

**STANDING THEIR GROUND: CORPORATIONS’
FIGHT FOR RELIGIOUS RIGHTS IN LIGHT OF
THE ENACTMENT OF THE PATIENT
PROTECTION AND AFFORDABLE CARE ACT
CONTRACEPTIVE COVERAGE MANDATE**

Comment*

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I.	A CALL TO ARMS: THE PPACA CONTRACEPTIVE COVERAGE MANDATE IGNITES A BATTLE OVER CORPORATE RELIGIOUS RIGHTS	1042
II.	SURVEYING THE FIELD: THEORIES OF CORPORATE PERSONHOOD	1044
III.	ASSEMBLING THE TROOPS: A BRIEF OVERVIEW OF CORPORATE CONSTITUTIONAL RIGHTS	1047
IV.	FORWARD MARCH: <i>NEWLAND</i> AND THE CONTRACEPTIVE MANDATE	1048
	A. <i>What Is the Contraception Mandate?</i>	1049
	B. <i>Religious Exemptions</i>	1050
	C. <i>Newland v. Sebelius</i>	1051
V.	IN THE TRENCHES: RELIGIOUS CHALLENGES TO THE PPACA	1053
	A. <i>RFRA Challenges</i>	1054
	B. <i>First Amendment Challenges</i>	1056
	1. <i>Free Exercise Objections</i>	1056
	2. <i>Establishment Clause Objections</i>	1057
VI.	THE LINE IN THE SAND: THE DIVISION OVER CORPORATE RELIGION	1058
	A. <i>Arguments Against Extending Corporate Religion</i>	1059
	B. <i>Arguments for Extending Corporate Religion</i>	1060
	C. <i>The Way Courts Are Leaning</i>	1063
VII.	TIME FOR A CEASE-FIRE: ALTERNATIVES TO THE CONTRACEPTION MANDATE.....	1065
	A. <i>Broadened Religious Exemption</i>	1066
	B. <i>Government Provision of Free Birth Control</i>	1069
VIII.	CONCLUSION.....	1071

* Selected as the Book 4 Outstanding Student Article by the Volume 45 Board of Editors. This award was made possible through the generous donations of the 1980 Board of Editors and BARBRI.

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I. A CALL TO ARMS: THE PPACA CONTRACEPTIVE COVERAGE MANDATE
IGNITES A BATTLE OVER CORPORATE RELIGIOUS RIGHTS

Crafty Creations opened for business in the garage of John Jones.¹ Mr. Jones opened the business with a few arts and crafts and a vision of operating Crafty Creations in a manner consistent with his Christian beliefs. More than forty years later, Crafty Creations has grown into a national conglomerate, while remaining committed to the Christian faith by donating millions of dollars to worldwide ministries, closing its doors on Sundays, and providing spiritual counseling for employees. Because Crafty Creations holds a fundamental belief that life begins at conception and should not be prevented, Crafty Creations does not provide coverage for contraceptive services in its insurance plans. Due to recent legislation, however, Mr. Jones's vision may be much more costly than he initially realized.

In 2010, Congress passed the Patient Protection and Affordable Care Act (PPACA), which includes a provision that requires businesses to provide coverage for contraceptive services in their insurance plans at no cost.² This legislation mandates that corporations such as Crafty Creations either provide coverage or suffer financially, imposing upwards of \$1 million a day in penalties.³ Although the government eventually promulgated a set of exemptions for "religious employers," these exemptions do not cover for-profit businesses and only provide protection to a very limited group of organizations—namely, churches.⁴ Corporations across the country are currently confronting this governmental attack on their religious faith, and until courts acknowledge that these faith-based corporations are entitled to religious protection, many more businesses will suffer.⁵

Prior to the PPACA's implementation, courts had not considered whether corporations are entitled to religious protection.⁶ The court in *Newland v. Sebelius* was the first to pose the question while simultaneously leading the way by issuing injunctive relief against the PPACA's

1. Crafty Creations is a fictional corporation created by the author for the purposes of this Comment, and the story of Crafty Creations and John Jones illustrates details similar to the accounts of the plaintiffs in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

2. See *infra* Part IV.A.

3. See, e.g., Verified Complaint paras. 142-44, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. CIV-12-1000-HE) [hereinafter *Hobby Lobby Verified Complaint*]. If Hobby Lobby did not offer the mandated contraception drugs and services by January 1, 2013, it would begin incurring penalties of \$1.3 million per day. *Id.* If, instead, it chose to drop employee insurance altogether, it would face penalties of \$26 million per year. *Id.*; see *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012).

4. See *Women's Preventive Services: Required Health Plan Coverage Guidelines*, HRSA, <http://www.hrsa.gov/womensguidelines> (last visited Apr. 18, 2013).

5. See, e.g., *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

6. See *Newland*, 881 F. Supp. 2d at 1296.

enforcement on a faith-based Colorado corporation.⁷ After *Newland*, many corporate plaintiffs in need of immediate relief began petitioning courts across the country to extend religious protection to corporations.⁸ While courts have yet to address whether corporations can exercise religion, the growing number of injunctions issued against the PPACA's enforcement indicates that courts are willing to acknowledge the idea of corporate religion.⁹

This Comment explores the disputes that have arisen following the implementation of the PPACA contraceptive coverage mandate and asserts the necessity for extending religious rights to for-profit corporations that must currently choose to either violate their religious beliefs or face penalization. Part II provides an overview of the development of corporate personhood,¹⁰ and Part III discusses the Supreme Court's extension of various constitutional rights to corporations.¹¹ Next, Part IV details the development of the controversy surrounding the contraception coverage mandate and details a case that is instructive as to courts' willingness to extend religious rights to corporations.¹² Part V introduces the religious challenges that have been initiated against the mandate.¹³ Part VI details how a corporation exercises religion and asserts that the Supreme Court should extend religious free exercise rights to corporations under the First Amendment and the Religious Freedom Restoration Act (RFRA).¹⁴ Finally, in the absence of any final decision by courts as to whether corporations are entitled to religious protection, Part VII recommends either that Congress broaden the religious employer exemption to adequately cover religious, for-profit corporations or, in the alternative, that the government provide free birth control by a variety of suggested methods, which will protect the religious corporations currently facing millions of dollars in penalties for violating the PPACA mandate.¹⁵

7. See *id.* at 1296, 1299.

8. See, e.g., Plaintiffs' Motion for Preliminary Injunction and Opening Brief in Support at 15, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. CIV-12-1000-HE) [hereinafter *Hobby Lobby Plaintiffs' Motion*].

9. See, e.g., *Newland*, 881 F. Supp. 2d at 1296-97.

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part VI. In the 2007 decision of *City of Boerne v. Flores*, the United States Supreme Court held that RFRA was unconstitutional as applied to the states; however, RFRA is still applicable to the federal government. *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997); see *Newland*, 881 F. Supp. 2d at 1296.

15. See *infra* Part VII.

II. SURVEYING THE FIELD: THEORIES OF CORPORATE PERSONHOOD

An examination of how and why courts have extended other constitutional rights to corporations assists in understanding how the First Amendment Free Exercise and Establishment Clauses and RFRA might protect corporations. After all, “corporations” do not appear among the “[n]ations,’ ‘states,’ ‘people,’ ‘citizens,’ and ‘tribes’” that are included in the text of the Constitution.¹⁶ Corporations, however, currently claim uniformity with natural persons when it comes to some constitutional rights.¹⁷ The idea that corporations are entitled to the same legal status and protections created for humans is often labeled “corporate personhood.”¹⁸ Under the law, “a corporation is an artificial person; its personhood status is a legal fiction we employ as a convenience to facilitate commerce.”¹⁹ Generally, this theory of corporate personhood falls into three categories: the artificial entity theory, the aggregate entity theory, and the real entity theory.²⁰

The artificial person theory, also referred to as the concession theory, was the first theory to prevail in America in the first half of the nineteenth century.²¹ This theory stood for the proposition that the corporation came into existence only after state grant or concession, and thus, the corporation was a fictional being that did not exist until sanctioned by the law.²² During the time that the artificial person theory prevailed, special acts of the state legislature granted corporate charters on a case-by-case basis, and legislatures only granted charters to enterprises that operated for some public good or benefit.²³ Thus, legislatures played an important role in

16. See Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 908-09 (2011) (footnotes omitted) (quoting various provisions of the United States Constitution).

17. See *id.*

18. See *Corporate Personhood*, RECLAIM DEMOCRACY, <http://reclaimdemocracy.org/corporate-personhood/> (last visited Apr. 18, 2013).

19. Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 214 (2011) [hereinafter Ripken, *Corporate First Amendment Rights*].

20. See Miller, *supra* note 16, at 911.

21. See Ripken, *Corporate First Amendment Rights*, *supra* note 19, at 218. This theory was also labeled the concession theory under the idea that “corporations are legally formed when the state approves their charters, and therefore, the personhood of corporations is merely a government concession.” *Id.*

22. See *id.* In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall made the classic statement of the following theory: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it” *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)) (internal quotation marks omitted).

23. See *id.* at 219 (“[T]he corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.” (Brandeis, J., dissenting) (alteration in original) (quoting *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933)) (internal quotation marks omitted)).

creating corporations and delineating their actions, underscoring the view that the government controlled corporations.²⁴

The corporation, however, was not completely denied constitutional protection under this theory.²⁵ *Dartmouth College* concluded that the Contracts Clause of the Constitution protected corporations because otherwise-private corporations would be unable to maintain possession and protection over the property that motivated their formation.²⁶ Under the artificial theory, however, no corporation could claim to possess rights such as free speech or privacy.²⁷ By the mid-nineteenth century, general incorporation statutes replaced special chartering, and the idea that corporations existed only by concession of the state was replaced with the more modern belief that the corporation owed its existence to the people who formed the corporation.²⁸

During the last half of the nineteenth century, an alternate view of the corporate person arose—the aggregate theory.²⁹ This theory emphasized the importance of human action with regard to the formation of the corporation, underscoring the idea that a corporation could not be formed without the action and agreement of humans.³⁰ Additionally, this theory recognized that corporate action would never occur without the action of the people who made up the corporate entity.³¹ Therefore, this theory viewed the corporation as more of a collection, or aggregate, of individuals who utilized the corporation for their mutual benefit.³² Thus, under this theory, the corporation had no existence or identity separate from the natural persons who composed the corporation.³³ The rights and duties of a corporation became the rights and duties of the people who composed the corporation.³⁴

24. *See id.*

25. *See Miller, supra* note 16, at 917; *see also Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636 (explaining that the corporation is an artificial being existing only by operation of law). *See generally* U.S. CONST. art. I, § 10, cl. 1 (delineating the Contracts Clause, which prohibits states from enacting laws that retroactively impair contract rights).

26. *See Miller, supra* note 16, at 917.

27. *See id.* (“Those rights were reserved for human beings. . . . [L]iberty means ‘the liberty of natural, not artificial, persons.’” (quoting Justice Harlan in *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906))). *Riggs* held that the “liberty” referred to in the Fourteenth Amendment did not apply to an insurance company. *Riggs*, 203 U.S. at 255.

28. *See Ripken, Corporate First Amendment Rights, supra* note 19, at 220.

29. *See id.* at 221.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.* Under this theory, “[t]he entity is ‘owned, managed, and administered by people, [and] its so called actions are but manifestations of actions by real persons.’” *Id.* (second alteration in original) (quoting Donald R. Cressy, *The Poverty of Theory in Corporate Crime Research*, in 1 *ADVANCES IN CRIMINOLOGICAL THEORY* 31, 36 (William S. Laufer & Freda Adler eds., 1989)).

34. *See id.* The United States Supreme Court implicitly relied on this view when it held that, under the Fourteenth Amendment, corporate property could not be taxed differently from an individual’s

Finally, at the turn of the twentieth century, the real entity theory became the newest way to describe the corporate person.³⁵ This theory conceptualized the corporation as an entity separate from its owners as well as independent of the state.³⁶ The corporation was viewed as possessing a “separate identity greater than the sum of its constituencies.”³⁷ The real entity theory rejected the concession theory’s view that the corporation was dependent on the state for its existence and instead recognized that the corporation existed both prior to and separate from the state.³⁸ The corporation was viewed as distinct from those individuals who formed the corporation, and the real entity theory stood for the proposition that a corporation could have its own will and pursue its own goals separate from that of each individual member.³⁹ Under this approach, the corporation also assumed rights and liabilities independent of its shareholders.⁴⁰

Together, these three theories compose the development of corporate personhood and provide insight into the legal personhood of corporations.⁴¹ On a theoretical level, this development has little, if any, impact on a corporation’s legal rights. When viewed in accordance with the law, however, the idea of corporate personhood played an important role in the development of extending constitutional protection to corporations because “[c]ourts have used all three theories to support their decisions, sometimes invoking multiple theories in a single case.”⁴² As such, an examination of the courts’ extension of constitutional rights to corporations aids in understanding the ability of a corporation to exercise religion.

property because the corporation’s property was essentially the individual shareholders’ property and should be similarly protected. *Id.* (citing *Cnty. of Santa Clara v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886)).

35. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 109 (2009) [hereinafter Ripken, *Corporations Are People Too*].

36. See Miller, *supra* note 16, at 921-22; see also Ripken, *Corporations Are People Too*, *supra* note 35, at 109.

37. Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 *SETON HALL L. REV.* 879, 902 (2012).

38. Ripken, *Corporations Are People Too*, *supra* note 35, at 112.

39. *Id.* “It is relevant that we regard corporations as persons in our ordinary thinking and discourse. . . . We say . . . that Nike *denied* that it *knew* about the wrongdoing, Exxon *believes* it *treats* its employees fairly, AOL *signed* a merger agreement with Time-Warner, and the Disney Channel *loves* young audiences.” *Id.* at 115.

40. See Miller, *supra* note 16, at 922.

41. See Ripken, *Corporations Are People Too*, *supra* note 35, at 118.

42. See *id.* (citing *Hale v. Henkel*, 201 U.S. 43, 70 (1906), *overruled in part on other grounds by* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964), *abrogated by* *United States v. Balsys*, 524 U.S. 666 (1998)). In *Henkel*, the Supreme Court relied on the artificial person theory to hold that corporations are not entitled to Fifth Amendment protection against self-incrimination. *Id.* However, the Court also applied the aggregate theory to decide that corporations are protected from unreasonable searches and seizures under the Fourth Amendment. See *id.* at 118 n.75.

III. ASSEMBLING THE TROOPS: A BRIEF OVERVIEW OF CORPORATE CONSTITUTIONAL RIGHTS

For more than a century, courts have sought to answer the question of whether corporations are entitled to constitutional protection.⁴³ Although the text of the Constitution never mentions the word “corporation,” the Supreme Court has held that corporations sometimes fall within a category of protected entities.⁴⁴ In a series of cases, the Supreme Court and circuit courts have held that corporations are entitled to constitutional protections, and as a result, the Supreme Court has invalidated laws that infringe on these corporate rights.⁴⁵ The constitutional protections previously extended to corporations are summarized best in the following paragraph:

Today, corporations possess some First Amendment free speech and press rights, some rights of expressive association, and (perhaps) some right to free exercise. They enjoy Fourth Amendment rights against unreasonable searches but only a limited right to privacy. Corporations possess Fifth Amendment rights against double jeopardy and takings but no rights against self-incrimination. The Sixth Amendment guarantees corporations a right to trial by jury and to counsel but not a right to appointed counsel. Corporations are “citizens” for purposes of Article III jurisdictional powers but not “citizens” for purposes of the Privileges or Immunities Clause. Corporations are “persons” with Fourteenth Amendment rights to equal protection and procedural due process and some, but not all, of the incorporated Bill of Rights. Corporations are also “persons” who may spend money to influence voters, but they cannot themselves become voters under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments.⁴⁶

43. See Ripken, *Corporate First Amendment Rights*, *supra* note 19, at 215.

44. See Miller, *supra* note 16, at 909.

45. See Ripken, *Corporate First Amendment Rights*, *supra* note 19, at 215 (explaining that the Supreme Court first extended constitutional protection to corporations for purposes of the Fourteenth Amendment in *County of Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886), which held that a private corporation has rights to equal protection and, thus, its property cannot be taxed differently from the property of individuals); *see, e.g.*, *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (holding that corporations are persons for Fourteenth Amendment purposes); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (holding that corporations are entitled to the Fourteenth Amendment guarantees of due process of law and equal protection).

46. Miller, *supra* note 16, at 910-11 (footnotes omitted) (citing cases in which the Supreme Court and various circuit courts have discussed corporations’ constitutional rights); *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 315-16 (2010) (holding that corporations possess the First Amendment rights to free speech and freedom of the press); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) (finding that corporations have First Amendment rights); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977) (finding that corporations have Fifth Amendment rights against double jeopardy); *Ross v. Bernhard*, 396 U.S. 531, 536, 542 (1970) (extending to corporations the Seventh Amendment right to a trial by jury).

None of these cases, however, delineate a standard doctrine for courts to follow when deciding whether corporations are entitled to constitutional protection.⁴⁷ The Court came closest to establishing a standard test in *First National Bank of Boston v. Bellotti*, in which Justice Powell extended “[c]ertain ‘purely personal’ guarantees” to corporations.⁴⁸ Justice Powell explained that whether a constitutional right is “‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”⁴⁹ This test, however, has yet to be applied in subsequent cases.⁵⁰ In fact, the Supreme Court often asserts that corporations have constitutional rights but fails to establish a test for determining which rights to extend.⁵¹ Given that the Court has yet to establish a test for determining corporate constitutional protections and has not discussed whether a corporation can exercise religion, precedent remains a strong argument for extending the bounds of constitutional rights to corporations.⁵² An examination of the factual and legal developments that gave rise to the question of corporate religion provides context for why courts should extend religious protection to corporations.

IV. FORWARD MARCH: *NEWLAND* AND THE CONTRACEPTIVE MANDATE

Before the government initiated the comprehensive changes to the healthcare industry that were incident to the implementation of the PPACA, the question of whether a corporation could exercise religion had not yet been addressed by the courts.⁵³ Prior to the PPACA’s enactment, corporations could abstain from providing insurance coverage for contraceptive services without penalization; however, the PPACA included a mandate that required non-exempt employers who met certain qualifications to provide coverage for these services in their insurance plans.⁵⁴ The implementation of this requirement instantaneously led many religious organizations and businesses to initiate religious challenges against the Act under the proposition that corporations, like people, lay claim to religious rights.⁵⁵

47. See Miller, *supra* note 16, at 911.

48. *Id.* (alteration in original) (quoting *Bellotti*, 435 U.S. at 778 n.14). *Bellotti* identified the right against self-incrimination as a purely personal right. *Bellotti*, 435 U.S. at 778 n.14.

49. See Miller, *supra* note 16, at 911 (quoting *Bellotti*, 435 U.S. at 778 n.14).

50. See *id.*

51. See *id.* at 913.

52. See *supra* text accompanying notes 45-46.

53. See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012).

54. See *id.* at 1291.

55. See, e.g., *id.* at 1298-1300.

A. *What Is the Contraception Mandate?*

The PPACA, signed into law March 23, 2010, instituted a variety of healthcare reforms to provide health coverage to all Americans.⁵⁶ Among the most controversial of the PPACA's provisions, and the source of controversy in *Newland v. Sebelius* and numerous other cases, is the provision that requires group health insurance plans and issuers to provide no-cost coverage for preventive care and screening for women.⁵⁷ The provisions are a result of a set of standards implemented by the Health Resources and Services Administration (HRSA), an agency of the United States Department of Health and Human Services (HHS) charged with developing regulations and recommending guidelines for required preventative coverage.⁵⁸ The HHS obtained these recommendations from the Institute of Medicine (IOM), which conducted a study on women's preventative healthcare and provided guidelines regarding preventative care for women.⁵⁹

Among the preventive services recommended by the HRSA are contraceptive services that include “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁶⁰

56. See *id.* at 1291. The PPACA requires a majority of U.S. citizens and legal residents to have health insurance, creates state-based health insurance exchanges, and requires those employers who have fifty or more full-time employees to offer health insurance. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 186-87, 253-55 (2010); see *Newland*, 881 F. Supp. 2d at 1291. The PPACA also provides provisions that ensure minimum levels of health care coverage. See *id.*; see also Rebecca Hall, *The Women's Health Amendment and Religious Freedom: Finding a Sufficient Compromise*, 15 J. HEALTH CARE L. & POL'Y 401, 406 (2012) (“Congress passed PPACA in an effort to bring health coverage to all Americans.”).

57. See *Newland*, 881 F. Supp. 2d at 1291 (citing 42 U.S.C. § 300gg-13(a)(4) (2006)); see also *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4 (stating that the purported reasoning for implementing these standards was to keep women healthy and to lessen healthcare costs).

58. See *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4. See generally *About HRSA*, HRSA, <http://www.hrsa.gov/about/index.html> (last visited Apr. 22, 2013) (explaining that HRSA is the primary federal agency in charge of improving access to healthcare services to the uninsured, isolated, or medically vulnerable).

59. See Chad Brooker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 170 (2012); see also *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, HEALTHCARE.GOV (Aug. 1, 2011), <http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html> (explaining that the HHS adopted suggestions for women's services promulgated by the IOM such as breastfeeding equipment, contraception, and domestic-violence screening and counseling).

60. *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4. HRSA provided that these contraceptive services should be covered based on a report by the IOM, which “review[ed] what preventive services are necessary for women's health and well-being” and developed recommendations. Hall, *supra* note 56, at 407 (alteration in original) (quoting COMM. ON PREVENTIVE SERVS. FOR WOMEN, INST. OF MED. OF THE NAT'L ACADS., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 2 box.S-1 (2011)) (internal quotation marks omitted).

Group plans and health insurers that did not have grandfathered status were required to provide the coverage beginning on or after August 1, 2012.⁶¹ Those institutions that were religiously opposed to the mandate, however, were not required to implement the preventive services if they qualified for an exemption as a religious organization.⁶²

B. Religious Exemptions

In addition to providing a compromise for grandfathered health plans, the PPACA provides qualifying religious employers with an exemption from any requirement to cover contraceptive services.⁶³ The exemption allows religious employers to choose not to provide the otherwise-mandated contraception coverage.⁶⁴ In order to qualify for the exemption, the religious employer must be one that “(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization under Internal Revenue Code [§] 6033(a)(1) and [§] 6033(a)(3)(A)(i) or (iii).”⁶⁵ Additionally, the guidelines provided a one-year “safe harbor” for plans sponsored by nonprofit organizations that had religious objections to the contraception coverage but did not qualify for the religious employer exemption.⁶⁶ Although most private health plans were required to comply with the preventive coverage mandate beginning August 1, 2012, the organizations that qualify for this safe harbor protection do not

61. See Hall, *supra* note 56, at 406. Certain healthcare plans existing on March 23, 2010, were grandfathered under the PPACA. See Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,540 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147 (2012)). A plan that meets the requirements for grandfathered status may be grandfathered for an indefinite period of time. See 26 C.F.R. § 54.9815-1251T(g) (2012).

62. See *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4.

63. See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012); see also 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, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147) (defining an employer that can invoke the religious employer exemption).

64. See Hall, *supra* note 56, at 409.

65. *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4 (citing 45 C.F.R. § 147.130(a)(1)(iv)(B)). “Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.” Hall, *supra* note 56, at 409 (citing Interim Final Rules 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).

66. See *Newland*, 881 F. Supp. 2d at 1291; see also *Brooker*, *supra* note 59, at 191 (stating that when the safe harbor expires, employers are required to comply with the mandate, and religious organizations will be exempt from the required coverage).

have to provide the mandated coverage until August 1, 2013.⁶⁷ During this temporary safe harbor, the government will not take enforcement action against a qualifying religious employer with an insurance plan that satisfies the following conditions: (1) the plan is sponsored by an employer that qualifies as a nonprofit entity, and beginning on February 10, 2012, the employer did not cover contraceptive services because of the religious beliefs of the organization; (2) the plan notifies employees that contraceptive services are not provided; and (3) the organization certifies that it has satisfied the criteria for safe harbor protection.⁶⁸ Despite this compromise, however, many religious groups—for-profit organizations like Hercules Industries in *Newland*—were not exempt.⁶⁹ These groups were required to either include the no-cost coverage for contraception in their group health plans or face monetary penalties.⁷⁰ Thus, many of these organizations initiated legal actions seeking to prevent the implementation of the mandate.⁷¹ In *Newland v. Sebelius*, Hercules Industries, Inc. was the first of these organizations to obtain a legal remedy in the form of a preliminary injunction against the implementation of the PPACA.⁷²

C. *Newland v. Sebelius*

On Friday, July 27, 2012, Judge John Kane of the U.S. District Court for the District of Colorado issued a preliminary injunction against the enforcement of the PPACA, prohibiting the Secretaries of Health and Human Services, Labor, and Treasury from requiring Hercules Industries to provide no-cost coverage for preventive care, including contraception,

67. See Press Release, The White House: Office of the Press Sec'y, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.

68. See *id.*; *ACA's Contraceptive Services Coverage Mandate: Regulatory and Judicial Update*, 35 BUCK CONSULTANTS 1, 2 (Aug. 28, 2012), <http://www.buckconsultants.com/portals/0/publications/fyi/2012/fyi-2012-0828-ACAs-Contraceptive-Services-Coverage-Mandate.pdf>.

69. See Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2180 (2012) [hereinafter Whelan, *HHS Contraception Mandate*] ("As the head of Catholic Charities USA observed, 'the ministry of Jesus Christ himself' would not qualify for the exemption. Nor will Catholic Charities, Catholic Relief Services, Catholic hospitals, food banks, homeless shelters, most Catholic schools . . . much less Catholic business owners who strive to conduct their businesses in accordance with their religious beliefs." (footnotes omitted) (quoting Press Release, Reverend Larry Snyder, President, Catholic Charities USA (Jan. 20, 2012))).

70. See *Newland*, 881 F. Supp. 2d at 1293.

71. See Hall, *supra* note 56, at 415-16.

72. See *Newland*, 881 F. Supp. 2d at 1287.

through its group health plan.⁷³ While various lawsuits arose in response to the mandate, the *Newland* action differs from the other legal challenges.⁷⁴

The plaintiff, Hercules Industries, is a Colorado S corporation, or closely held corporation, that manufactures and distributes heating, ventilation, and air conditioning products and equipment.⁷⁵ While religiously affiliated individuals, colleges, and nonprofit organizations initiated other legal actions, the plaintiffs in *Newland* represented for-profit corporations engaged in a secular business.⁷⁶ The PPACA provided a religious exception to the contraception mandate, exempting religious employers from any requirement to cover contraceptive services.⁷⁷ Hercules Industries, however, as a private business corporation, did not qualify as a religious employer for the exemption.⁷⁸

The Newlands, the owners of Hercules Industries, argued that Hercules Industries should be included among the exempted religious employers because the Newlands adhere to the Catholic Christian faith and “run Hercules Industries in a manner that reflects their sincerely held religious beliefs.”⁷⁹ In order to foster their religious beliefs within Hercules Industries, the Newlands implemented a program that built the corporate culture of Hercules Industries around Catholic principals.⁸⁰

Specifically, the Newlands made two amendments to Hercules Industries’ articles of incorporation that reflect the role religion plays in Hercules Industries’ corporate governance: “(1) it added a provision specifying that its primary purposes are to be achieved by ‘following appropriate religious, ethical or moral standards,’ and (2) it added a provision allowing members of its board of directors to prioritize those ‘religious, ethical or moral standards’ at the expense of profitability.”⁸¹

73. See Timothy Jost, *Newland V Sebelius: The General Welfare, Religious Liberty, and Contraception Coverage Under the ACA*, HEALTH AFFAIRS BLOG (July 30, 2012), <http://healthaffairs.org/blog/2012/07/30/newland-v-sebelius-the-general-welfare-religious-liberty-and-contraception-coverage-under-the-aca/>.

74. See Ellen Ross, *The Newland v Sebelius Preliminary Injunction: What It Means, Part One*, EXAMINER.COM (July 29, 2012), <http://www.examiner.com/article/the-newland-v-sebelius-preliminary-injunction-what-it-means-part-one>. Compare *Newland*, 881 F. Supp. 2d at 1298-1300 (dealing with a corporation and issuing a preliminary injunction against the PPACA’s implementation), with *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552-53 (D.C. Cir. 2012) (dealing with colleges as opposed to corporations and holding that the colleges’ challenges were not ripe for judicial review).

75. See *Newland*, 881 F. Supp. 2d at 1292.

76. See Ross, *supra* note 74.

77. See *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4 (citing 45 C.F.R. § 147.130(a)(1)(iv)(B) (2012)).

78. See *Newland*, 881 F. Supp. 2d at 1293.

79. *Id.* at 1292.

80. See *id.*

81. *Id.* (quoting Amended Complaint para. 112, *Newland*, 881 F. Supp. 2d 1287 (No. 1:12-cv-1123-JLK) [hereinafter *Newland* Amended Complaint]).

Furthermore, the corporation donated significant amounts of money to Catholic causes and institutions.⁸²

According to the Newlands, they provided health insurance for their “employees ‘[a]s part of fulfilling their organizational mission and Catholic beliefs and commitments.’”⁸³ Because the Catholic Church condemns the use of contraception, however, Hercules Industries’ health insurance plan did not cover abortifacient drugs, contraception, or sterilization.⁸⁴ Consequently, the Newlands argued that it would be “immoral and sinful for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, sterilization, and related education and counseling,” which the PPACA requires to be included in the health insurance coverage they offered at Hercules Industries.⁸⁵

Because the Newlands did not qualify as a religious employer and would be forced to either include no-cost contraception coverage in their health plan or face monetary penalties, the Newlands—unwilling to comply with the mandate—brought religious challenges against the Government under RFRA and the Free Exercise Clause and Establishment Clause of the First Amendment to the U.S. Constitution.⁸⁶ Ultimately, Judge Kane issued a preliminary injunction against the implementation of the PPACA, as applied to the Newlands, based on these religious challenges.⁸⁷ The Newlands, however, were among many organizations that challenged the PPACA as a violation of their religious rights.⁸⁸

V. IN THE TRENCHES: RELIGIOUS CHALLENGES TO THE PPACA

Since HHS announced its interim rules in August 2011, 44 cases were filed on behalf of over 130 individuals “representing hospitals, universities, businesses, schools, and people” challenging the PPACA contraception coverage mandate.⁸⁹ An examination of the religious objections made by religious employers opposed to the mandate provides insight as to why

82. *Id.*

83. *Id.* (alteration in original) (quoting *Newland* Amended Complaint, *supra* note 81, para. 37).

84. *Id.*; see also Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, 8 GUTTMACHER REP. ON PUB. POL’Y (May 2005), available at <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html> (explaining that a contraceptive prevents pregnancy while an abortifacient terminates pregnancy).

85. Verified Complaint para. 32, *Newland*, 881 F. Supp. 2d 1287 (No. 1:12-cv-1123-JLK) [hereinafter *Newland* Verified Complaint].

86. *Id.* paras. 93-127.

87. See *Newland*, 881 F. Supp. 2d at 1299-1300.

88. See *supra* notes 63-65 and accompanying text.

89. *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited Apr. 22, 2013); see, e.g., Complaint for Declaratory & Injunctive Relief at 8-13, *Korte v. Sebelius*, 2012 WL 6757353 (S.D. Ill. Oct. 9, 2012) (No. 3:12-CV-01072-MJR-PMF) (alleging that Korte & Luitjohan Contractors is a family-owned, full-service construction contractor whose owners operate and manage it in a way that reflects the teachings, mission, and values of their Catholic faith).

these employers feel that they should be exempt from mandated contraceptive coverage. These challenges stem from the religious belief that contraceptive drugs are abortifacient in nature and are unnecessary treatments.⁹⁰ The religious organizations opposed to the implementation of the contraceptive mandate maintain that it violates their religious rights under RFRA, the First Amendment Free Exercise Clause, and the First Amendment Establishment Clause.⁹¹

A. RFRA Challenges

Under RFRA, the government may impose a substantial burden on a person's free exercise of religion if it "demonstrates that application of the burden to the person: '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"⁹² Under RFRA, this standard applies "even if the burden results from a rule of general applicability."⁹³ Thus, a neutral law passed for nonreligious purposes that incidentally burdens both religious and nonreligious organizations does not violate RFRA.⁹⁴ Although RFRA is unconstitutional as applied to the states, RFRA is applicable to federal laws that do not explicitly repeal or override RFRA's protections.⁹⁵

Those opposed to the contraception mandate allege that the "mandate imposes a 'substantial burden' on the 'exercise of religion' of those individuals and organizations who, for religious reasons, oppose covering contraceptives and abortifacients in the health insurance plans they provide."⁹⁶ These complainants bear the initial burden of showing that the mandate imposes a substantial burden on their ability to exercise their sincerely held religious beliefs.⁹⁷ This right to exercise religion is not limited to the belief and profession of religion but includes the performance or abstention from physical acts.⁹⁸

If a substantial burden on the complainant's free exercise rights is found, the burden shifts to the government to prove that it is acting in furtherance of a compelling governmental interest and in the least restrictive

90. Hall, *supra* note 56, at 414.

91. See, e.g., *Newland*, 881 F. Supp. 2d at 1293.

92. Whelan, *HHS Contraception Mandate*, *supra* note 69, at 2181 (quoting 42 U.S.C. § 2000bb-1(b) (2006)).

93. *Id.* (quoting 42 U.S.C. § 2000bb-1(a)) (internal quotation marks omitted).

94. Richard Epstein, *On the Constitutionality of the Contraception Mandate*, RICOCHET (Mar. 6, 2012, 8:02 PM), <http://ricochet.com/main-feed/On-the-Constitutionality-of-the-Contraception-Mandate>.

95. See Whelan, *HHS Contraception Mandate*, *supra* note 69, at 2181 & n.12; see also *City of Boerne v. Flores*, 521 U.S. 507, 530-36 (1997) (holding that while Congress may enact RFRA to prevent the infringement on religious freedoms, it may not determine the manner in which states enforce the substance of its legislative restrictions).

96. Whelan, *HHS Contraception Mandate*, *supra* note 69, at 2185.

97. Hall, *supra* note 56, at 416.

98. See Whelan, *HHS Contraception Mandate*, *supra* note 69, at 2181-82.

manner.⁹⁹ The Government maintains that it has two compelling interests: (1) promoting women's health and the health of potential newborn children by "regulating the health care and insurance markets" and (2) furthering gender equality by assuring women equal access to contraception coverage.¹⁰⁰ Further, the Government asserts that the preventive care coverage mandate advances this compelling interest.¹⁰¹

Judge Kane, in *Newland*, stipulated that although the government's mandate furthers a compelling interest, that compelling interest does not justify a substantial burden on the Newlands' free exercise of religion because the alleged harm the government would suffer in providing a temporary exemption for business owners like the Newlands "pales in comparison" to the infringement of the Newlands' rights under RFRA.¹⁰² He noted that the government's exemption of more than 190 million health plans and beneficiaries from the requirement undermines the government's compelling interest.¹⁰³

Even if the Government establishes a compelling interest in applying the preventive care coverage to those who oppose it, however, the Government must also demonstrate that no less-restrictive alternatives exist.¹⁰⁴ The Government bears this burden by refuting the alternatives proposed by those who oppose the law.¹⁰⁵ In *Newland*, the Newlands proposed one alternative—government provision of free birth control—that they argued would allow the government to fulfill its compelling interest of providing increased access to contraception coverage without burdening their religion.¹⁰⁶

The Newlands maintained that this alternative could be achieved by several different methods: "creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to

99. Hall, *supra* note 56, at 416.

100. See, e.g., Amended Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 22-25, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) [hereinafter *Newland* Amended Memorandum] (quoting *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011)) (internal quotation marks omitted). *Mead* stated that a lack of contraceptive use has proven in many cases to have negative health consequences for women and developing fetuses, and it asserted that the PPACA's regulations will increase access to more costly services that have often been inaccessible to women. *Mead*, 766 F. Supp. 2d at 43.

101. See, e.g., *Newland* Amended Memorandum, *supra* note 100, at 22-25 ("Congress's attempt to equalize the provision of preventive health care services, with the resultant benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest.")

102. See *Newland*, 881 F. Supp. 2d at 1294-95.

103. See *id.* at 1298.

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

105. See *id.*

106. See *id.*

give its items away for free.”¹⁰⁷ While other courts have yet to analyze the PPACA’s lawfulness under RFRA,¹⁰⁸ the court in *Newland* held that government programs similar to the Newlands’ proposed alternative exist, and thus, the Government failed to show that preventive care coverage mandate was the least restrictive means of ensuring increased access to contraception coverage.¹⁰⁹ Challenges to the PPACA, however, were not limited to claims under RFRA.¹¹⁰

B. First Amendment Challenges

I. Free Exercise Objections

In addition to the RFRA objections made by the religious organizations opposed to the contraceptive mandate, the organizations brought First Amendment claims under the Free Exercise and Establishment Clauses of the Constitution.¹¹¹ Many of these same religiously affiliated entities challenged state contraceptive coverage mandates in the past, but the United States Supreme Court has yet to weigh in on this recurring issue.¹¹²

The Supreme Court has held that neutral, generally applicable laws from which the impairment to religious practice is “merely the incidental effect of . . . an[] otherwise valid provision” do not violate the Free Exercise Clause of the First Amendment.¹¹³ In *Employment Division, Department of*

107. *Id.*

108. *See, e.g.,* *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102, 104 (D.D.C. 2012).

109. *See Newland*, 881 F. Supp. 2d at 1299.

110. *See infra* Part V.B.

111. *See, e.g., Newland* Verified Complaint, *supra* note 85, paras. 103-27; *see also* *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-77 (1990) (“The Free Exercise Clause of the First Amendment . . . provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’” (emphasis omitted) (quoting U.S. CONST. amend. I)), *superseded by statute*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, *held unconstitutional in part on other grounds by* *City of Boerne v. Flores*, 521 U.S. 507 (1997), *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011).

112. *See* *Brooker*, *supra* note 59, at 191-92; *see also* *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 76-79 (Cal. 2004) (holding that a California law mandating coverage of contraceptives with a narrow religious exception did not violate the Free Exercise Clause); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) (holding that a New York State contraceptive coverage mandate did not impermissibly interfere with an employer’s religion because the religious employer’s primary focus was not the inculcation of religious values, and the employer had the option not to offer prescription coverage). *See generally* *Hall*, *supra* note 56, at 411-12 (“As of June 1, 2012, twenty-eight states ‘require insurers that cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices.’ A number of these states offer some exemptions for mandated contraceptive coverage, often requiring employers who refuse to cover these services to notify employees.” (footnotes omitted) (quoting Janice Lee, Note, *A Quick Fix Solution for the Morning After: An Alternative Approach to Mandatory Contraceptive Coverage*, 9 GEO. J.L. & PUB. POL’Y 189, 191 n.3 (2011))).

113. *Smith*, 494 U.S. at 878.

Human Resources of Oregon v. Smith, the Court emphasized that a person exercises religion by believing and professing that person's religious preference.¹¹⁴ Thus, free exercise protection only applies when a law or regulation has the purpose of burdening that individual's religious beliefs.¹¹⁵

Those who are religiously opposed to the mandate assert that they exercise religion within the meaning of the Free Exercise Clause by complying with Catholic teachings on abortifacients, contraception, and sterilization.¹¹⁶ Thus, the opponents generally have two arguments for how the mandate burdens their religion: (1) it is intentionally discriminatory and (2) the mandate impedes some religious organizations but not others.¹¹⁷ Proponents of the PPACA, however, argue that the contraception coverage provision does not violate the First Amendment because it is a neutral regulation that applies equally to all employers; it does not single out any particular religious practice, and it furthers a legitimate government interest of preventing unwanted pregnancies.¹¹⁸ As a result, the Government asserts that the PPACA preventive care coverage mandate does not burden the free exercise of religion.¹¹⁹ Those opposed to the mandate, however, did not limit their religious challenges to RFRA and the Free Exercise Clause.¹²⁰

2. Establishment Clause Objections

Additionally, opponents to the contraception coverage mandate allege that the PPACA violates the Establishment Clause of the First Amendment.¹²¹ The Establishment Clause "prohibits the establishment of any religion and/or excessive government entanglement with religion."¹²²

Specifically, in *Newland*, the plaintiffs alleged that in order for the government to determine whether religious employers are required to comply with the mandate or whether they fit within one of the exemptions, the government must examine the organization's religious beliefs.¹²³ They argued that in order for the government to make these distinctions, the

114. See *id.* at 877.

115. See Brooker, *supra* note 59, at 192.

116. See, e.g., *Newland Verified Complaint*, *supra* note 85, para. 95.

117. See Hall, *supra* note 56, at 418.

118. See, e.g., *Newland Amended Memorandum*, *supra* note 100, at 39-40 (asserting that the preventive services coverage regulations are not restricted to religious employers but apply to all health plans that do not qualify for the religious exemptions).

119. See Brooker, *supra* note 59, at 193.

120. See *infra* Part V.B.2.

121. See, e.g., *Newland Verified Complaint*, *supra* note 85, paras. 121-27.

122. *Id.* para. 122; see U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . ."); see also *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

123. See *Newland Verified Complaint*, *supra* note 85, para. 123.

government must conduct “ongoing, comprehensive government surveillance that impermissibly entangles [the government] with religion.”¹²⁴ Opponents also assert that the mandate favors particular religions over others by adopting a view of what is morally acceptable with regard to contraception and imposing this belief by requiring those opposed to the mandate to “either conform their consciences or suffer penalty.”¹²⁵

While previous challenges to state-mandated contraception coverage under the First Amendment Free Exercise and Establishment Clauses proved unsuccessful, a ruling by the United States Supreme Court could likely yield different results.¹²⁶ Additionally, Judge Kane’s issuance of the preliminary injunction in *Newland* indicates that although courts may be unwilling to find the PPACA’s contraception coverage mandate unlawful under the First Amendment, the possibility of success under RFRA is likely.¹²⁷ The idea, proffered by Judge Kane, that Hercules Industries may have the ability to exercise religion—a religion that was burdened by the implementation of the PPACA’s contraception coverage mandate—is analogous to other cases in which the Supreme Court has held that corporations are entitled to constitutional protection in limited circumstances.¹²⁸

VI. THE LINE IN THE SAND: THE DIVISION OVER CORPORATE RELIGION

As the number of lawsuits filed against the PPACA rises, the question of whether a corporation can exercise religion has become the primary subject of debate.¹²⁹ The issue of whether these corporate plaintiffs can prevail on their claims requires a threshold determination of whether the plaintiffs have the ability to assert “‘free exercise’ rights” under the Constitution and RFRA.¹³⁰ While courts have declined to address the question of whether for-profit corporations can exercise religion, the courts’

124. *Id.* para. 124; *see also* Reply in Support of Motion for Preliminary Injunction at 30, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) [hereinafter *Newland* Preliminary Injunction Reply]. The Government asserted that the only way an employer can qualify as a religious organization is if it hires employees of the same religion and serves the sole purpose of inculcating religion. *Id.* at 30. The Government stated that a person cannot practice Catholicism and sell air conditioners. *Id.* In determining whether an employer meets these criteria, however, the government must entangle itself in the affairs of the corporation in violation of the Establishment Clause. *See id.*

125. *Newland* Verified Complaint, *supra* note 85, para. 126.

126. *See* *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 76-79 (Cal. 2004); *see also* *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006) (upholding the constitutionality of the New York Women’s Health and Wellness Act (WHWA), which is identical to the PPACA and requires employee health plans that cover prescription drugs to include coverage of FDA-approved contraceptive drugs and devices).

127. *See Newland*, 881 F. Supp. 2d at 1295-96.

128. *See supra* note 46 and accompanying text.

129. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

130. *See id.* at 1287.

issuances of injunctive relief against the PPACA indicate that courts might soon be willing to extend religious protection to for-profit corporations.¹³¹

A. Arguments Against Extending Corporate Religion

Defenders of the PPACA acknowledge that a corporation can engage in speech, but they argue that a for-profit, secular corporation cannot exercise religion because a corporation cannot hold religious beliefs.¹³² Additionally, they maintain that RFRA does not protect a secular, profit-making enterprise from regulation of its employment practices.¹³³ One argument stems from the idea that for-profit corporations exist to serve a purpose; specifically, they exist for the purpose of making money.¹³⁴ Thus, proponents of the mandate argue that a corporation can use political speech to lobby for favorable laws because lobbying ultimately serves the purpose of making money for the corporation; however, a corporation cannot use religion to make a profit.¹³⁵ Moreover, opponents refuse to acknowledge that a corporation can both manufacture a product and serve the purpose of exercising religion.¹³⁶

An additional argument stems from Title VII of the Civil Rights Act of 1964, which prohibits for-profit companies from discriminating on the basis of religion in the hiring or firing of their employees or in establishing the terms and conditions of their employment.¹³⁷ Opponents, however, acknowledge that Title VII provides an exemption for “religious corporation[s].”¹³⁸ Under this exemption, a for-profit corporation qualifies

131. See, e.g., *Tyndale Publishers, Inc. v. Sebelius*, No. 1:12-CV-1635-RBW, 2012 WL 5817323, at *3 (D.D.C. Nov. 16, 2012).

132. “*Can a Corporation Exercise Religion?*,” DAILY KOS (July 29, 2012, 12:13 PM), <http://www.dailykos.com/story/2012/07/29/1114750/--Can-a-corporation-exercise-religion>; see also Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 8, *Tyndale*, 2012 WL 5817323 (No. 1:12-CV-1635-RBW) [hereinafter *Tyndale* Defendants’ Opposition] (stating that although the Supreme Court has made clear that religious and secular groups both enjoy freedoms of speech and association, the Free Exercise Clause only gives special attention to the rights of religious organizations).

133. See *Tyndale* Defendants’ Opposition, *supra* note 132, at 8.

134. “*Can a Corporation Exercise Religion?*,” *supra* note 132.

135. See *id.*

136. See *id.* (“As the court noted, Hercules is ‘engaged in the manufacture and distribution of heating, ventilation, and air conditioning . . . products and equipment.’ This is what Hercules does. Hercules does not exercise religion. . . . [I]n response to the passage of ACA, the owners of Hercules have now defined a corporate directive that ‘its primary purposes are to be achieved by ‘following appropriate religious, ethical or moral standards[.]’ . . . Does this change cause the Hercules corporation to engage in the exercise of religion? No it does not. Hercules still engages in the exact same activity as it did prior to the adoption . . . of the Affordable Care Act.” (quoting *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012))).

137. See *Tyndale* Defendants’ Opposition, *supra* note 132, at 10; see also 42 U.S.C. § 2000e-2(a) (2006) (stating that an employer cannot discriminate against any individual with respect to religion in hiring, firing, or classifying employees).

138. See *Tyndale* Defendants’ Opposition, *supra* note 132, at 10; see also 42 U.S.C. § 2000e-1(a) (quoting § 2000e-2(e)(2)) (providing an exemption for religious corporations).

as a religious corporation if it meets one of three qualifications: (1) the corporation is affiliated with a formally religious entity; (2) a formally religious entity participates in the corporation's management; or (3) the corporation's membership is composed only of individuals who share the corporation's religious beliefs.¹³⁹ Thus, proponents of the PPACA argue that a corporation that does not qualify as a religious corporation under Title VII should not be able to maintain religious rights under the Constitution or RFRA.¹⁴⁰ To hold otherwise, they allege, would allow a corporation to impose its owner's religious beliefs on its employees in a way that would deny those employees protection from discrimination under federal law.¹⁴¹ Secular companies would be entitled to the same rights as religious organizations and could require their employees to observe standards such as attending church, tithing, and abstaining from coffee, tea, alcohol, or tobacco without restriction, which would ultimately contradict the purposes of Title VII.¹⁴²

Ultimately, opponents of extending free exercise rights to corporations maintain that the fault lies with the corporation that chose to enter the commercial marketplace as a for-profit entity.¹⁴³ Thus, under this argument, when founders of a corporation who belong to a particular religion choose to enter into commercial activity, they lose their ability to impose their religious beliefs on their employees.¹⁴⁴ This reasoning, however, provides no solution to the burden caused by the implementation of the PPACA and suggests that religious protection can only be afforded to churches and religiously affiliated nonprofit organizations.¹⁴⁵ Some commentators believe that opponents of extending religious rights to corporations have too narrowly defined religious exercise and have erroneously attempted to draw a line between a corporation's purpose and the manner in which it makes a profit.¹⁴⁶

B. Arguments for Extending Corporate Religion

While several courts have held that the PPACA burdens the free exercise of religion, no court has specifically extended religious free exercise rights to for-profit corporations.¹⁴⁷ Accordingly, although the ability to exercise religion is impaired, corporations are afforded no relief

139. See *Tyndale Defendants' Opposition*, *supra* note 132, at 10 (citing *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226-31 (3d Cir. 2007)).

140. See *id.*

141. See *id.* at 10-11.

142. See *id.* at 11.

143. See *id.* at 12.

144. See *id.*

145. See *id.* at 12-13.

146. See, e.g., "Can a Corporation Exercise Religion?," *supra* note 132.

147. See, e.g., *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295-96 (D. Colo. 2012).

because they do not fall within the protection of RFRA or the First Amendment.¹⁴⁸ This issue, however, is not without solution. Courts can and should extend RFRA and the First Amendment's protection of the free exercise of religion to corporations.

The Supreme Court's extension of other constitutional protections to corporations—specifically, First Amendment free speech—weighs in favor of extension.¹⁴⁹ In *Citizens United*, the Court held that “First Amendment protection extends to corporations” and that a First Amendment right “does not lose First Amendment protection ‘simply because its source is a corporation.’”¹⁵⁰ While the Court did not explicitly extend free exercise rights to corporations in *Citizens United*, its acknowledgement that a corporation has the ability to engage in political speech—as an individual does—indicates that a corporation is entitled to all First Amendment rights, including the ability to freely exercise religion.¹⁵¹ Just as the political affiliations of the people who ran *Citizens United* were inseparable from the corporation's political affiliations, the religious beliefs of the owners of closely held corporations are inseparable from the beliefs of the corporation.¹⁵² The corporation ultimately acts as an alter ego of its owners for religious purposes.¹⁵³

Corporations such as Hercules Industries and Hobby Lobby exercise religion just as an individual does.¹⁵⁴ Thus, if courts extend religious protection to corporations, the PPACA would violate these corporations' free exercise rights.¹⁵⁵ Both the First Amendment and RFRA protect against the government's interference with a person's free exercise of religion.¹⁵⁶ Courts have held that this protection extends not only to individuals who actively exercise religion but also to individuals who exercise religion by refraining from a morally objectionable activity or by

148. *Tyndale Defendants' Opposition*, *supra* note 132, at 11.

149. *See supra* note 46 and accompanying text.

150. *See Citizens United v. FEC*, 558 U.S. 310, 340-44 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)). The Court in *Citizens United* specifically found that even though corporations are not natural persons, corporations can engage in political speech because, like individuals, corporations contribute to the discussion, debate, and distribution of ideas and information. *Id.*

151. *See id.*

152. *See Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-CV-1635-RBW, 2012 WL 5817323, at *3 (D.D.C. Nov. 16, 2012). *Tyndale* emphasizes that the beliefs of the owners of closely held corporations are indistinguishable from the beliefs of the corporation. *Id.* Although the court does not mention publicly owned corporations, this argument more strongly favors closely held corporations because the rights of a few owners are identifiable, whereas the beliefs of the owners of publicly held corporations would most likely be unidentifiable and would vary greatly. *Id.*

153. *See id.*

154. *See, e.g.*, Motion for Preliminary Injunction & Memorandum of Law in Support at 9, *Tyndale*, 2012 WL 5817323 (No. 1:12-CV-1635-RBW) [hereinafter *Tyndale* Preliminary Injunction Motion].

155. *See supra* Part V.B.1.

156. *See supra* Part V.

avoiding participation in certain acts.¹⁵⁷ When a corporation morally objects to providing coverage for contraceptive services, the corporation is exercising religion under both RFRA and the Free Exercise Clause.¹⁵⁸ Corporations exercise religion in this way by refraining from offering coverage through their employee insurance policies that would violate their religious beliefs.¹⁵⁹ Specifically, many of these corporations believe that “all human beings are created in the image and likeness of God from the moment of their conception” and that the PPACA forces them to provide and pay for drugs that the owners believe causes “the death of human beings created in the image and likeness of God shortly after their conception.”¹⁶⁰ FDA-approved contraceptive methods imposed upon the corporations’ health plans include products such as emergency contraceptives, which these corporations view as abortifacient in nature.¹⁶¹ Thus, the owners of the corporation believe that the contraceptive items mandated under the PPACA are not morally different than surgical abortions and operate “in ways that cause the demise of recently fertilized embryos before they can implant into the mother’s uterus.”¹⁶² A corporation has exercised religion by abstaining from providing coverage for these items in its health insurance plan.¹⁶³

For-profit corporations also actively exercise religion.¹⁶⁴ Both Hobby Lobby and Mardel amply illustrate this fact.¹⁶⁵ Hobby Lobby, a for-profit

157. See *supra* notes 151-56 and accompanying text; see also *Emp’t Division, Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (explaining that the “exercise of religion” involves the performance of or abstention from physical acts), *superseded by statute*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 102 Stat. 1488, *held unconstitutional in part on other grounds by City of Boerne v. Flores*, 52 U.S. 507 (1997), *as recognized in Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011); *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972) (holding that one exercises religion by refraining from sending children over a certain age to school), *overruled by Smith*, 494 U.S. at 872-73, *superseded by statute*, RFRA, 102 Stat. 1488, *held unconstitutional in part on other grounds by Flores*, 521 U.S. 507, *as recognized in Sossamon*, 131 S. Ct. at 1655-56; *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (holding that a person exercises religion by choosing not to go to work on certain days), *overruled by Smith*, 494 U.S. at 872-73, *superseded by statute*, RFRA, 102 Stat. 1488, *held unconstitutional in part on other grounds by Flores*, 521 U.S. 507, *as recognized in Sossamon*, 131 S. Ct. at 1655-56.

158. See *supra* notes 151-56 and accompanying text.

159. See *supra* notes 151-56 and accompanying text.

160. See, e.g., Verified Complaint at 2, *Tyndale House Publishers, Inc. v. Sebelius*, 2012 WL 5817323 (D.D.C. 2012) (No. 1:12-CV-1635-RBW).

161. See, e.g., *Tyndale Preliminary Injunction Motion*, *supra* note 154, at 2-6. Specifically at issue are Plan B One-Step and Ella. See *Hobby Lobby Willing to Pay Millions in Fight Against Emergency Contraception*, NAZARETHPATCH (Dec. 28, 2012), <http://nazareth.patch.com/articles/hobby-lobby-willing-to-pay-millions-in-fight-against-emergency-contraception>. Plan B One-Step is intended to prevent pregnancy after contraceptive failure or unprotected sex, and Ella helps prevent pregnancy by delaying ovulation for five days and can also prevent attachment of the egg to the uterus. *Id.*

162. *Tyndale Preliminary Injunction Motion*, *supra* note 154, at 11.

163. See, e.g., *id.*

164. See, e.g., *Hobby Lobby Verified Complaint*, *supra* note 3, at 11-12.

165. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

corporation, operates its business “in a manner consistent with Biblical principles” by giving millions of dollars from its profits to support worldwide ministries, closing its stores on Sundays, employing full-time chaplains to meet its employees’ spiritual needs, taking out full-page ads that celebrate the religious nature of Christmas and Easter, and directing readers to spiritual counseling.¹⁶⁶ The owners of Hobby Lobby also seek to operate Mardel, a bookstore that sells Christian materials, according to religious principals by donating ten percent of Mardel’s profits to print Bibles and by employing chaplains in its company.¹⁶⁷

Similarly, corporations not directly engaged in the sale of religious products also actively exercise religion.¹⁶⁸ While Hercules Industries engages in the manufacture and sale of heating and air conditioning equipment, it also donates hundreds of thousands of dollars to Catholic causes, is run according to a mission statement committed to spiritual growth, and has implemented a program that helps companies build their culture based on Catholic principles.¹⁶⁹ Together, these actions indicate that Hercules Industries was designed not solely to manufacture a product but also to foster religion both within the corporation and externally.¹⁷⁰

Thus, when a corporation delineates in its articles of incorporation a religious business purpose and furthers this purpose through its interaction with its employees or manufacture of its products, a corporation exercises religion.¹⁷¹ When viewed collectively, the abstention from certain acts in furtherance of religious principals by corporations such as Hobby Lobby and Hercules Industries indicates that for-profit corporations can manufacture or sell a product while also furthering their religious beliefs.¹⁷²

C. *The Way Courts Are Leaning*

While courts have failed to define a standard for determining whether a corporation can exercise religion, courts in several cases filed by owners of for-profit businesses have issued injunctive relief against implementation

166. See Ed Whelan, *Wobbly Hobby Lobby Ruling in Favor of HHS Mandate*, NAT’L REV. ONLINE (Nov. 20, 2012, 4:48 PM), <http://www.nationalreview.com/bench-memos/333808/wobbly-ihobby-lobbyi-ruling-favor-hhs-mandate-ed-whelan#> [hereinafter Whelan, *Wobbly Hobby Lobby Ruling*] (quoting *Hobby Lobby Verified Complaint*, *supra* note 3, paras. 41-42); see also *Hobby Lobby Verified Complaint*, *supra* note 3, paras. 39-52 (explaining that Hobby Lobby has taken a number of actions to foster a Christian purpose, both within and outside the corporation).

167. See Whelan, *Wobbly Hobby Lobby Ruling*, *supra* note 166; see also *Hobby Lobby Verified Complaint*, *supra* note 3, paras. 49-51 (explaining Mardel’s religious principles).

168. See, e.g., *Newland Verified Complaint*, *supra* note 85, para. 34.

169. See *id.* paras. 35-36.

170. See *id.* paras. 27-36.

171. See Whelan, *Wobbly Hobby Lobby Ruling*, *supra* note 166.

172. See *id.*

of the PPACA contraception mandate.¹⁷³ The courts that issued preliminary relief have found that the mandate imposes a substantial burden on the religious faith of the people who run the corporations and that it burdens the religious principles on which the corporations are run; however, a definitive answer on whether a corporation has the ability to exercise religion remains unanswered.¹⁷⁴ Many courts, however, have acknowledged that a for-profit company owned by religious employers has a right to protection of its religious principles.¹⁷⁵

The Seventh Circuit relied on *Citizens United's* extension of First Amendment rights to corporations to rebut the Government's assertion that a secular, for-profit corporation has no rights under RFRA.¹⁷⁶ The court stipulated that the fact that the contracting company at issue in the case chose to operate as a corporation did not automatically strip the company of religious protection—indicating that courts are willing to extend First Amendment rights to corporations in the religious context.¹⁷⁷

Additionally, despite the Government's repeated argument that a corporation cannot assert claims on its own behalf within the meaning of RFRA and the First Amendment, at least one court has held that a corporation has standing to assert its owners' free exercise rights.¹⁷⁸ In issuing a preliminary injunction against the enforcement of the PPACA, the court in *Tyndale Publishers* analyzed the collective ownership of a closely held corporation and ultimately found that the beliefs of the corporation and its owners were indistinguishable.¹⁷⁹ The court noted that the four entities that controlled the corporation, the directors, and many of the employees shared the same religious beliefs, and the corporation did not exhibit any free exercise rights different from or greater than its owners' rights—thus, the corporation could assert free exercise rights on behalf of its owners.¹⁸⁰ This analysis indicates that a corporation whose religious beliefs are indistinguishable from the beliefs of its owners and employees not only has

173. See Ed Whelan, *Michigan Court Blocks HHS Mandate*, NAT'L REV. ONLINE (Dec. 31, 2012, 11:07 AM), <http://www.nationalreview.com/bench-memos/336654/michigan-court-blocks-hhs-mandate-ed-whelan>.

174. See, e.g., *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

175. See Lyle Denniston, *Religious Employer Wins Big—Temporarily*, SCOTUSBLOG (Dec. 29, 2012, 12:24 AM), <http://www.scotusblog.com/2012/12/religious-employer-wins-big-temporarily/>; see also *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294-96 (D. Colo. 2012) (asserting that the governmental interest of equalizing contraceptive coverage to men and women is outweighed by the harm the PPACA causes to the religious beliefs of Hercules Industries).

176. See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010); *Korte*, 2012 WL 6757353, at *5.

177. See *Korte*, 2012 WL 6757353, at *5.

178. See *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-CV-1635-RBW, 2012 WL 5817323, at *3-7 (D.D.C. Nov. 16, 2012).

179. *Id.* at *7.

180. See *id.* at *7-8.

standing to assert the free exercise rights of its owners but also has the ability to assert its own identical free exercise rights.¹⁸¹

The Supreme Court's unwillingness to extend injunctive relief to Hobby Lobby and Mardel, however, denotes the division that has arisen between the courts with regard to the PPACA's application to corporations.¹⁸² Despite Hobby Lobby's claim that it would face irreparable harm in the form of millions of dollars if it chose not to comply with the PPACA mandate—a claim identical to those of the other corporations that successfully obtained injunctive relief—the Court was reluctant to join other courts in finding that the PPACA imposed a burden on Hobby Lobby's free exercise of religion.¹⁸³ The Supreme Court's reluctance to issue injunctive relief, however, does not indicate that the Court will not eventually answer the question of whether a corporation can exercise religion.¹⁸⁴ Moreover, the common response by other courts in issuing injunctions against the implementation of the PPACA and allowing corporations to assert religious claims on behalf of their owners suggests that corporations may soon be entitled to the same religious free exercise rights that individuals enjoy under RFRA and the Constitution.¹⁸⁵

VII. TIME FOR A CEASE-FIRE: ALTERNATIVES TO THE CONTRACEPTION MANDATE

Although courts have acknowledged that the promotion of public health sufficiently qualifies as a compelling government interest for RFRA and First Amendment purposes, the current contraception mandate is not the only means by which the government can achieve this goal.¹⁸⁶ Assuming courts conclude that corporations can exercise religion, there are other, less restrictive alternatives that would allow for increased and equalized access to contraception coverage without violating the religious rights of corporations.¹⁸⁷

181. *See id.* at *7-10.

182. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012). The Supreme Court held that Hobby Lobby and Mardel did not satisfy the standard for injunctive relief but declined to address whether for-profit corporations are entitled to free exercise rights under RFRA and the First Amendment. *Id.*

183. *See id.* *But see, e.g., Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

184. *See Hobby Lobby Stores, Inc.*, 133 S. Ct. at 643.

185. *See, e.g., Tyndale House Publishers, Inc.*, 2012 WL 5817323, at *3.

186. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294-99 (D. Colo. 2012).

187. *See, e.g., id.*

A. Broadened Religious Exemption

Although the Government asserts that its compelling government interest in mandating contraception coverage is the promotion of health and increased access to contraceptives, over 190 million health plan participants are exempt from compliance with the mandate—thus undermining its supposed goal.¹⁸⁸ While the exemption covers millions of religious employers, the government’s definition is too narrow and inadequate, and thus, the exemption should either be eliminated or broadened to provide sufficient protection for the objecting, faith-based employers.¹⁸⁹ As the definition emphasizes, a religious organization does not qualify as a religious employer unless it has met all four of the characteristics delineated by the government, which allows the government to engage in illogical line-drawing.¹⁹⁰

One of the most controversial of the four exemptions defines a religious employer as a religious organization that “serves primarily persons who share the religious tenets of the organization.”¹⁹¹ This requirement that an employer must primarily serve people of its own faith contradicts an essential characteristic of many religious organizations—to serve people without regard to their religious beliefs.¹⁹² Additionally, this provision acts contrary to the government’s faith-based initiative, which stipulates that entities that receive federal grants are prohibited from discriminating on the

188. See *id.* at 1298; see also *Hobby Lobby Plaintiffs’ Motion*, *supra* note 8, at 15 (asserting that while the mandate aims to increase access to contraceptives and ultimately promote women’s health, the government created a wide-ranging scheme of exemptions and chose not to mandate contraception coverage in millions of policies—contrary to its goal).

189. See *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4; see also Stanley W. Carlson-Thies, *Which Religious Organizations Count as Religious? The Religious Employer Exemption of the Health Insurance Law’s Contraceptives Mandate*, 13 *ENGAGE: J. FEDERALIST SOC’Y’S PRAC. GROUPS* 58, 59 (2012) (explaining that objections to the narrowness of the religious exemptions are not limited to members of the Catholic faith). In a letter to the White House, a multi-faith group of religious leaders conceded that they did not share identical convictions about the moral acceptability of the mandate but wrote,

[W]e . . . agree that the definition of religious employer . . . is so narrow that it excludes a great many actual ‘religious employers’ and probably most faith-based organizations that serve people in need. . . . We believe it is detrimental to faith-based organizations, the services they deliver, and the people they serve if the government decides to protect the religious freedom only of organizations that fit the narrow criteria set out in the amended regulations.

Id.

190. See Carlson-Thies, *supra* note 189, at 59.

191. *Id.* (quoting 45 C.F.R. § 147.130(a)(1)(iv)(B)(3) (2011)).

192. See *id.* Many Catholic organizations opposed to this requirement have quoted the late Archbishop James Cardinal Hickey who said, “We serve [them] not because they are Catholic, but because we are Catholic.” *Id.* (alteration in original) (quoting *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?: Hearing on the Respect for Rights of Conscience Act of 2011 Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 112th Cong. 139 (2011) (statement of Jane G. Belford, College of the Roman Catholic Diocese of Wash.)) (internal quotation marks omitted).

basis of religion.¹⁹³ Thus, the contradictory nature of this exemption prevents faith-based entities from simultaneously qualifying as a religious organization under the PPACA and complying with governmental initiatives against religious discrimination in the workplace.¹⁹⁴ To qualify for a religious exemption under the PPACA, a faith-based organization would have to choose to only serve people who shared its religious beliefs, but in doing so, the entity would lose federal grants as a result of its religious discrimination.¹⁹⁵ Therefore, this provision should be removed from the statute due to its inaccuracy and encouragement of religious discrimination.

Further, another requirement of the mandate specifies that to be considered a religious employer, the “purpose” of the organization must be “the inculcation of religious values.”¹⁹⁶ This requirement is too narrow because it automatically disqualifies any organization that is not engaged in religious teaching or ministry.¹⁹⁷ If, however, purpose, inculcation, and religious values were more broadly construed, then more entities like Hercules Industries would qualify as religious organizations under this part of the test.¹⁹⁸ Yet, in its current form, the definition’s requirement imposes a characteristic too narrow to allow many faith-based organizations to qualify.¹⁹⁹

An additional troubling aspect of this requirement is the government’s involvement with religion when making its determination.²⁰⁰ The government must “troll through the inner lives of religious organizations” to determine whether an entity is sufficiently religious to qualify, which ultimately violates the Establishment Clause’s prohibition against the government’s entanglement with religion.²⁰¹ Thus, many religious employers do not qualify for an exemption because the government was

193. *See id.* This initiative applies to organizations that are directly funded by federal funds and were enacted during the Clinton Administration. *Id.* at 63 n.22. This requirement was also applied to additional federal funding through President George W. Bush’s Executive Order 13,279, which is entitled *Equal Protection of the Laws for the Faith-Based and Community Organizations*. *Id.* (citing Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2012)). President Barack Obama confirmed the initiative through Executive Order 13,559, entitled *Fundamental Principles in Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*. *Id.* (citing Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010)).

194. *See* Carlson-Thies, *supra* note 189, at 59.

195. *See id.*

196. *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4 (quoting 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)).

197. *See* Carlson-Thies, *supra* note 189, at 59.

198. *See* *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012) (“Although Hercules is a for-profit, secular employer, the Newlands . . . ‘seek to run Hercules in a manner that reflects their sincerely held religious beliefs.’” (quoting *Newland Amended Complaint*, *supra* note 80, para. 2)).

199. *See* Carlson-Thies, *supra* note 189, at 60.

200. *See id.*

201. *Id.*; *see also supra* Part V.B.2 (explaining the Establishment Clause challenges raised against the PPACA).

unable to conclude that these particular organizations sufficiently served a religious purpose.²⁰² Despite its inadequacies, this provision, if read broadly, would adequately serve both the religious rights of employers and the goals of the government. The government would still be able to ensure that a limited number of businesses would be exempt from the mandate, and the free exercise rights of faith-based corporations would be respected. Any other reading, however, would be too narrow and would fail to include those businesses that both serve a religious purpose and manufacture a product or provide a service unrelated to religion. Ultimately, the government must decide how it will define or interpret “religious purpose.”²⁰³

An organization that seeks to qualify as a religious employer must also primarily employ people whose religious beliefs are aligned with the beliefs of the organization.²⁰⁴ This requirement not only is ambiguous and excessively narrow but also allows the government to become entangled with the religious matters of the organization by deciding whether the employees are sufficiently aligned with a religious organization’s beliefs.²⁰⁵ And while these religious organizations are permitted to only hire employees who share the organization’s religious beliefs, many businesses and organizations do not discriminate based on religion in the hiring of their employees.²⁰⁶ Thus, due to the narrowness of this exemption, which wrongly assumes that religious employers will only hire employees of similar religious belief, many faith-based organizations, including churches, cannot qualify as religious organizations under the PPACA.²⁰⁷ For this reason, this requirement should be repealed.

In addition, the PPACA limits its extension of religious exemptions to nonprofit organizations described in the Internal Revenue Code (the Code).²⁰⁸ These Code sections, however, should not be used to delimit or

202. See Carlson-Thies, *supra* note 189, at 60.

203. See Complaint and Demand for Jury Trial at 33, *Univ. of Notre Dame v. Sebelius*, No. 3:12-CV-253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), 2012 WL 1859163 [hereinafter *Notre Dame Complaint*], available at http://opac.nd.edu/assets/69013/hhs_complaint.pdf.

204. See *supra* note 65 and accompanying text.

205. See *ObamaCare and Its Mandates Fact Sheet*, ALLIANCE DEFENDING FREEDOM 4 (Aug. 8, 2012), <http://www.alliancedefendingfreedom.org/content/docs/facts/ObamaCare-and-its-mandates.pdf>. The ambiguity of this exemption leaves undetermined whether the exemption would apply to a denominational organization that hires Christians of other denominations. *Id.*

206. See Carlson-Thies, *supra* note 189, at 60 (“[T]he Catholic Health Association says, ‘Men and women of any or no faith who are willing to serve with us in a manner faithful to the teachings of the Catholic Church are welcomed to join us as colleagues and employees.’” (quoting *CHA Comments on Religious Employer Exceptions to Preventive Services*, CATHOLIC HEALTH ASS’N (Sept. 22, 2011), http://www.chausa.org/Pages/Advocacy/Issues/Faith-based_and_Ethical_Concerns/)).

207. See *id.*

208. See *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *supra* note 4; see also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Final Rules, 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147 (2012) and 26 C.F.R. pt. 54 (2012)) (noting that the Internal

define religious organizations under the PPACA because the Code sections only govern the disclosure of information to the government by categories of exempt organizations.²⁰⁹ The organizations that meet this definition are not required to file the annual tax return that is required of most nonprofit organizations.²¹⁰ Moreover, the Code does not limit its definition of religious organizations to churches.²¹¹ Thus, the PPACA's requirement that a business must be categorized as a nonprofit organization to be regarded as a religious employer is too narrow and inconsistent with the Code's own definition of a religious organization.²¹²

When viewed collectively, only a very limited number of religious organizations—churches and religious institutions—are included in the four-part definition of religious employer outlined by the PPACA.²¹³ The sole requirement that could adequately encompass faith-based corporations like Hobby Lobby and Hercules Industries is the requirement that specifies that a religious employer's purpose must be the “inculcation of religious values,” but the narrowness and ambiguity of the other three requirements render them inadequate and harmful to organizations that clearly should be protected as religious institutions.²¹⁴ Even the religious purpose criterion, however, remains too narrow and should be interpreted or defined by the government.²¹⁵ Moreover, the current stipulation that all four conditions must be met in order for a faith-based organization to qualify as a religious organization acts as a complete barrier for for-profit employers like the Newlands who do not solely hire or serve people with identical religious beliefs.²¹⁶ As such, until the religious employer exemption is broadened or repealed, faith-based employers will be forced to either violate their religious beliefs or suffer a penalty.

B. Government Provision of Free Birth Control

While broadening the religious exemption would serve the purpose of silencing objecting religious employers, the government could also accomplish its goal of providing increased access to contraceptives through governmental provision of free birth control via a variety of methods.²¹⁷

Revenue Code's definition of a nonprofit organization refers to “churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order”).

209. See Carlson-Thies, *supra* note 189, at 60.

210. See *id.*

211. See *id.*

212. See *id.*

213. See *ObamaCare and Its Mandates Fact Sheet*, *supra* note 205.

214. See Carlson-Thies, *supra* note 189, at 59.

215. See *Notre Dame Complaint*, *supra* note 203, at 33.

216. See Carlson-Thies, *supra* note 189, at 60.

217. See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

Although this would not ultimately deal with the issue of whether a corporation is entitled to religious protection, corporations religiously opposed to providing contraceptive services would be spared from the choice of providing coverage for contraceptive services or suffering millions of dollars in penalties.²¹⁸ The government could provide free birth control by several methods, which include (1) creating a contraception insurance plan with free enrollment; (2) directly compensating contraception and sterilization providers; (3) creating a tax credit or deduction for contraception purchasers; or (4) imposing a mandate on the pharmaceutical companies or physicians to give away contraceptive items for free and sponsor education about the products.²¹⁹ All of these suggestions provide real—not hypothetical—alternatives to federally mandated contraception coverage on religiously objecting employers.²²⁰

Indicative of the government's ability to use its own resources for contraceptives is a plan, announced on the HHS website, to spend over \$300 million in 2012 to provide contraceptives directly through Title X funding.²²¹ Additionally, the government partnered with state governments to construct a funding network designed to increase contraceptive access, use, and education, which included, among other things, the designation of hundreds of millions of dollars for family planning services.²²² Moreover, public funding for these family planning services has increased by thirty-one percent from fiscal year 1980 to fiscal year 2010.²²³ As such, nothing prevents the government from using this preexisting funding to ensure increased access for women to contraceptive services.²²⁴ The existence of these and other programs indicates that the government can further its goals without coercing religious employers to violate their faith.²²⁵

By adopting any of these suggestions, the government could ensure that contraception services would be more widely available without burdening the religious beliefs of individuals and corporations. And while

218. *See id.*

219. *See id.*; *see also Hobby Lobby Plaintiffs' Motion*, *supra* note 8, at 15 (delineating an array of alternatives the government has for expanding contraceptive access without forcing religious objectors to comply).

220. *See Hobby Lobby Plaintiffs' Motion*, *supra* note 8, at 15.

221. *See id.*; *see also Title X Family Planning*, OFF. POPULATION AFF., available at <http://www.hhs.gov/opa/title-x-family-planning/> (last visited Apr. 22, 2013) (stating that the Title X Family Planning Program is a federal grant program that provides comprehensive family planning and related health services to individuals through access to contraceptive services, supplies, and information).

222. *See Hobby Lobby Plaintiffs' Motion*, *supra* note 8, at 15; *see also Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INST. (May 2012), available at http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (explaining that government funding included \$2.37 billion in public expenditures for family planning services in fiscal year 2010, \$228 million in fiscal year 2010 for Title X of the Public Health Service Act, and \$294 million in state spending for family planning in fiscal year 2010).

223. *See Hobby Lobby Plaintiffs' Motion*, *supra* note 8, at 15.

224. *See id.*

225. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012).

taxpayers would still ultimately finance many of these options, they are much less restrictive than forcing faith-based organizations to relinquish their religious freedoms.²²⁶

VIII. CONCLUSION

Pennsylvania House Representative Mike Kelly adequately summed up the contraception mandate's impact on faith-based corporations like Hobby Lobby and Hercules Industries when he compared the mandate to other attacks against the United States: "[T]hink of times when America was attacked. One is December 7th[,] . . . [t]he other is September 11th I want you to remember August the 1st, 2012, the attack on our religious freedom. That is a day that will live in infamy"²²⁷

Despite the Supreme Court's reluctance to issue an injunction against the PPACA's implementation, many courts, including the Seventh Circuit, have joined sides with Representative Kelly in finding that the contraception mandate acts as an assault on the religious liberty of faith-based organizations.²²⁸ This growing trend indicates that courts are willing to accept that for-profit corporations should lay claim to religious rights.²²⁹ In order for religious businesses to freely exercise their religion, however, the Supreme Court must ultimately extend religious rights to corporations under the First Amendment and RFRA.²³⁰ Moreover, because the current form of the contraception mandate acts as a barrier to the religious freedoms of for-profit and nonprofit businesses alike, the government should either broaden or repeal the religious employer exemptions or do away with mandated contraception coverage altogether.²³¹

In the end, the debate over whether corporations are entitled to religious free exercise rights will continue until the Supreme Court decides the issue or Congress amends the contraception coverage portion of the PPACA.²³² In the meantime, for-profit corporations like Hercules Industries and Hobby Lobby will be forced either to violate the religious beliefs upon which they were founded or to incur millions of dollars in penalties for freely exercising their religion

226. See Joanna Stephens, *Measuring Justice in the Contraceptive Mandate*, CAPITAL COMMENT, <http://www.capitalcommentary.org/contraception-mandate/measuring-justice-contraceptive-mandate> (last visited Apr. 22, 2013).

227. Michael O'Brien & Frank Thorp, *Republican Likens Contraceptive Mandate to Pearl Harbor, 9/11*, NBC NEWS (Aug. 1, 2012), http://firstread.nbcnews.com/_news/2012/08/01/13070876-republican-likens-contraceptive-mandate-to-pearl-harbor-911?lite.

228. See, e.g., *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

229. See, e.g., *id.*

230. See *supra* Part V.

231. See Carlson-Thies, *supra* note 189, at 58-60.

232. See *supra* Parts VI & VII.