.²⁶⁷

The amendments to the mandate the government proposed in the February 2013 proposed rules likely will not lessen the burden on nonprofit organizations opposed to facilitating access to contraceptives. Even though the only action required of an eligible organization would involve self-certification to an insurance issuer or a third party administrator,²⁶⁸ that action might still require the eligible organization to violate its religious beliefs. The proposed rules provide a degree of separation between the eligible organization and contraceptive coverage because either the insurance company offering the coverage or the third party administrator is responsible for paying for the coverage.²⁶⁹ However, that degree of separation does not lessen the burden on “eligible organizations.”

263. See, e.g., *EWTN Says New Mandate Proposal Likely Brings No Relief*, CATHOLIC NEWS AGENCY (Feb. 1, 2013), <http://www.catholicnewsagency.com/news/ewtn-says-new-mandate-proposal-likely-brings-no-relief/>.

264. E.g., Complaint at 6–7, *Eternal Word Television Network, Inc. v. Sebelius*, No. 2:12-cv-00501 (N.D. Ala. Feb. 9, 2012), 2012 WL 401609.

265. See, e.g., Comments from Anthony R. Picarello, Jr., *supra* note 2, at 12; cf. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (emphasizing that the government misunderstood a for-profit plaintiff's claim because the “religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services”).

266. See *supra* notes 135–36 and accompanying text.

267. See *Thomas*, 450 U.S. at 717–18.

268. See *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8474–75 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.131(b)(4)).

269. See, e.g., *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *2 (D. Colo. Jan. 7, 2013) (footnote omitted) (citation omitted) (nonprofit plaintiff asserting that “deliberately providing insurance that would facilitate access to [contraceptives] . . . would violate its deeply held religious beliefs, regardless of whether the insurance was paid for by [the plaintiff] or an insurer”).

The proposed rules might not alleviate the mandate's burden on an eligible organization because that organization might view itself as complicit in providing its employees with access to contraceptives. In other words, the organization might reason that its choice to provide its employees with health insurance coverage set into motion the process by which the Mandate requires third parties to provide those employees with contraceptive coverage.²⁷⁰ The United States Conference of Catholic Bishops made that argument in its comment to the ANPRM.²⁷¹ To the extent a large number of nonprofit organizations affiliated with the Catholic Church have challenged the mandate, even if the government's proposed rules accommodate a wider range of nonprofit organizations, they might not relieve the substantial burden on the religious exercise of other organizations. At least one nonprofit plaintiff, Eternal World Television Network, issued a preliminary statement that it did not believe the proposed rule provided it with any relief from the mandate.²⁷² Although in most instances dubious weight should be given to the statements of a litigant, in the RFRA context a plaintiff's statements have added weight because courts defer to that plaintiff on whether an activity violates its religious beliefs.²⁷³ Although, at this writing, the effect of the proposed rules remains unclear, there is a strong possibility that they will not alter the burden on many eligible organizations because the proposed rules have not altered the requirement that those organizations provide insurance coverage that will ultimately result in an employee receiving access to contraceptives.

Supporters of the mandate have argued that the mandate does not substantially burden these religious employers because it does not force them to use or endorse contraceptives.²⁷⁴ They argue that the mandate does not burden a religious employer's free

270. The same thing might be said when employers pay taxes that are used to fund contraceptives. *See, e.g., O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12 CV 476 (CEJ), 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012). However, the difference in that situation lies not in analysis under the burden prong, but under the other parts of the compelling interest test; *cf. United States v. Lee*, 455 U.S. 252, 257 (1982) ("Because the payment of the taxes . . . violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.").

271. Comments from Anthony R. Picarello, Jr., *supra* note 2, at 12.

272. *See EWTN Says New Mandate Proposal Likely Brings No Relief*, *supra* note 263.

273. *See Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *4 (E.D. Mich. Dec. 30, 2012).

274. *See Corbin*, *supra* note 205, at 157-60; *Gedicks*, *supra* note 205, at 9-11; *Schvey*, *supra* note 4, at 13.

exercise because the employee's independent action determines whether the employer has actually facilitated access to contraception.²⁷⁵

These critics fundamentally misunderstand the nature of the burden on nonprofit organizations' religious beliefs. Unlike what these critics suggest, no employee action is needed to burden these employers' free exercise rights. The employer is required, under the threat of substantial fines, to provide health insurance for its employees.²⁷⁶ The mandate requires that health insurance coverage includes contraceptives coverage without cost sharing.²⁷⁷ Even under the February 2013 proposed rules, that insurance coverage will result in those employees receiving access to contraceptives.²⁷⁸ Therefore, the employer has violated its religious beliefs by establishing a health insurance plan through which, directly or indirectly, the employee will have the ability to obtain contraceptives.²⁷⁹ To that extent, the decisions made by the employee are immaterial because the burden comes not just from facilitating the use of contraceptives, but also from facilitating *access* to contraceptives.

Mandate supporters have also contended that the mandate requires employers to "facilitate" access to contraceptives no more than paying any compensation to an employee facilitates that employee's access to contraceptives.²⁸⁰ They argue that health insurance coverage is simply a form of compensation.²⁸¹ If the em-

275. See, e.g., Corbin, *supra* note 205, at 157–59.

276. See *supra* notes 38–42 and accompanying text.

277. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8474 (Feb. 6, 2013).

278. See *id.* Though employees might still need to schedule a doctor's appointment or travel to a pharmacy before being able to acquire contraceptives under the employer's plan, they will not be required to pay for those contraceptives out of pocket because the mandate forbids imposing cost-sharing for required women's preventive services. The relevant consideration is, that short of actually distributing contraceptives itself the employer has facilitated access to contraceptives to the greatest extent it can by providing an insurance plan that guarantees that employees will be able to acquire contraceptives without cost-sharing once they have engaged in the minimum functional process necessary to physically acquire those contraceptives.

279. See, e.g., Colo. Christian Univ. v. Sebelius, No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *2 (D. Colo. Jan. 7, 2013); cf. Brief of Plaintiffs-Appellants at 3–4, Korte v. U.S. Dep't of Health & Human Servs., No. 12-3841(7th Cir. Jan. 28, 2013), 2013 WL 431686 (for-profit plaintiff arguing that coerced coverage of contraceptive services burdened plaintiff's religious exercise).

280. See, e.g., Gedicks, *supra* note 205, at 10–11.

281. *Id.* at 11.

ployer did not provide health insurance coverage, the employee's wages or salary would be increased, and the employee could then use that income to purchase contraceptives.²⁸² From that perspective, the mandate "facilitate[s]" contraception no more than paying an employee a salary or wages because the employee can use her wages to buy contraceptives.²⁸³

These critics are mistaken. If an employee uses her wages to purchase contraceptives, the employer has only *indirectly* facilitated access to contraceptives. The employee's choice to purchase individual health insurance or to pay directly for the contraceptives creates that employee's access to contraception. The employee's choice has broken the causal link between the employer and contraceptive access. The employer's decision to pay wages is not a sufficient condition²⁸⁴ to the employee receiving access to contraceptives because the employee must choose to use those funds to acquire access to contraceptives. Conversely, if the employer chooses to provide health insurance coverage for employees—while the mandate requires that coverage to include contraception—the employer's choice to provide a plan alone has facilitated the employee's access to contraceptives.²⁸⁵ Under the mandate, once the employer provides health insurance coverage, it is *certain* that the employee will have access to contraceptives.²⁸⁶ That same degree of certainty is not present when an em-

282. *Id.*

283. *Id.*

284. A sufficient condition of a stated proposition is a condition the occurrence of which guarantees the occurrence of the stated proposition. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (2002) (defining a sufficient condition as "a proposition having relation to the validity of another such that . . . validity of the first is sufficient evidence that the second is valid . . ."). For example, if X condition can by itself create Y outcome, X is a sufficient condition of Y.

285. See Michael Gerson, Editorial, *A Solution that Fixes Nothing*, WASH. POST, Feb. 5, 2013, at A15 ("While these institutions aren't required to pay directly for contraceptive coverage, they are forced to provide insurance that includes such coverage. It is a shell game useful only for those who want to deceive themselves.").

286. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8474 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.130(a)(1)). Though other barriers to physically acquiring contraceptives would exist such as a doctor's unwillingness to prescribe medication or an inability to travel to a pharmacy to fill a prescription for contraceptive medication, the employer has eliminated the crucial barrier of cost-sharing by the employee. The other barriers to accessing contraceptives would be present under any variation to the mandate short of requiring the employer to offer an on-premises one-stop shop for contraceptives where an employee could consult a doctor, receive a prescription for contraceptives, and have that prescription filled.

ployer simply provides an employee with wages that *might* eventually aid the employee in receiving access to contraception.

In sum, notwithstanding the arguments of mandate proponents, both the mandate and the February 2013 proposed rules place a burden on the religious exercise of non-exempt nonprofit organizations by requiring them to facilitate access to contraceptives that violate their religious beliefs. This burden is substantial because of the steep fines the government will exact for non-compliance.

The mandate's penalty provisions compel nonprofit organizations to comply with the mandate or face a fine.²⁸⁷ Although the government's proposed rules have taken a preliminary step towards accommodating more nonprofit organizations with religious objections to the mandate,²⁸⁸ the current version of the mandate does not accommodate many nonprofit organizations with religiously based objections to the mandate.²⁸⁹ If these non-exempt nonprofit organizations refuse to provide contraceptive coverage to their employees, the government will assess a \$2000 annual fine against them for each of their full-time employees and a \$100 per day per worker tax on them as well.²⁹⁰

The mandate's fine transforms its burden on free exercise into a substantial burden. The mandate's fine is the sort of coercive burden that Congress designed RFRA to eliminate. Congress enacted RFRA in order to restore the compelling interest test set out in *Sherbert* and *Yoder*.²⁹¹ As the Court emphasized in *Thomas*, the dispositive question is whether the state has placed substantial pressure on the religious adherent to violate his religious beliefs.²⁹² Importantly, the directness of the government's pressure does not control whether a burden is substantial. The Court in

287. 26 U.S.C. § 4980D(a)–(b) (Supp. V 2011).

288. See *supra* Section II.B.

289. See 45 C.F.R. § 147.130(a)(iv)(B) (2012). To qualify for the exception, an employer must satisfy four conditions: (1) Have the inculcation of religious values as its purpose; (2) primarily employ persons who share its religious tenets; (3) primarily serve persons who share its religious tenets; and (4) be a nonprofit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. *Id.*

290. See *supra* notes 38–42 and accompanying text.

291. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb(b) (2006)).

292. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).

Sherbert recognized an indirect burden can be as impermissible as a direct burden.²⁹³

The mandate's fine creates a substantial burden by putting substantial pressure on non-exempt nonprofit organizations to violate their religious beliefs. Forcing an organization to choose between paying a fine and following its religious tenets is akin to the burden of choosing between one's religious beliefs and receiving a benefit, the unconstitutional burden upon the plaintiff in *Sherbert*.²⁹⁴ The mandate does not carry criminal sanctions, like the compulsory school attendance law in *Yoder*.²⁹⁵ Nonetheless, by requiring nonprofit organizations to provide health insurance coverage for contraceptives anathema to their religious beliefs, the mandate's penalties for noncompliance pressure nonprofit organizations like Catholic Health Services of Long Island to "perform acts undeniably at odds with fundamental tenets of their religious beliefs" in order to avoid the mandate's penalties.²⁹⁶ Accordingly, the mandate's burden on those organizations' free exercise is substantial.

If the mandate remains unchanged, it will substantially burden the religious exercise of non-exempt nonprofit organizations. Even under the February 2013 proposed rules, that substantial burden will likely remain on many nonprofit organizations. It will certainly continue to burden for-profit corporations.

b. For-Profit Corporations

The mandate also substantially burdens the religious exercise rights of for-profit corporations and those corporations' owners. The mandate indisputably applies to for-profit corporations under the current regulations²⁹⁷ and February 2013 Proposed Rules.²⁹⁸

293. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (quoting *Braunfeld v. Brown*, 333 U.S. 599, 607 (1961)).

294. See *id.*

295. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

296. *Id.* at 218; see *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542 (BMC), 2012 WL 6042864, at *7 (E.D.N.Y. Dec. 4, 2012); see also Thomas C. Berg, *Religious Structures under the Federal Constitution*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES* 129, 134–35 (James A. Serritella et al. eds., 2006) ("The special solicitude for religious freedom was clearest in situations where a believer or church was forced by government to violate a specific doctrinal tenet—for example, in *Sherbert v. Verner* . . .").

297. See *Coverage of Preventive Health Services*, 45 C.F.R. § 147.130(a)(iv)(B)(4) (2012); *Bulletin*, *supra* note 72, at 3.

Therefore, an analysis of for-profit corporations' RFRA claims is, in one sense, more straightforward because it need not consider the February 2013 Proposed Rules' effects. On the other hand, that analysis is more difficult because the Supreme Court has not considered whether a for-profit corporation can exercise religion under RFRA or the First Amendment.²⁹⁹ The similarity between for-profit corporations and nonprofit organizations suggests that they can: both are entities separate from their members or owners, both incorporate for similar reasons, and both can facilitate the religious exercise of their members or owners.³⁰⁰

The for-profit corporations' RFRA claims enter a somewhat uncharted area of law. The courts hearing for-profit corporations' challenges to the mandate have recognized that those cases present difficult questions about whether a for-profit corporation can exercise religion.³⁰¹ Neither the Supreme Court nor the courts of appeals have conclusively determined whether a for-profit corporation can exercise religion.³⁰²

Unsurprisingly, courts have reached divergent conclusions on this controversial issue. The *Hobby Lobby* and *Conestoga Wood Specialties* courts have expressly held that for-profit corporations cannot bring a claim under RFRA.³⁰³ The *Hobby Lobby* court reasoned that RFRA's context suggested that a for-profit corporation was not a "person" whose religious exercise could be substantially

298. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8474 (to be codified at 45 C.F.R. § 147.130(a)(1)).

299. Exercise of religion under RFRA is coextensive with exercise of religion under the First Amendment. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5, 107 Stat. 1488, 1489 (1993) (codified at 42 U.S.C. § 2000bb-2(4) (2006)).

300. See *infra* notes 323–45 and accompanying text.

301. See, e.g., *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) ("These arguments pose difficult questions of first impression. Can a corporation exercise religion? Should a closely held subchapter-s corporation owned and operated by a small group of individuals professing adherence to uniform religious beliefs be treated differently than a publically held corporation owned and operated by a group of stakeholders with diverse religious beliefs? Is it possible to 'pierce the veil' and disregard the corporate form in this context?").

302. See *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *4 (E.D. Mich. Oct. 21, 2012) (stating that "[n]either the Supreme Court nor the Sixth Circuit has held that a for-profit corporation can assert its own rights under the Free Exercise Clause").

303. See *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291–92 (W.D. Okla. 2012) (footnote omitted) ("The same reasons behind the court's conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not 'persons' for purposes of the RFRA.").

burdened.³⁰⁴ The *Conestoga Wood Specialties* court emphasized that although the Supreme Court has extended certain constitutional rights to corporations, those decisions turned upon the history, nature, and purpose of the constitutional provision in question.³⁰⁵ The court then held that “the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the ‘purely personal’ rights . . . unavailable to a secular, for-profit corporation.”³⁰⁶ Other courts resolving for-profit corporations’ challenges to the mandate have refused to address whether a for-profit corporation can exercise religion.³⁰⁷ Still others, including the Seventh Circuit, have implicitly suggested that a corporation can exercise religion.³⁰⁸

Trial and appellate court decisions to preliminarily enjoin the government from enforcing the mandate against for-profit corporations suggest that there is at least a possibility that those corporations can exercise religion for the purposes of RFRA. Before granting a preliminary injunction, a court must find that the plaintiff is likely to succeed on the merits of its case.³⁰⁹ A number of trial and appellate courts have granted preliminary injunctions to for-profit corporations.³¹⁰ To the extent a court concludes that a plaintiff is likely to succeed on an RFRA claim, the court has implicitly determined that the plaintiff can exercise religion because a RFRA claim requires a substantial burden on religious exercise. Therefore, the trial court decisions to grant preliminary injunctive relief to for-profit corporations support a conclusion that for-profit corporations can exercise religion.

304. *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1291–92.

305. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *6 (citing *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765, 778 n.14 (1978)).

306. *Id.* at *7.

307. *See, e.g., Grote Indus. v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *4 (S.D. Ind. Dec. 27, 2012) (“[W]e decline to reach the issue of whether a secular, for-profit corporation is capable of exercising a religion within the meaning of RFRA.”).

308. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3–4 (7th Cir. Dec. 28, 2012).

309. *See supra* note 190 and accompanying text.

310. *See supra* notes 184–89 and accompanying text.

An entity's corporate status alone does not resolve the question of whether the entity can exercise religion.³¹¹ Indeed, an entire line of Supreme Court First Amendment jurisprudence relates to resolving the internal disputes within religious organizations.³¹² Furthermore, the Supreme Court has held that government activity can unconstitutionally violate the free exercise clause by suppressing the religious exercise of a nonprofit corporation.³¹³ In a related context, Justice Alito has emphasized that religious bodies serve a crucial function in protecting individuals from the power of the state.³¹⁴ In short, not only has the Court held that a nonprofit corporation can exercise religion, it has also recognized that those corporations serve an important role in protecting the individual from the state.

In another First Amendment area—free speech—the Supreme Court has extended constitutional protections to for-profit corporations. In *Citizens United*, the Supreme Court expressly held that a corporation could exercise a First Amendment right through political speech.³¹⁵ The Court underscored that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”³¹⁶ Political speech and religious exercise are not identical. A for-profit organization might have a stronger interest in political speech than religious exercise to the extent that a for-profit corporation might directly benefit from one politician's policies more than another's.

311. See *Grote Indus.*, 2012 WL 6725905, at * 3–4 (7th Cir. Jan. 20, 2013); *Korte v. U.S. Dep't of Health and Human Servs.*, No. 12-3841, slip. op. at 4 (7th Cir. Dec. 28, 2012) (“That the Kortes operate their business in the corporate form is not dispositive of their claim.”).

312. See Berg, *supra* note 296, at 145–46.

313. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525, 547 (1993) (“Petitioner . . . is a not-for-profit corporation . . .”). The *Lukumi* Court's statement that “the Church and its congregants practice the Santeria religion” supports the notion that a church as a separate entity can exercise religion. *Id.* at 525 (emphasis added).

314. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. ___, ___, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)); see also William P. Marshall, *Constitutional Coherence and the Legal Structures of American Churches*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, *supra* note 296, at 759, 770 (“Religious institutions form intermediary institutions that shield the individual from the government.”).

315. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 913 (2010).

316. *Id.* at ___, 130 S. Ct. at 913.

That said, if an organization can hold political beliefs—a proposition the Supreme Court recognized in *Citizens United*³¹⁷—there is a strong argument that a corporation can hold religious beliefs. To the extent “shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues,”³¹⁸ those same shareholders may decide that the corporation should engage in religiously motivated behavior or operate in accordance with religious principles. Similarly, religious beliefs, like political beliefs, compete with other religious and secular beliefs in public discourse.³¹⁹ To the extent religious values and beliefs form the framework of some individuals’ political beliefs, it might be difficult to disentangle religious exercise from political speech.³²⁰ That difficulty suggests that for-profit political speech might at times be indistinguishable from possible for-profit religious exercise. While the history, purpose, and nature of free exercise rights are different from the history, purpose, and nature of political free speech rights,³²¹ that conclusion alone does not necessarily indicate that a court should find that a for-profit corporation cannot exercise religion. The case for corporate political speech may be stronger than the case for corporate free exercise, given the Supreme Court’s decision in *Citizens United*; however, the Supreme Court has not conclusively resolved whether a for-profit corporation can exercise religion.³²²

The similarity between nonprofit organizations and for-profit corporations suggests that courts should resolve the question in

317. *See id.* at ___, 130 S. Ct. at 912–13.

318. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978).

319. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”); Marshall, *supra* note 314, at 761.

320. *Cf. Marshall, supra* note 314, at 767 (“Religion often gets directly involved in the public debate over issues of national importance. . . . Religious values and beliefs compose an important part of the social fabric that underlies political choice. . . . Religious beliefs, like political beliefs . . . are in competition with each other and with secular belief systems for the hearts and minds of adherents.”).

321. *See Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *6–8 (E.D. Pa. Jan. 11, 2013).

322. *See id.* at *6–7.

favor of for-profit corporations because those entities are comparable to nonprofit corporations. If a nonprofit corporation can exercise religion (a widely accepted proposition),³²³ a for-profit corporation should be able to as well because (1) both are separate entities from their members; (2) both incorporate for similar reasons; and (3) both can facilitate the religious exercise of human persons.

First, both nonprofit corporations and for-profit corporations are distinct legal entities from their members or owners. When an incorporator files articles of incorporation for a nonprofit corporation, the incorporator creates a separate and distinct legal entity.³²⁴ That legal entity, a nonprofit corporation, is separate from its members.³²⁵ As a separate legal entity, the nonprofit corporation has the authority to take a wide range of actions on its own behalf, including suing and being sued, holding property, and making contracts.³²⁶ Similarly, a for-profit corporation is an entity that is distinct from its shareholders.³²⁷ The for-profit corporation, just like the nonprofit corporation, can take a wide range of actions on its own behalf, including suing and being sued, holding property, and making contracts.³²⁸ In short, both nonprofit and for-profit organizations are similar in legal form as entities separate from their members or shareholders. Accordingly, if free exercise depends on the activity of individuals, for-profit and nonprofit corporations, as distinct entities from their members or owners, are similarly situated vis-à-vis human persons.

As distinct legal entities, nonprofit and for-profit corporations alike shield their members or owners from the corporations' liabilities and should be treated the same on that basis. Once a for-profit or nonprofit corporation is formed, any liabilities it incurs through the exercise of its powers are the liability of the corpora-

323. See *supra* notes 260, 263–66 and accompanying text.

324. See MODEL NONPROFIT CORP. ACT § 2.03 (2008). State law governs nonprofit corporations; however, the Model Nonprofit Corporation Act is useful for illustrative purposes.

325. 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 25 (perm. ed., rev. vol. 2006).

326. See MODEL NONPROFIT CORP. ACT § 3.02 (2008).

327. 1 FLETCHER, *supra* note 325, § 25 (Supp. 2012).

328. Compare MODEL NONPROFIT CORP. ACT § 3.02 (2008), with MODEL BUS. CORP. ACT § 3.02 (2011).

tion, but not its members or owners.³²⁹ One court has concluded that because the corporate form shielded a for-profit owner from liability, the owner could not exercise religion through the corporation.³³⁰ However, to the extent the corporate form likewise shields the members of nonprofit corporations from liability, that principle also would seem to extend to nonprofit corporations as well. The Supreme Court has protected a nonprofit corporation's exercise of religion and did not mention the relevance of a corporate shield.³³¹ Thus, courts should not distinguish between for-profit corporations and nonprofit corporations on the basis of either type of entity's corporate shield.

Second, individuals form nonprofit corporations and for-profit corporations for similar reasons. For example, one prominent scholar on the law of corporations has emphasized that individuals form for-profit corporations to allow for an entity to exist perpetually independent of the individuals that compose it and to limit owners' liability.³³² Individuals form nonprofit corporations for similar reasons. For example, members of an unincorporated religious association can be personally liable for the debts of the association and cannot hold property as an association.³³³ By incorporating into a nonprofit corporation, a religious organization can solve these problems and receive similar benefits as a for-profit corporation. The nonprofit corporation benefits from clear corporate structure allowing for continuity through perpetual succession; the corporation limits church members' liability; and the corporation can own property in its own name.³³⁴ The similar motivations behind using the corporate form for both nonprofit and for-profit entities undermine the contention that one entity has free exercise rights, but the other does not.

329. See MODEL NONPROFIT CORP. ACT § 6.12 (2008); MODEL BUS. CORP. ACT § 6.22 (2011).

330. See *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013).

331. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

332. See 1 FLETCHER, *supra* note 325, §§ 7, 25.

333. 2 MARILYN E. PHELAN, PHELAN NONPROFIT ORGANIZATIONS §§ 16:10, 16:11 (2010).

334. *Id.* § 16:13; see JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 243–44 (3d ed. 2011).

Admittedly, for-profit corporations and nonprofit corporations are not identical, but the important question is how they differ in relation to free exercise. Nonprofit corporations receive a host of benefits that for-profit corporations do not receive, including tax exemptions, access to certain categories of government contracts and funding, a friendly regulatory environment, and the reputational benefits associated with nonprofit organizations.³³⁵ However, it is not eminently clear why these benefits accrue in favor of increased free exercise rights for nonprofit corporations under the mandate but not for for-profit corporations. Although a nonprofit corporation can legally be formed for the specific purpose of furthering a religion,³³⁶ the February 2013 proposed rules do not require a nonprofit corporation's charter to include such a provision in order for a nonprofit organization to qualify as an eligible organization.³³⁷ Accordingly, a nonprofit corporation's charitable purpose provision provides only a small distinction between for-profit corporations and nonprofit corporations because the mandate does not require nonprofit corporations to be incorporated for a religious purpose.

The profit motive does not sufficiently distinguish a for-profit corporation from a nonprofit corporation for RFRA purposes either. The greatest seeming distinction between for-profit and nonprofit corporations is the former's profit motive. However, incorporation as a nonprofit corporation *does not* mean that corporation cannot make a profit. Many nonprofit corporations make substantial profits.³³⁸ Nonprofit status simply forbids the corpora-

335. See NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR* 15–17 (2001).

336. See Patty Gerstenblith, *Associational Structures of Religious Organizations*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES*, *supra* note 296, at 223, 226–27.

337. See 45 C.F.R. § 147.130(a)(iv)(B) (2012) (only exempting an employer that (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serve persons who share its religious tenets; and (4) is a nonprofit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code); *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8474–75 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.131(b)).

338. 1 PHELAN, *supra* note 333, § 1:1. For example, the National Collegiate Athletic Association is a nonprofit corporation. *National Collegiate Athletic Association and Subsidiaries: Consolidated Financial Statements As of and for the Years Ended August 31, 2011 and 2010*, NAT'L COLL. ATHLETIC ASSOC. 6 (2011), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/NCAA+consolidated+financial+statements>. In 2011, the NCAA had a total revenue in excess of \$845 million and total expenses of

tion from making profit distributions to members.³³⁹ The nonprofit organization's members can still receive reasonable compensation for their efforts and reimbursement for reasonable expenses they incur.³⁴⁰ Though these members may have a lesser incentive to earn profits than their for-profit counterparts, the law does not forbid nonprofit corporations from doing so. Nonprofit corporations' ability to earn profits indicates that profit-making, when combined with the long-accepted view—almost taken as a given in some instance—that they can exercise religion,³⁴¹ indicates that nonprofit corporations are not so different from for-profit corporations that the latter should be denied relief when government policies force those corporations to take actions contrary to their beliefs. Actions, which if taken by a nonprofit corporation, would entitle that corporation to relief.

Third, for-profit corporations can facilitate and protect the free exercise of individuals in a similar fashion to nonprofit corporations. The free exercise of religion often involves doing so along with other individuals.³⁴² For many individuals this associational

roughly \$778 million, generating a profit of roughly \$67 million. *See id.* at 4. Scholars have recognized that nonprofit corporations often compete in the same markets as for-profit corporations. *See* 1 PHELAN, *supra* note 333, § 1:1. Indeed, there is almost no doubt the NCAA's Division I Basketball Tournament crowds out some professional basketball viewership during that period. Though the NCAA surely will not qualify as an "eligible association," *see* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8462, the important point is that the NCAA's *corporate form alone* would not prevent it from qualifying for the accommodation. Nor would the fact that it competes with for-profit organizations. *See id.* The competition between nonprofit corporations, already aided by substantial preferences over for-profit organizations such as tax exemption, SILBER, *supra* note 336, at 15–17, and for-profit corporations indicates that the fears that allowing for-profit corporations to receive RFRA relief would tip the competitive scales decisively in favor of those for-profit corporations, *see* Gedicks, *supra* note 205, at 18, do not resolve the issue of whether a corporation, for-profit or nonprofit, can exercise religion. If nonprofit corporations' added competitive advantage through exemption from the mandate does not lessen those corporations' ability to exercise religion, that added competitive advantage to for-profit corporations should not determine whether a for-profit corporation can exercise religion.

339. *See* MODEL NONPROFIT CORP. ACT § 6.40 (2008).

340. *Id.* § 6.41.

341. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993) (stating that "Petitioner . . . is a not-for-profit corporation. . . . The Church and its congregants practice the Santeria religion."). The *Lukumi* court seemed to assume that the nonprofit corporation plaintiff could exercise religion, and did not discuss the corporate status of that church beyond the factual background information of the case.

342. *See* Edward McGlynn Gaffney, Jr., *Full and Free Exercise of Religion, in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, *supra* note 296, at 773, 804.

freedom is a crucial aspect of their faith.³⁴³ The Supreme Court has recognized that individuals often exercise religion through nonprofit corporations.³⁴⁴ Likewise, a for-profit corporation might facilitate an individual's or group's exercise of religion.³⁴⁵

The plaintiffs in *Tyndale House Publishers* and *Newland* demonstrate how a for-profit corporation might facilitate an individual's or group's exercise of religion.³⁴⁶ In *Tyndale House Publishers*, a for-profit corporation engaged in significant religious activities itself and facilitated the free exercise of the corporations' employees.³⁴⁷ The Tyndale House Publishers' articles of incorporation declared that its corporate purpose was to "minister to the spiritual needs of people, primarily thorough literature consistent with biblical principles."³⁴⁸ To that end, the corporation primarily produced Christian books including biblical commentaries and Christian fiction.³⁴⁹ The vast majority of the profits from those sales accrued to the corporation's primary owner, a nonprofit religious entity that directed much of its proceeds to Christian ministries.³⁵⁰ The production, sale, and distribution of religiously-themed literature, in furtherance of the corporation's express purpose, might be viewed as the corporation exercising religion by spreading the religious beliefs adopted in its articles of incorporation, similar to an individual spreading his own personal beliefs.

343. Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1389 (1981).

344. See, e.g., *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 525, 528 (religious nonprofit organization bringing First Amendment free exercise claim).

345. And possibly its own exercise. Though it is analytically difficult to imagine how corporations (entities sometimes described as "legal fictions") can exercise any religion of their own, this same difficulty applies equally between nonprofit and for-profit corporations. See *supra* notes 297–302 and accompanying text. If a nonprofit corporation can exercise its own religion independent of its members, the corporate form alone of the for-profit corporation does not exclude it from doing so.

346. *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *1 (D.D.C. Nov. 16, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

347. *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *2, *7.

348. See *id.* at *7 (citations omitted) (internal quotation marks omitted).

349. See *id.* at *2.

350. See *id.*

Additionally, Tyndale House Publishers facilitated its employees' exercise of religion in much the same way a nonprofit religious corporation might by providing a location where those employees could worship. By holding weekly chapel services for its employees, Tyndale House Publishers created a forum in which its employees could exercise their faith.³⁵¹ Just as a church might facilitate the free exercise of individuals by allowing them a place for communal worship and sharing of their beliefs,³⁵² Tyndale House Publishers allowed its employees to come together in order to worship, a distinctly religious activity.³⁵³

Korte illustrates how a corporation might facilitate the free exercise of its owners.³⁵⁴ In *Korte*, a closely-held, family-run, for-profit corporation and its owners sued to enjoin the government from enforcing the mandate.³⁵⁵ The corporation's owners sought to operate their corporation in accord with their Catholic beliefs and objected to the mandate's contraceptives coverage provisions.³⁵⁶ The corporation in *Korte* provided its owners with a forum through which they could practice and express their religious beliefs.³⁵⁷ Likewise, one can imagine evangelical owners forming a for-profit corporation to facilitate their practice of religion by operating as an example of Christian principles that might bring individuals into their religious fold.³⁵⁸ In short, just as a nonprofit organization might allow members to express their religious beliefs by operating an organization in accord with their faith, a for-profit corporation might provide a similar conduit for its owners.

The similarity between nonprofit corporations and for-profit corporations indicates that for-profit corporations should have

351. *Id.* at *7.

352. *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993).

353. *See* *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (internal quotation marks omitted) (“[T]he exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical act: assembling with others for a worship service . . .”).

354. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012).

355. *See id.* at *3.

356. *Id.* at *1.

357. *Id.* at *1, *3, *4.

358. *Cf.* BRUCE T. MURRAY, *RELIGIOUS LIBERTY IN AMERICA* 32 (2008) (internal quotation marks omitted) (“For evangelicals, the example Christians set in their daily lives, the help they give the needy, and the effectiveness of their proclamation of the gospel—these can bring lost souls to Christ and help fulfill the divine plan.”).

free-exercise rights coextensive with those of nonprofit corporations. If the corporate form does not preclude a nonprofit corporation from exercising religion, it should not preclude for-profit corporations from doing so. Accordingly, to satisfy the rigorous test established by RFRA, the mandate must further a compelling government interest and must be the least restrictive means of doing so.³⁵⁹ Ultimately, its myriad exemptions probably cause it to fail the second prong of RFRA test.

2. The Mandate's Exemptions Undermine the Government's Compelling Interest

The government has argued that the mandate furthers two governmental interests—promoting the public health in general and removing the barriers to economic advancement and political and social integration that have historically plagued women.³⁶⁰ Though the government probably has a compelling interest in furthering both of those interests, all things being equal, the mandate's numerous exemptions undermine those otherwise compelling interests.

The Supreme Court has stated that “a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”³⁶¹ Under this standard, if a government policy leaves appreciable damage to an otherwise vital interest unprohibited, that interest will not satisfy the compelling interest test. Furthermore, the government must also show that it has a compelling interest in the application of the rule to the *particular plaintiffs* challenging the mandate.³⁶² These cases suggest that—given the number of exemptions to the mandate—the government will have difficulty proving that it has a compelling interest in enforcing the mandate against those who object to it on religious grounds.

359. *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *10 (D.D.C. Nov. 16, 2012).

360. *See id.* at *15 (citations omitted).

361. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (alteration in original) (citations omitted) (internal quotation marks omitted).

362. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (citations omitted).

The government will not enforce the mandate against every employer's insurance plan because the mandate does not apply to small employers or grandfathered plans.³⁶³ Each of these exemptions leaves "appreciable damage" to the government's asserted interests unprohibited, and therefore reduces the likelihood that a court will find the government's interest compelling enough for the purposes of RFRA.³⁶⁴

The mandate only applies to employers with fifty or more full-time employees.³⁶⁵ In a report on health reform for small businesses, the government states that the ACA's coverage provisions will not apply to 5.8 million firms, or ninety-six percent of all employers in the United States, because those firms employ less than fifty employees.³⁶⁶ This small employer exemption prevents almost *thirty-four million* employees from being covered by the mandate.³⁶⁷ This suggests that appreciable damage to those interests is left unprohibited by the mandate, undermining the government's asserted interests. By exempting small employers from the mandate, the government has left millions of women uncovered by the mandate. None of the government's notices in the Federal Register indicate why the government's interest in promoting the public health and the equality of women would not also be furthered by covering women employed by small employers.³⁶⁸ Likewise, critics of the religious exemption have not

363. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *1, *3 (7th Cir. Dec. 28, 2012).

364. *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *17.

365. 26 U.S.C. § 4980H(c)(2) (Supp. V 2011); *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *17.

366. *Health Reform for Small Business*, THE WHITE HOUSE 1, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Apr. 18, 2013).

367. *Id.*

368. *Cf.* Brief of Plaintiffs-Appellants at 52–53, *Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-3841 (7th Cir. Jan. 28, 2013), 2013 WL 431686 (arguing that the government "cannot explain how there is a compelling need to apply the Mandate to [for-profit] [p]laintiffs when employers with fewer than fifty full-time employees (employing millions of individuals) can avoid the Mandate . . . there is no principled difference between an employer with approximately ninety full-time employees such as [plaintiff], which is subject to the Mandate, and an employer with forty-nine full-time employees, which would not be subject to the mandate"); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2188 (2012) (arguing that "[i]f the government genuinely regarded marginally increased access to contraceptives to be a compelling interest, what possible sense would it make to exempt grandfathered plans from the obligation to provide insurance coverage for contraceptives?").

addressed why the mandate should not also apply to small employers. The same state interests in promoting the public health and the equality of women that mandate proponents so vehemently argue support applying the mandate to organizations regardless of an organization's religious views,³⁶⁹ would seem to weigh equally in favor of applying the mandate to small employers.

The grandfathered plan exception further undermines the government's purportedly compelling interest by leaving millions more employees outside the mandate's coverage requirements. Under the government's own mid-ranged estimates, "98 million individuals will be enrolled in grandfathered group health plans in 2013."³⁷⁰ Even if the number of individuals in grandfathered plans decreases as plans lose their grandfathered status, millions of individuals will remain uncovered by the mandate solely on the grounds that their plans are old enough to be grandfathered. Though there are pragmatic reasons to exclude those plans from the mandate's requirements, such as "easing the transition of the healthcare industry into the reforms . . . by allowing for gradual implementation," the reasonableness behind the government's decision to exempt these plans does not alter the fact that the individuals covered by those plans will not receive the mandate's protections.³⁷¹ Accordingly, to the extent the mandate does not apply to these plans, the government's interest in promoting the public health and the equality of women is not furthered through grandfathered plans. By grandfathering a significant number of plans, the government has undermined its compelling interest in promoting the public health and the equality of women by leaving unprohibited plans that damage those interests.

Plaintiffs have already seized upon these factors to argue that the mandate does not further a compelling interest. For example, in a brief submitted to the Seventh Circuit, the plaintiffs in *Korte*

369. See, e.g., Corbin, *supra* note 205, at 160–62.

370. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,732 (July 19 2010).

371. See *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *9 (E.D. Mich. Oct. 21, 2012). However, the government argued that it would be perverse to discourage Congress from considering the practical effects of an enactment by requiring it to enforce laws immediately to preserve compelling interest status. See *id.*

argued that the grandfathered plan exemption “leaves appreciable damage to the government’s asserted interests untouched and indicates the lack of any compelling need to apply the [m]andate to [the] [p]laintiffs.”³⁷² Likewise, the plaintiffs in *Sharpe Holdings* underscored their view that the government could not meet its burden under RFRA because the small employer and grandfathered plan “exceptions provided by the Act and mandate undermine the government’s claim that such interests are compelling.”³⁷³ Courts have been somewhat receptive to those arguments.³⁷⁴

A number of district courts have preliminarily enjoined the government from enforcing the mandate and, in doing so, have recognized that plaintiffs will likely prevail on their RFRA claims because the government has undermined its otherwise compelling interests by exempting too many plans from the mandate.³⁷⁵ These courts have concluded that the government will likely fail to meet its burden of showing that it has a compelling interest in enforcing the mandate against the organizations that have raised RFRA challenges.³⁷⁶ These courts are correct because the government has left appreciable harm to the interests it has sought to further through the mandate by exempting small employers and grandfathered plans, and in doing so, has rendered its interests no longer compelling.

The government will probably have an even greater difficulty demonstrating that the mandate furthers a compelling interest because many employers already provide coverage for contraceptives. Under the Court’s decision in *Yoder*, for the government to satisfy the compelling interest test, it must show that its interests are “not otherwise served.”³⁷⁷ Even a decade before the mandate, roughly nine out of ten employer-sponsored health insur-

372. Brief of Plaintiffs-Appellants at 51, *Korte*, 2013 WL 431686.

373. *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012).

374. *Id.*; see also *Legatus*, 2012 WL 5359630, at *10; *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635 (RBW), 2012 WL 5817323, at *17 (D.D.C. Nov. 16, 2012).

375. See, e.g., *Sharpe Holdings*, 2012 WL 6738489, at *5–6; *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2–5 (7th Cir. Dec. 28, 2012).

376. See, e.g., *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *5–6, *8 (E.D. Mich. Dec. 30, 2012); *Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *18; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297 (D. Colo. 2012).

377. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

ance plans covered the full-range of contraceptive measures.³⁷⁸ Furthermore, the number of individuals covered by contraceptives has tended to increase over time.³⁷⁹ These two factors combine to suggest that at least ninety percent of employer health insurance plans covered contraceptives before the government promulgated the mandate. Accordingly, the mandate will only marginally increase the number of plans that cover contraceptives because most plans already do. Moreover, by exempting grandfathered plans and small employers from the mandate, the government has even further reduced the likely number of individuals who will gain access to contraceptive coverage solely because of the mandate. The marginal size of the mandate's increase in contraceptive coverage might indicate that interest is "otherwise served" without the mandate, and therefore, it reduces the likelihood that the mandate furthers a compelling government interest.³⁸⁰

In short, the number of exceptions to the mandate and the limited increase in contraceptive coverage the mandate will enable make it unlikely that the government will be able to overcome the high barrier imposed by RFRA's compelling interest test.

3. The Least Restrictive Means Prong: A Closer Question

Assuming the government can show that it has a compelling interest in promulgating the mandate—a dubious proposition—the government will then have to show that the mandate is the least restrictive means of achieving that interest.³⁸¹ To make this showing, the government must, at minimum, prove that the alternative methods the opposing parties have presented are not viable.³⁸² If the government can meet that burden, a court will find that the mandate meets the least restrictive means prong.³⁸³ At this stage, most courts have not determined whether the

378. Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 72, 78 (2004).

379. *See id.* at 72.

380. *See supra* notes 246–51 and accompanying text.

381. *See supra* Section IV.A.

382. *See supra* notes 253–55 and accompanying text.

383. *See United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011).

plaintiffs will likely be able to succeed on the least restrictive means prong of the RFRA compelling interest test because they have either concluded that the government lacks a compelling interest to support the mandate or that the plaintiffs' have not made the threshold showing that the mandate substantially burdens their religious exercise.³⁸⁴ Therefore, an assessment of whether the mandate meets the least restrictive means prong is speculative at best. Nevertheless, a few words can be said about whether the mandate is less restrictive than some of the alternatives put forward by those contesting the mandate.

RFRA plaintiffs have alleged two prominent alternatives to the mandate: the government could offer incentives to employers who provide the contraceptive coverage—as opposed to punishing those that do not provide the services—or the government could provide the contraceptive services directly.³⁸⁵ One scholar has made similar suggestions.³⁸⁶ The mandate is almost certainly more restrictive than those two proffered alternatives.

If the government simply incentivized providing contraceptives, the government would place a lower burden on religious objectors than under the mandate. Rewarding those organizations that provided contraceptives, as opposed to punishing those that did not, would arguably eliminate the burden on the organizations that refused to provide the contraceptives because it would lack the coercive threat of fines imposed under the current mandate system. Religious groups might remain displeased with the government's decision to promote contraceptive coverage; however, their free exercise would not be burdened because they would not be required to themselves facilitate or encourage contraceptive coverage.

384. See, e.g., *Grote Indus. v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012) (concluding that the court need not evaluate whether the plaintiffs were likely to succeed under the compelling interest test because plaintiffs were not likely to be able to show a substantial burden on their free exercise); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *18 (D.D.C. Nov. 16, 2012) (determining that plaintiffs were likely to succeed on establishing that the government lacked a compelling interest and therefore not considering the least restrictive means prong).

385. See, e.g., *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6739476, at *6 (E.D. Mich. Dec. 30, 2012).

386. See Whelan, *supra* note 368, at 2186.

Likewise, if the government itself provided contraceptive coverage to the employees of religious objectors, the government would diminish the burden on those objectors. The employer might be dissatisfied with the government's policy, but the provision of contraceptive coverage would not impinge upon the employer's religious beliefs because the government would be responsible for providing the coverage instead of the employer.

Though, at first glance, the challengers' proffered alternatives are less restrictive than the mandate, it is not clear that they would be *viable* alternatives.³⁸⁷ The government can satisfy RFRA's least restrictive means prong if it can refute these alternatives.³⁸⁸ The additional number of individuals covered under a system that incentivized contraceptive coverage, as opposed to the mandate's sanctioning non-coverage, might not be significant. Most insurance plans already cover contraceptives.³⁸⁹ To the extent that plans without contraceptive coverage do not provide that coverage because of religious opposition by the employer, the number of religiously-motivated employers who would cover contraceptives in response to government incentives might be fairly low depending upon the strength of those employers' religious convictions. Furthermore, if the incentives are paid out to all those who cover contraceptives, including the ninety percent of plans that do currently, the cost of those incentives might make them prohibitively expensive. On the other hand, the government might make the incentives minimal; however, employers with strong religious convictions would not likely respond to such a minimal incentive. The incentive alternative might not be able to achieve as significant an increase in contraceptive coverage as the mandate, and therefore might be an alternative the government can refute.

The most common alternative to the mandate plaintiffs have proposed is government provision of, or funding for, contraceptives.³⁹⁰ The plaintiffs have a decent argument that the govern-

387. See *supra* notes 254–55 and accompanying text.

388. See *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011).

389. See *Sonfield et al.*, *supra* note 378, at 72, 78.

390. See, e.g., *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 3012); *Monaghan*, 2012 WL 6738476, at *6 (E.D. Mich. Dec. 30, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

ment itself could provide contraception coverage to employees of employers with religious objections to the mandate because the government already provides contraceptive coverage to some women: In 2006, more than nine million women received publicly-funded contraception coverage.³⁹¹ Presumably, the government would impose less of a burden on some employers' religious exercise by expanding this public coverage, as opposed to mandating that the employer provide a plan covering contraceptives.³⁹² Indeed, one court has already concluded that the government was unlikely to meet its burden of refuting this alternative.³⁹³ That court emphasized that "the current existence of analogous programs heavily weighs against" the government's argument that it could not provide coverage for contraceptives as an alternative to requiring employers to do so.³⁹⁴ That court's decision indicates that at least some courts will probably find that the mandate fails RFRA's least restrictive means prong when they finally reach the merits of these cases.

Nonetheless, although the government already funds contraceptive coverage for many women, the government might be able to refute this alternative to the mandate by arguing that it would be too expensive to expand that coverage. In 2010, public expenditures on contraceptive coverage totaled \$2.37 billion, eighty-eight percent of which the federal government funded.³⁹⁵ Expanding federally-funded contraceptive coverage would require an increase in this federal funding. Whether the government could afford such an increase is a tough question. The United States has witnessed a number of fiscal policymaking battles in recent years, which are likely to continue into 2013.³⁹⁶ Moreover, Congress is

391. See *Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INST. (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html.

392. Though the mandate does not require anyone to provide contraceptives, it fines those that do not, creating an effective requirement that certain employers provide coverage. See *supra* Section II.A.

393. *Newland*, 881 F. Supp. 2d at 1289–99.

394. *Id.* at 1299.

395. See Adam Sonfield & Rachel Benson Gold, *Public Funding for Family Planning, Sterilization and Abortion Services, FY 1980-2010*, GUTTMACHER INST. 5, 8 (Mar. 2012), available at <http://www.guttmacher.org/pubs/Public-Funding-FP-2010.pdf>.

396. See Damian Paletta, *Fresh Budget Fights Brewing—Markets Breathe Sigh of Relief After Fiscal Clash, but Tax-and-Cut Battles Loom*, WALL ST. J., Jan. 3, 2013, at A1.

sharply divided on the mandate.³⁹⁷ In the face of severe budgetary constraints and given the controversy associated with contraceptives, it is unlikely that policymakers would agree to increase federal funding for contraceptives as an alternative to the mandate.

The government will bear the burden of refuting the alternatives to the mandate that the plaintiffs have offered.³⁹⁸ Though the government might be able to raise questions about whether those alternatives are viable, it is not clear how courts will resolve those questions at this time. Nevertheless, by placing the burden of proof on the government, RFRA will make it more difficult for the government to satisfy RFRA's least restrictive means element.³⁹⁹ At least one court has determined that the government will not likely be able to meet its burden under the compelling interest test,⁴⁰⁰ providing an indication of the important role the burden of proof will play in future RFRA challenges. When courts eventually address the merits of plaintiffs' RFRA claims against the mandate, the fact that the government has the burden of proof in disproving the alternatives presented by the plaintiff might be determinative when there is conflicting evidence of whether an alternative design is feasible. In such a case, even if the government can show that the mandate furthers a compelling interest, the plaintiffs might win their case because the government cannot satisfy the least restrictive means prong.

V. CONCLUSION

This comment has attempted to provide an introduction to the mandate and the legal challenges to it.

At this stage, uncertainty surrounds the mandate. Only one district court has adjudicated the merits of a claim that the mandate violates RFRA, and the courts of appeals have yet to address the substance of the mandate. Furthermore, the contours of the mandate might change as a result of the administrative process

397. See Erik Eckholm, *Poll Finds Divisions over Requiring Coverage*, N.Y. TIMES, Mar. 2, 2012, at A15.

398. See *supra* notes 254–55 and accompanying text.

399. See *supra* notes 254–55 and accompanying text.

400. See *supra* note 376 and accompanying text.

that the government initiated through the ANPRM and the February 1, 2013 proposed rules. Nonetheless, courts will undoubtedly be forced to further grapple with the mandate and its validity because the mandate implicates divisive issues, religious freedom and women's access to contraceptives. Both the U.S. Senate and everyday Americans are closely split on whether the government should impose the mandate.⁴⁰¹ The high-profile debate over the mandate and the staunchness of the mandate's supporters and detractors create a strong possibility that cases challenging the mandate will remain on the dockets of courts throughout the United States. Given the prominence of the issue, if the courts continue to reach conflicting decisions over the mandate, it would not be surprising if the Supreme Court decided to resolve the issues the mandate has created.⁴⁰²

One scholar has suggested that the question for policymakers is which harm they should avoid in balancing increasing access to contraceptives with religious liberty.⁴⁰³ However, Congress has already made that determination. Under RFRA, religious liberty must win out in any battle between policies if the competing policy cannot satisfy the compelling interest test. The mandate is an example of one such competing policy. As this comment has argued, the mandate infringes upon the religious freedom of both nonprofit and for-profit corporations alike, and therefore, it must satisfy the compelling interest test. Though the Court has not yet held that a for-profit corporation can exercise religion, the similarities between for-profit corporations and nonprofit corporations suggest that the former entities can exercise religion as much as the latter. Mandate litigation remains in its infancy. Nevertheless, even at this stage, it is apparent that the government will not be able to satisfy RFRA's exacting standard. The number of exemptions to the mandate will make it difficult for the government to prove that it furthers a compelling interest, and the least restrictive means test will only add to this difficulty. Striking down the mandate will undoubtedly lead to great consternation among its supporters. Nonetheless, the mandate violates RFRA

401. See Eckholm, *supra* note 397.

402. See, e.g., Bronner, *supra* note 223; Denniston, *supra* note 108; Louise Radnofsky & Jess Bravin, *Latest Birth Control Offer 'Falls Short,'* WALL ST. J., Feb. 8, 2013, at A3.

403. Wilson, *supra* note 126, at 1505.

in its current form. If the mandate's supporters have a quarrel with anyone, it should be with Congress for enacting RFRA, and not those who have exercised their rights under that statute. RFRA has stacked the deck against the mandate. It cannot surmount that obstacle.

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