

TIED HANDS: THE PROBLEM WITH APPLYING THE
CONTRACEPTION MANDATE TO SECULAR CLOSED
CORPORATIONS IN LIGHT OF GILARDI V. UNITED
STATES AND KORTE V. SEBELIUS

*Sean Rose**

On March 21, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (Act) into law, making official a sweeping overhaul to the troubled American health care system after months of heated political debate.¹

At the time of its passage, the health care system in America was widely viewed as failing millions of its citizens.² Insurance was known to be difficult to obtain given the obstacles imposed by profiteering insurance companies in the uniquely American for-profit health insurance market.³ Health insurance providers even enjoyed the freedom to drop an individual's coverage when expenses got too high.⁴ A crisis was at hand, and with the demand for change looming large, Congress finally acted in a comprehensive manner.⁵

The Act's impact is as massive as its pagination (2,073 pages including the original bill and subsequent adjustment measures passed through reconciliation).⁶ The goal of the legislation was to address the laundry list of issues with the American health care

* Sean Rose is an Associate New Developments Editor for the Rutgers Journal of Law and Religion and a May 2014 Candidate for Juris Doctor at Rutgers School of Law-Camden.

1 Sheryl Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/health/policy/24health.html>.

2. Frank Newport, *Americans' Views of Healthcare Quality, Cost, and Coverage*, GALLUP (Nov. 25, 2013), <http://www.gallup.com/poll/165998/americans-views-healthcare-quality-cost-coverage.aspx>. Question four tracks how people view the health care industry state in America over the last twenty years. It has been a consistent trend that between 15-20% view the American health care system "in crisis," while over 50% view it as having "major problems."

3. Lane Kenworthy, *America's Inefficient Health-care System: Another Look* (July 10, 2011), <http://lanekenworthy.net/2011/07/10/americas-inefficient-health-care-system-another-look/>.

4. THE STAFF OF THE WASHINGTON POST, *LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL* vii-viii (2010).

5. Stolberg & Pear, *supra* note 1.

6. THE STAFF OF THE WASHINGTON POST, *supra* note 4.

system,⁷ containing provisions to expand coverage to the nearly fifty-million Americans who lived without health insurance, an expansion of Medicaid at the state level, the creation of state marketplaces (either by the states or the federal government if the state did not create its own), and an individual mandate to manage the “free rider dilemma” and to ensure that enough young and healthy people sign up for health insurance to offset the higher cost to insurance companies of enrolling the less healthy.⁸

Along with expanding coverage, another major goal of the Act was to improve the quality of health insurance for those who already had it.⁹ Among the quality improvement provisions was a requirement that employers offering coverage must issue health insurance to cover “preventive services” without cost sharing by the employee.¹⁰ Under the guidelines issued by the Health Resources Services Administration (HRSA, an agency within the Department of Health and Human Services (HHS)), employer plans had to cover the minimum amount of preventive services as mandated by the Act and detailed by subsequent HHS regulations.¹¹

HHS would eventually define women’s preventive care requirement to include contraception coverage,¹² commonly referred to as the “contraception mandate.”¹³ The contraception mandate generated controversy especially from religious organizations, particularly those that are employers that would theoretically need to comply with the mandate.¹⁴ The mandate included an exemption

7. *Id.* at 73.

8. *The Requirement to Buy Coverage Under the Affordable Care Act*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://kff.org/infographic/the-requirement-to-buy-coverage-under-the-affordable-care-act/> (last visited June 22, 2014).

9. *Strategic Goal 1: Strengthen Health Care*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/strategic-plan/goal1.html> (last visited June 1, 2014).

10. 42 U.S.C. § 300gg-13(a)(4) (2010).

11. 42 U.S.C. § 300gg-13 (2010).

12. As recommended by the independent Institute of Medicine, women’s preventive care was defined to include FDA-approved contraception methods. Press Release, *U.S. Dep’t of Health & Human Servs., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, (Aug. 1, 2011), available at <http://www.hrsa.gov/womensguidelines/>.

13. 45 C.F.R. § 147.130(a)(1)(iv)(A) (2011).

14. *HHS Mandate*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/religious-liberty/hhs-mandate/> (last visited June 1, 2014). Most notably, the United States Conference of Catholic Bishops has come out swinging against the mandate. After its release, Cardinal Dolan of New York led the charge stating three main concerns in a statement:

for religious employers that covered churches, synagogues, mosques, and other religious institutions that operate to predominantly employ and serve people of faith.¹⁵ To fit within that exemption, the regulation crafted by HHS asserts that if the “inculcation of religious values” is the principal purpose of the organization, and the organization serves and/or employs persons who “share the religious tenets of the organization,” then that organization would be exempt from the mandate.¹⁶ Many other entities, such as schools, hospitals, and social service providers that do not qualify for the religious exemption under the regulation, have also asserted significant objections due to its potentially unconstitutional implications.¹⁷

Despite its importance in improving the quality of health insurance plans, the contraception mandate was riddled with exemptions and exclusions.¹⁸ An employer can be exempted from the mandate if they had maintained the same plan that had continuously covered someone since the date of the Act’s passage, March 23, 2010.¹⁹ Plans remain grandfathered so long as they have not been significantly modified since the date of passage.²⁰ Modifications include entering a new plan, eliminating benefits, increasing

(1) the narrow definition of ‘religious employers’ that are exempted, (2) the “accommodation” of religious ministries excluded from that definition, and (3) the treatment of businesses run by people who seek to operate their companies according to religious principles. Based on the March 2012 statement, the final rule shows that the first and third concerns still have not been addressed. Additionally, the second area of concern appears mostly the same, except for three relatively small changes that will require more time and analysis to evaluate.

Id.

15. 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4) (2011).

16. *Id.*

17. Michelle Bauman, *Catholic Organizations Protect Contraception Mandate Ad in DC Papers*, CATHOLIC NEWS AGENCY (Oct. 24, 2011, 12:32 PM), <http://www.catholicnewsagency.com/news/catholic-organizations-protest-contraception-mandate-with-ad-in-dc-papers/>.

18. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8456-57 (Jul. 2, 2013) (to be codified at 45 C.F.R. § 147.130 (2011)).

19. Preservation of Right to Maintain Existing Coverage, 45 C.F.R. § 147.140(a)(1)(i) (2010). As has been much publicized recently, the grandfather clause applies to all the Affordable Care Act’s provisions, including minimum coverage standards, etc.

20. *Id.* (“[G]randfathered health plan coverage means coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section).”).

cost-sharing requirements such as co-payments or deductibles, decreasing employer's contribution rate, or altering annual limits.²¹ As long as the employer's plan satisfies these criteria, that plan is not subject to the mandate to provide contraceptive care.²²

In addition to the grandfathered plans, the Act also exempted small employer plans.²³ The Act specifies that only "large employer plans" (defined as one with at least fifty full-time employees) must comply with the contraception mandate. The effect of the Act distinguishing between large and small employers here is that although the preventive services provision (and within it, contraception coverage) is of vital importance, only large employers are mandated to offer it to their employees.²⁴

These two sizable exemptions in the "mandate" would be key in its subsequent legal setbacks and court analysis as to whether the contraceptive mandate satisfied the Religious Freedom Restoration Act's (RFRA) statutory requirements (see *infra* Sections III and IV). Even more complicated issues arise when applying this new mandate on secular closed corporations that operate for profit. Some plaintiffs who have recently filed suit in federal court say that such a mandate to provide contraceptive benefits infringes on their right of free exercise.²⁵ In two recently decided cases, federal circuit courts have decided that such a mandate does infringe on those constitutional and statutory rights.

This article will examine the outcomes and implications of two recent cases decided by federal circuit courts, *Gilardi v. United States* from the D.C. Circuit, and *Korte v. Sebelius* from the Seventh Circuit. It will begin with a brief section overviewing the litigation stemming from the contraceptive mandate, specifically the analogous cases that have grappled with the issue of for-profit close corporations²⁶ who object to the contraception mandate be-

21. 45 C.F.R. §§ 147.140(a)(1)(ii), 147.140(g) (2010).

22. 45 C.F.R. §§ 147.140(a)(1)(ii) (2010).

23. 26 U.S.C. § 4980H(a) (2011).

24. *See id.*

25. *Gilardi v. U.S. Dep't of Health & Human Services*, 733 F.3d 1208, 1210 (D.C. Cir. 2013).

26. For the purposes of this article, the main focus will be on the burden the government has to overcome to win a RFRA claim.

However, a huge issue that the courts have had to grapple with is the rights of corporations and religious free exercise. For case law more on point with that discussion, see *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); and *Conestoga Wood Specialties Corp. v. Sec'y HHS*, 724 F.3d 377 (3d Cir. 2013). For purposes of understanding some of the discussion in this article, an

cause of its burden on their right to free exercise under RFRA and the First Amendment's Free Exercise Clause. It will then touch upon the current state of RFRA and Free Exercise doctrine, highlighting the burdens that are on the plaintiffs and the government respectively and how the Court has developed the tests for both. For illustrations of the RFRA analysis in practice, the article will then detail the *Gilardi* and *Korte* circuit court holdings. Since the two cases are both decided on RFRA grounds, the article will focus primarily on RFRA and the strict scrutiny analysis, with special focus paid to the government's high burden, the difficulty the contraception mandate poses for meeting that heightened standard under the statute, and why both circuit courts properly analyzed and ruled on the issue. The article will then conclude with a recap why the courts were correct and why the government needs to separate policy from legality in its defense of the contraception mandate.

I. THE CONTRACEPTION MANDATE IN FEDERAL COURT

After the Act was signed into law, litigation almost immediately began challenging the constitutionality of various provisions. While most of the focus was on the individual mandate and coerced Medicaid expansion, the central focus was on the potential overbreadth of federal power. As the challenges to those provisions reached their resolution in the landmark *NFIB v. Sebelius*,²⁷ the HHS promulgated its preventive care regulations that included

accessible and succinct definition and explanation of what makes up a closed corporation can be found at: <http://legal-dictionary.thefreedictionary.com/Closed+Corporation>. It provides:

A closed corporation is also known as a close corporation, a family corporation, an incorporated partnership, and a chartered partnership. In this type of corporation all of the functions are usually performed by the same parties. These individuals serve as shareholders, officers, and directors and are involved in the management and operation of the business. A closed corporation differs from a publicly held corporation since its stock is neither issued nor traded to the public at large.

Closed Corporation, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Closed+Corporation>, (last visited June 23, 2014).

27. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). This landmark decision by the Court upheld the main provisions of the law, including the individual mandate as valid under Congress's tax and spending power, and the Medicaid expansion (in a modified version).

the requirement that insurance packages offered by employers cover all FDA-approved forms of contraception.²⁸

At this point, the contraception mandate is no stranger to federal court.²⁹ Currently, there are multiple cases pleading the courts to issue an injunction stopping the government from enforcing the mandate as applied to the religious organizations (such as schools, etc.) that did not fit into the exemption.³⁰ One such challenge, *Sebelius v. Hobby Lobby*,³¹ from the 10th Circuit, has been granted certiorari and was taken up by the Supreme Court in March 2014.³² In that case, the Court will have to decide whether the mandate's requirement can be applied to a corporation itself.³³

The 10th Circuit did not rule on whether the owners themselves could pursue a similar religion-based challenge, those are the questions posed in *Korte* and *Gilardi*.³⁴ Only the D.C. and 7th Circuit courts have dealt with this unique question in *Gilardi v. United States* and *Korte v. Sebelius*. The uncertainty generated by these specific questions of secular, closed corporations and the religious freedom of their operators, demands that the Supreme Court should grant certiorari in these two cases and evaluate whether the mandate violates the RFRA.

II. THE RFRA AND THE CONTRACEPTION MANDATE'S FAILURE TO MEET ANY OF THE THREE PRONGS

The challenges to the contraceptive mandate have generally implicated both the Free Exercise Clause and the RFRA.

28. Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception Mandate*, N.Y. TIMES, Jan. 20, 2012, <http://www.nytimes.com/2012/01/21/health/policy/administration-rules-insurers-must-cover-contraceptives.html>.

29. Lyle Denniston, *Birth-control Mandate: Which Case to Review?*, SCOTUSBLOG (Nov. 4, 2013, 8:20 PM), <http://www.scotusblog.com/2013/11/birth-control-mandate-which-case-to-review/>.

30. Lyle Denniston, *New Challenges to Birth-control Mandate* (UPDATED), SCOTUSBLOG (Dec. 31, 2013, 4:36 PM), <http://www.scotusblog.com/2013/12/new-challenges-to-birth-control-mandate/>.

31. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

32. Lyle Denniston, *Court to Rule on Birth-control Mandate* (UPDATED), SCOTUSBLOG (Nov. 26, 2013, 12:20 PM), <http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/>.

33. *Id.*

34. *Id.* The same question is posed by a similar case in *Conestoga Wood Specialties Corp. v. Sec'y HHS*, 724 F.3d 377 (3d Cir. 2013).

A. The Free Exercise Clause

The right to the Free Exercise of our religion is rooted in the First Amendment.³⁵ The Free Exercise Clause states, “[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”³⁶ As the name indicates, it prohibits federal and state government from infringing on an individual’s right to engage in their own religious practices.³⁷ As far as the Clause’s protection against legislation, the Free Exercise Clause has been held to only apply to protecting religious practices from discriminatory legislation.³⁸ Under the Court’s holding in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, neutral laws of “general applicability” do not violate the Free Exercise Clause.³⁹

In *Smith*, the Court grappled with a challenge to a dismissal of two Native American employees working as counselors in a rehabilitation center that were fired for ingesting peyote, a powerful hallucinogen, as part of their religious practices in the Native American Church.⁴⁰ Consequently, the rehabilitation organization fired the two individuals.⁴¹ The government denied their application for unemployment compensation because their dismissal was for work-related misconduct by taking illegal drugs.⁴² After the Supreme Court remanded the claim to Oregon state court to determine whether the two employees’ conduct violated state drug laws, the case returned to the Court presenting the question as to whether a state could deny unemployment benefits to a worker fired for using illegal drugs for religious purposes.⁴³

35. U.S. CONST. amend. I.

36. *Id.*

37. Michael W. McConnell, *The Origins and Historic Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). This article conducts an in-depth study of the historical understanding of the Free Exercise Clause and how the Court has interpreted it up to 1990 when the regime of evaluating Free Exercise issues was changed (as discussed below).

38. *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879-80 (1990). As discussed, *Smith* changed this understanding of the Free Exercise right, holding that neutral laws of general applicability need only the basic test for rationality that applies to all laws.

39. *Id.*

40. *Id.* at 874.

41. *Id.*

42. *Id.*

43. *Smith*, 494 U.S. at 876.

The Court found in favor of the state, concluding that because Oregon's laws against the possession and use of peyote were not specifically targeting a protected religious practice, there was no burden on free exercise.⁴⁴ The state drug laws applied to everyone who possessed or used peyote, regardless of the religious or non-religious reason, and was therefore a "neutral law of general applicability."⁴⁵ Further, the Court noted that it had never held that an individual's religious beliefs could excuse him from obeying a valid law that prohibits certain conduct that the government is free to regulate, and if so inclined, to criminalize.⁴⁶ The Court feared a "slippery slope" effect in granting such exceptions, reasoning that allowing exceptions to state laws or regulations affecting religious practices "would open the prospect of constitutionally-required exemptions from civic obligations of almost every conceivable kind . . ."⁴⁷ The Court feared that such exceptions could lead to attempts to excuse people from complying with laws forbidding polygamy, child labor, Sunday closing, registration for Selective Service, and the paying of Social Security taxes by following their religious beliefs.⁴⁸

In subsequent cases, the Court clarified the requirements of the general applicability and neutrality standards. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that laws of "general applicability" are identified as being "religiously neutral."⁴⁹ Conversely, if a law is not religiously neutral, it is likely not "generally applicable," with the Court noting that "neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."⁵⁰ To be neutral, the law must not single out a religion or religious practice for disfavor, and is applied to everyone.⁵¹

The pre-*Smith* Free Exercise jurisprudence had been substantially more exacting, demanding that the government identify a

44. *Id.* at 878.

45. *Id.* at 879 (internal citations and quotations omitted).

46. *Id.* at 879-80.

47. *Id.* at 879 ("To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

48. *Smith*, 494 U.S. at 880.

49. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529-31 (1993).

50. *Id.* at 531.

51. *Id.* at 534.

compelling interest and that it be the least restrictive means in burdening religion.⁵² As it stands now, essentially, Free Exercise Clause cases are analyzed through a two-prong test synthesized from the standards explained above.⁵³ First, the court examines the text of the law to ensure it is neutral.⁵⁴ Second, the Court analyzes the effect of the law “in its real operation,” because it is “strong evidence of its object” to ensure its neutrality and general applicability.⁵⁵

The post-*Smith* Free Exercise test was considered so lenient for the government in burdening religion, Congress responded shortly thereafter.

B. Congress Responds to *Smith*- The RFRA

Congress responded to the Court’s ruling in *Smith* by enacting the Religious Freedom Restoration Act in 1994.⁵⁶ In passing the

52. *Sherbert v. Verner*, 374 U.S. 398, 408 (1963).

53. *City of Hialeah*, 508 U.S. at 533-34.

54. *Id.* Once again, the Court identifies a law as being neutral if it does not discriminate against religion on its face or if the object of the law is not targeting or prohibiting religious practices. Because of the development of the law, not many laws are facially discriminatory against religion, so most of this inquiry examines the effects or purpose of the law in question.

55. *Id.* at 534-35.

56. 42 U.S.C. § 2000bb (1993):

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and

RFRA, Congress created a new statutory right to religious exercise that went further than the constitutional right to free exercise under the First Amendment (post-*Smith*).⁵⁷ In creating this new statutory right, the RFRA also provided courts with a test to apply when reviewing a claim of religious practice burden brought under the statute.⁵⁸ The RFRA restored the strict scrutiny analysis⁵⁹ asserted by the Court in *Sherbert v. Verner*⁶⁰ and *Wisconsin v. Yoder*,⁶¹ free exercise cases that had preceded *Employment Division v. Smith*. The test set forth provides: “Government may (1) *substantially burden* a person’s exercise of religion *only if* it demonstrates that application of the burden to the person-- (2) is in furtherance of a *compelling governmental interest*; and (3) is the *least restrictive means* of furthering that compelling governmental interest.”⁶²

The RFRA created a high bar that allows the government to only “substantially burden” religious exercise only after satisfying the “exacting standard that is strict scrutiny.”⁶³ Also, unlike pre-RFRA Free Exercise jurisprudence, the government cannot place a substantial burden on a person’s exercise of religion without justi-

to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id.

57. *Id.* Special emphasis placed on the relevant parts of the statute that emphasize that Congress was seeking to reverse the Court’s conclusion in *Smith*.

58. 42 U.S.C. § 2000bb(b) (1993). Note that RFRA only applies to the federal government, not the states. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that the application of the statute to the states was beyond Congress’ legislative authority under Section Five of the Fourteenth Amendment.

59. The pertinent part of the statute states:
Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (1993).

60. *Sherbert*, 374 U.S. at 398.

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

62. 42 U.S.C. § 2000bb-1(b) (1993) (emphasis added).

63. “Strict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any . . . classification [are] clearly identified and unquestionably legitimate.” *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (internal quotations omitted).

fyng it through the strict scrutiny analysis, even for a law of general applicability.⁶⁴

Under the RFRA's first prong, a substantial burden⁶⁵ is placed on a person's ability to exercise if it exerts substantial pressure on a person to violate his beliefs. In the statute, Congress did not define what constitutes a substantial burden on a person's ability to exercise, thus the standard has been developed over time by the Supreme Court, primarily in pre-RFRA cases.⁶⁶ In *Sherbert v. Verner*, the Court explained that a substantial burden occurs when a person has to "choose between following the precepts of her religion and forfeiting government benefits . . . and abandoning one of the precepts of her religion in order to accept the benefits."⁶⁷ In writing about an example of what would constitute a burden, the opinion (in dicta) referenced imposing a fine for a person exercising their beliefs, such as a person going to worship on the Sabbath, as making a person chose between religion and avoiding government sanction (in that case, a fine).⁶⁸ Going further in *Wisconsin v. Yoder*,⁶⁹ the Court wrote that if a law "compels [people], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tents of their religious beliefs," that law substantially burdens religion.⁷⁰

If a court determines the government has substantially burdened the exercise of religion, the burden shifts over to the government to then show that the burden is in furtherance of a compelling government interest.⁷¹ Similar to the ambiguity of what constitutes a substantial burden, the RFRA did not provide a defi-

64. 42 U.S.C. § 2000bb (1993).

65. *Id.*

66. The "substantial burden" standard was primarily shaped by the two cases that were overruled by *Employment Division v. Smith*, namely the aforementioned *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

67. The issue in this case was whether a Seventh Day Adventist could be fired for refusing to work on a Saturday, their Sabbath. *Sherbert*, 374 U.S. at 398. After unemployment insurance was denied because the state benefit service said it was an unreasonable justification for refusing to work; therefore, she did not qualify for unemployment insurance benefits. *Id.* at 404. The Court reversed the denial, holding that the state had burdened her religious exercise.

68. *Id.* at 404.

69. In *Yoder*, the Court had the issue before it of whether parents of Amish faith could act contrary to a state educational mandate statute. The parents refused to keep their kids in school past eight grade because it was contrary to their religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

70. *Id.* at 218.

71. 42 U.S.C. § 2000bb(b)(2) (1993).

nition or list for which government interests are “compelling,” thus the courts have been left to establish a cohesive standard. In *Yoder* and *Sherbert*, the Court used words and phrases such as: “only those interests of the highest order,” “paramount,” and not “colorable.”⁷² Given the language of the statute and the Court’s past interpretation of what serves as a compelling governmental interest, some scholars have noted that under the RFRA, few government interests would qualify as sufficiently compelling.⁷³

The final element is whether the substantial burden placed on religion that is furthering a compelling government interest is the least restrictive means of doing so.⁷⁴ In *Sherbert*, the Court held that the government must demonstrate that there was no alternative to the regulation ultimately adopted that burdens a person’s exercise rights while serving a compelling interest.⁷⁵ Because of the difficulty the government has in convincing a court that a specific regulation is the *only reasonable method* in achieving the government’s goal, the government seems unlikely to win many RFRA challenges once a plaintiff demonstrates a substantial burden (emphasis added) (*see infra* Section IV).

Because of the doctrine of constitutional avoidance, courts will usually be faced with resolving complaints under a statute, such as the RFRA, before getting to a question of whether a statute violates the Constitution (Free Exercise Clause jurisprudence and the implications of the mandate independent of the RFRA will be discussed in depth in Section V).⁷⁶ Similarly, the focus of *Gilardi* and *Korte* has been the implications of the contraception mandate under the RFRA.

72. *Sherbert*, 374 U.S. at 406; *see also Yoder*, 406 U.S. at 215.

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

74. 42 U.S.C. § 2000bb(b)(2) (1993).

75. *Sherbert*, 374 U.S. at 406.

76. “The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

III. THE CASES

A. *The Gilardis' Road to the D.C. Circuit*

Freshway Foods and Freshway Logistics (Freshway) are two closely held corporations headquartered in Ohio that collectively employ about 400 people, and operate a self-insured health plan through a third-party administrator (a typical model for an employer-based health plan).⁷⁷ The companies are equally co-owned by two brothers, Francis and Philip Gilardi, who are ardent adherents to the Catholic faith.⁷⁸ As part of their faith, the Gilardis passionately oppose contraception, sterilization, and abortion.⁷⁹ In their roles as executives and owners of Freshway, they excluded coverage of products and services that fell under those categories in their health plans.⁸⁰

The Affordable Care Act changed their ability to make that choice. The contraceptive mandate directed all group plans and health insurance issuers to provide preventive care as defined by the HHS, and as discussed, those guidelines would require coverage for “all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁸¹ The Freshway companies did not fit under any of the exemptions for grandfathered plans or religious organizations, and therefore the Gilardis had two choices:⁸² either adjust the health plans offered by the company to provide the mandated contraceptive services in direct contravention of their religious beliefs, or pay the penalty under the law (applying the penalty to the Freshway company would have resulted in approximately a fourteen million dollar penalty per year).⁸³

Stuck between a rock and a hard place, the Gilardi brothers and their companies filed suit for a preliminary injunction in district court, alleging the Contraception Mandate violated their rights under the RFRA, the Free Exercise Clause, and the Admin-

77. *Gilardi v. U.S. Dep't of Health & Human Services*, 733 F.3d 1208, 1210 (D.C. Cir. 2013).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Gilardi*, 733 F.3d, at 1210.

82. *Id.*

83. *Id.*

istrative Procedure Act.⁸⁴ The district court denied their request for a preliminary injunction, determining that Freshway companies could not “exercise” religion and thus no substantial burden on religious exercise was demonstrable under the RFRA.⁸⁵ The Gilardis moved for an interlocutory appeal and filed for an injunction pending the appeal to the D.C. Circuit, which was approved giving them temporary relief from the mandate until the appeal was heard.⁸⁶

On appeal, the D.C. Circuit reversed.⁸⁷ In examining the RFRA claim, the court quickly found that the mandate imposed a burden on the Gilardis’ ability to exercise their religious beliefs.⁸⁸ The government had argued that the link between the mandate and burden was “too remote” and “attenuated,” as it would arise only when an employee purchases or uses a contraceptive service.⁸⁹ The court held differently, finding that the burden actually exists when the employer is pressured into choosing between violating their religious beliefs by selecting the plan that included the mandated contraception coverage or paying onerous penalties.⁹⁰ Because the mandate demands that the Gilardis “meaningfully approve” and endorse the inclusion of contraceptive coverage in their companies’

84. *Id.* at 1210-11. The reason both the Gilardis and Kortess filed their complaints under, amongst the constitutional questions, the Administrative Procedure Act (APA), is because under the APA, there is a general statutory cause of action that allows litigants to bring actions against administrative agencies such as the Department of Health and Human Services that inflicts injury on a litigant (what is commonly known as a § 1331 suit). WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 272-75 (2013).

85. *Gilardi*, 733 F.3d at 1210-11.

86. *Id.* at 1211.

87. *Id.* at 1210. To get to the merits, the court first needed to resolve whether the Gilardis could bring suit as having their religious exercise burdened on their corporation. The RFRA statute proves that “a person whose religious exercise has been burdened” can seek judicial relief, but unlike most statutes, it does not provide what a person is. The D.C. Circuit decided that the Gilardis could proceed with their suit through the shareholder-standing rule, acknowledging that the Gilardi brothers had an injury that was “separate and distinct from an injury to the corporation.” As non-religious corporations, the court held that they could not “engage in religious exercise,” and therefore the right (and ability to sue) belonged to the Gilardis. *Id.* at 1211-16.

88. *Id.* at 1217-18.

89. *Id.*

90. *Gilardi*, 733 F.3d at 1217.

employer provided plans, it is a “compelled affirmation” of religious belief that indicates substantial burden.⁹¹

Additionally, the court found that the government lacked a compelling interest sufficient to satisfy the statute’s second requirement.⁹² The government asserted multiple concerns in attempting to satisfy this standard, including “safeguarding public health,” “protecting a woman’s compelling interest in autonomy,” and promoting gender equality.⁹³ However, the court did not find a nexus between those issues looking to be promoted and the mandate to provide contraception.⁹⁴ They were all either “too broadly formulated” (for the safe-guarding public health interest),⁹⁵ not the state’s interest to assert (the woman’s interest in autonomy is the individual’s interest to assert),⁹⁶ or not an interest of analogous application for the purposes of the mandate at issue (finding that the “gender equality” interest was a “misnomer” in being asserted to justify the mandate as it is more analogous to abortion cases).⁹⁷

Even though the government failed the second prong, the court also looked at the third prong and analyzed whether the mandate was the least restrictive means of meeting those interests.⁹⁸ The court identified two main flaws in the government’s contention that the mandate satisfied this prong. First, there are alternatives that would achieve the same substantive goals while accommodating religious exercise.⁹⁹ Second, the mandate, with all its exemptions (including those with grandfathered plans and small businesses), demonstrated that it was “underinclusive by design,” sug-

91. *Id.* at 1217-18. The court rejects the government’s argument that the mandate is not a substantial burden with seeming disbelief, stating that:

The burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson’s choice. They can either abide by the sacred tents of their faith, pay a penalty of over \$14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not substantial pressure on an adherent to modify his behavior and to violate his beliefs, we fail to see how the standard could be met.

Id. at 1218 (internal quotations omitted).

92. *Id.* at 1219.

93. *Id.* at 1219-21.

94. *Id.*

95. *Gilardi*, 733 F.3d at 1221.

96. *Id.*

97. *Id.* at 1221-22.

98. *Id.* at 1222-24.

99. *Id.*

gesting the law was not narrowly tailored as per required by the RFRA.¹⁰⁰

B. Meet the Kortes

Cyril and Jane Korte own and operate Korte & Luitjohan (K&L) Contractors, Inc., a construction company located in Highland, Illinois.¹⁰¹ At the time of litigation, K&L had about 90 full-time employees, 70 of whom belonged to a union that sponsors their health-insurance plan.¹⁰² For the remaining 20 employees that are not in the union, the company provides a health care plan.¹⁰³ The Kortes own about 87% of the stock of the corporation, are its only directors, and set all company policy.¹⁰⁴

Much like the Gilardis, the Kortes are Catholic and follow the teachings of the religion regarding the respect and protection of human life “from conception to natural death, and the moral wrongfulness of abortion, sterilization, and the use of abortifacient drugs and artificial means of contraception.”¹⁰⁵ Also, like the Gilardis, the Kortes manage their company, including their choice of health plan, in accordance with their faith commitments.¹⁰⁶ In August 2012, when the contraception mandate regulations were being finalized, the Kortes discovered that their then-existing health plan did comport to the regulation by covering sterilization and contraception measures.¹⁰⁷ However, the Kortes did not want to cover such items because they conflicted with their religious convictions and replaced them with one that conforms to the requirements of their Catholic beliefs.¹⁰⁸

The contraception mandate stood in their way. With the company’s health-care plan due to renew on January 1, 2013, the requirements for the Kortes to offer contraceptive coverage would trigger large financial penalties and possible enforcement actions

100. *Gilardi*, 733 F.3d at 1222.

101. *Korte v. Sebelius*, 735 F.3d 654, 662-63 (7th Cir. 2013).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; see also *Abortifacient*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/abortifacient> (last visited June 25, 2014) (stating an abortifacient drug is a drug that induces abortion).

106. *Korte*, 735 F.3d at 663.

107. *Id.*

108. *Id.*

if they did not comply.¹⁰⁹ For the Kortes, providing such coverage would amount to a moral wrong under their religious beliefs; however, just like the Gilardis, following their faith in offering health insurance to their employees without giving effect to the mandate could result in a devastating fine that would cripple K&L (they calculated that given the fine of \$100 per day per employee, the monetary penalty would total \$730,000 per year).¹¹⁰

Before going to court, the Kortes promulgated ethical guidelines for K&L Contractors memorializing the faith-informed moral limitations on the company's health-care benefit choices.¹¹¹ The guidelines included the moral explanation as to why the Kortes could not offer insurance coverage for abortions, abortifacient drugs, artificial contraception, and sterilization.¹¹² After the guidelines were published, the Kortes filed suit in district court seeking an injunction against the mandate, claiming violations of their rights under the RFRA; the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment; and the Administrative Procedure Act.¹¹³

109. *Id.*

110. *Id.*

111. *Korte*, 735 F.3d at 663.

112. *Id.* at 663 n.5. In footnote 5 of the *Korte* opinion, the court attached the company's ethical guidelines. In part, they asserted that:

1. As adherents of the Catholic faith, we hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. We believe that actions intended to terminate an innocent human life by abortion, including abortion-inducing drugs are gravely sinful. We also adhere to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

2. As equal shareholders who together own a controlling interest in *Korte & Luitjohan Contractors, Inc.*, we wish to conduct the business . . . in a manner that does not violate our religious faith and values.

3. Accordingly, we and *Korte & Luitjohan Contractors, Inc.* cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, abortion-inducing drugs, or related education and counseling, except in the limited circumstances where a physician certifies that certain sterilization procedures or drugs commonly used as contraceptives are being prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy, without violating our religious beliefs.

Id.

113. *Id.* at 663.

The district court denied the injunction, finding as the lower court did in *Gilardi* that K&L had not demonstrated a likelihood of success on the merits because they were not “persons” within the meaning of the RFRA and could not invoke the statute’s protection.¹¹⁴ On appeal, the Seventh Circuit reversed on the standing issue and ruled in favor of the Kortés on the merits.¹¹⁵

On the merits of the RFRA claim, the Seventh Circuit resolved the issues similarly to the D.C. Circuit in *Gilardi*. The decision concluded that there “can be little doubt that the contraception mandate imposes a substantial burden” on the religious exercise by the plaintiffs.¹¹⁶ Citing the heavy fines leveled on companies that do not follow the mandate, the court found there was “enormous pressure” placed on the plaintiffs in picking a health care plan that would include items that violated their religious beliefs

114. *Id.* The district court judge found that because K&L could not invoke the rights under the RFRA, there was no substantial burden to their religious exercise rights. The judge reasoned that the link between the mandated coverage of contraceptives and the Kortés’ religious beliefs were “too attenuated.” In simpler terms the judge found the burden on religious exercise is insubstantial because the mandate is too far removed from the independent decisions by plan participants and beneficiaries to use contraception.

Additionally, the court dealt with the standing issue similar to the D.C. Circuit. Relying on the shareholder standing exception, the court concluded that the Kortés had standing because of their “direct and personal interest in vindicating their individual religious-liberty rights, even though the rights of their closely held corporation were at stake.” In analyzing the pre-RFRA Free Exercise cases, the court concluded that nothing in the Supreme Court’s jurisprudence would foreclose RFRA claims by profit-seeking entities.

115. *Id.* at 659. On appeal, the case was consolidated with a similar case arising from the Southern District of Illinois. In that case, Grote Industries, Inc., a family-owned manufacturer of vehicle safety systems had filed for an injunction against the contraception mandate also on the grounds that as people of Catholic faith the mandate burdened their right to free exercise (along with identical claims brought by the Kortés, the Grote family added a Due Process complaint). Like the Kortés, the Grotes claimed to run their company in accordance with their religious commitments, and designed their health insurance offerings to their 1,148 (464 in the country) employees accordingly. Therefore, prior to the mandate kicking in on January 1, 2013, Grote Industries did not offer contraceptive and sterilization coverage in their health plans.

The Grotes objected to the mandate on religious grounds, but with its large full-time workforce, refusal to acquiesce to the mandate would cost them about \$17 million per year in penalties. As such, they filed suit in District Court seeking an injunction. The District of Southern Indiana denied their motion, also concluding, like in *Korte*, that the plaintiffs would not be likely to succeed on their RFRA motion. The judge also doubted whether a secular, for-profit corporation like Grote could have religious-exercise rights under the RFRA.

116. *Korte*, 735 F.3d at 683.

by conforming to the regulatory mandate.¹¹⁷ Because the plaintiffs established the prima facie case of substantial burden under the RFRA, the burden shifted to the government.¹¹⁸ Once again, the government could not meet the high burden in the statute.

The Seventh Circuit shared the D.C. Circuit's doubt that the contraception mandate could satisfy the RFRA.¹¹⁹ However, their main source of doubt lay in the government's ability to satisfy the third prong of the analysis: a compelling interest. In asserting a compelling interest, the government argued that "public health" and "gender equality" were the interests they were trying to promote and the mandate would help achieve those goals by promoting "greater parity in health care costs," and "promoting the autonomy of women both economically and in their reproductive capacities."¹²⁰ The court recognized those governmental interests are legitimate, perhaps even compelling.¹²¹ However, by "stating the interest so generally," the government "seriously misunderstands" strict scrutiny, which "guarantees that the mandate will flunk the test."¹²² Under strict scrutiny, there must be "a close fit" between the governmental interest and the means chosen to further that interest.¹²³ The assertion of interests in such generalities made it "impossible to show that the mandate is the least restrictive means of furthering them."¹²⁴

Like *Gilardi*, the court stated it was implausible that the federal government would be furthering a truly compelling interest in mandating coverage of contraceptives by noting the extensive exemptions in the regulatory scheme (including the small-business exemption, grandfathered plans, etc.)¹²⁵ Further, there are count-

117. *Id.* at 683-84. Also, just like in *Gilardi*, the 7th Circuit found the government's argument that the burden on religious exercise is unavailingly "attenuated," because they are forced to provide insurance coverage for the drugs and services that violate their faith (the government tries to characterize the burden as taking place when the employee utilizes the service to obtain the drugs or services, not when the employer has to select the plan).

118. *Id.* at 686.

119. *Id.* at 686-87.

120. *Id.* at 687.

121. *Korte*, 735 F.3d at 686 (stating "The apparent aim of the mandate is to broaden access to free contraception and sterilization so that women might achieve greater control over their reproductive health. We accept this as a legitimate governmental interest."). *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 687.

less other ways that the government could increase access to free contraceptives without infringing on the religious liberty enjoyed by the plaintiffs.¹²⁶ For example, as the plaintiffs pointed out, the government can give tax incentives to contraception supplies to provide those to qualified customer for no cost, give tax incentives to consumers who purchase contraceptive services, or any other that do not burden the religious liberty of business owners.¹²⁷

IV. WHY THE COURTS WERE RIGHT

The D.C. Circuit and Seventh Circuit correctly combined to dismantle the contraception mandate in the twin cases *Gilardi v. United States* and *Korte v. Sebelius*. Congress asserted a very clear policy in enacting the RFRA, making it a statutory priority to vigorously protect religious freedom against governmental legislation and interference. Put simply, the contraception mandate fails all three prongs of the strict scrutiny test because: (1) it places a substantial burden on the free exercise of religion, (2) does not further a compelling government interest, (3) nor is it the least restrictive means.¹²⁸

*A. Should the Gilardis and Kortes Even be in Court? A Purposefully Short Discussion*¹²⁹

The first contentious issue in these two cases is whether a for-profit secular corporation can have its free-exercise rights violated. The *Korte* court reiterated two key doctrinal points: that the Free Exercise Clause and the RFRA protect not just belief and profession but also “religiously motivated conduct,” and that individuals and organizations (whether incorporated or not) can exercise religion.¹³⁰ As the court noted, nonprofit religious corporations routinely exercise religion by conducting activities that are religiously

126. *Korte*, 735 F.3d at 686.

127. *Id.*

128. 42 U.S.C. § 2000bb-1 (1993).

129. As discussed earlier, cases such as *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), and *Conestoga Wood Specialties Corp. v. Sec’y HHS*, 724 F.3d 377 (3rd Cir. 2013), have far more extensive discussions on the implications of allowing corporate owners and corporations to bring suit. This section will only discuss what the *Gilardi* and *Korte* courts discussed, which is whether a plaintiff-owner of a closed corporation could bring suit under the RFRA statute.

130. *Korte*, 735 F.3d at 674-81.

motivated (with such activities being protected by Free Exercise and RFRA), secular, for-profit corporations can claim the same rights and protections of free-exercise “to the extent that an aspect of its conduct is religiously motivated.”¹³¹

A legitimate fear of the government and skeptics of the *Korte* case is the notion of extending more rights and protections to corporations. It is a legitimate fear, but it should be noted that these cases (and the *Hobby Lobby* case before the Supreme Court), can be dealt with using a statute, the Religious Freedom Restoration Act, and not fuel any further corporate *constitutional* personhood fears.¹³² The RFRA statute did not define “person” for the purposes of the law, so the courts relied on the Dictionary Act, a standard method of finding meaning to terms in a law.¹³³ The Dictionary Act has long included corporations as persons for the sake of defining terms, but Congress has the freedom to re-define the term “person” in the RFRA statute or the Dictionary Act.

Since the court determined corporations are people under the RFRA, the next question is from a policy standpoint; do we want the RFRA or any statute to allow corporations to bring religious burden claims? The fact is that, whether for-profit or non-profit, the business has to choose between paying a substantial fine that is correlated with the size of the workforce to follow their religious beliefs, or comply with a regulation that violates their sacred beliefs that are protected by statute and the Constitution. This no-win situation is especially true for close corporations, which tend to be smaller in workforce and financial strength than the larger companies (what we traditionally think of as corporations), where such actions such as picking out the health plan are left to the discretion of those that manage the corporation and act on its behalf. The *Kortes* and *Gilardis*, as well as the operators/owners of most close corporations, were in the position of being mandated to select, provide, and contribute to a health plan that would allow holders to take actions that violated their Catholic belief systems,

131. *Id.* at 679. The opinion strongly challenged the notion that corporate profit-seeking would change the paradigm of the Free Exercise analysis, asking “unless there is something disabling about mixing profit-seeking and religious practice, it follows that a faith-based, for profit corporation can claim free-exercise protection. *Id.*”

132. For a more extensive discussion on whether corporations have been or should be extended free exercise rights, see Kyle J. Weber, *Corporate Personhood and the First Amendment: A Business Perspective on an Eroding Free Exercise Clause*, 14 RUTGERS J. L. & RELIGION 217 (2012).

133. 1 U.S.C. § 1 (2012).

with no alternative other than to pay a crippling fine. Further, because the size of both companies qualified them as “large employers” subject to the Affordable Care Act’s large employer mandate that all non-exempt companies of over 50 full-time employees provide health plans to their workforce, Freshway and K&L would also face a fine if they decided to not offer coverage at all.¹³⁴ The Gilardis’ and Kortés’ hands were tied. Therefore, it follows that such injured parties should be able to bring litigation.

B. The Substantial Burden

The next issue is far easier to navigate. The standard for finding that a burden has been placed on the ability of one to exercise their beliefs is “substantial pressure on an adherent to modify his behavior or violate his beliefs.”¹³⁵ Here, we have substantial pressure in the form of crippling fines for refusing to comply or betray the teachings of their faith.¹³⁶ Both the Gilardis and the Kortés faced multi-million dollar fines if they did not comply with the mandate, and for corporations the size of Freshway and K&L, such penalties would be devastating.

In Judge Edwards’ dissent in *Gilardi*, it is asserted that because the plaintiffs themselves do not have to purchase the disputed services, there is no burden on religion.¹³⁷ This once again misses the point of the issue because Free Exercise or the RFRA jurisprudence has held that it needs only to “burden the exercise,” and in these cases, the plaintiffs run their companies in conformity with the exercise of their faith, which includes their choosing of health plans. Further, as employers providing coverage, it is likely (if not these specific plaintiffs, than other similar plaintiffs) that the Gilardis and Kortés subsidize their employee health packages so they are directly contributing to financially supporting these practices that run counter to not only their personal beliefs, but more importantly for the substantial burden analysis, the belief system that they have applied in running their companies.

Therefore, the burden correctly shifted to the government to defend the substantial burden they placed on plaintiffs free exercise ability.

134. 42 U.S.C. § 18001 (2010).

135. *Korte*, 735 F.3d at 682 (internal quotation marks omitted).

136. *Id.* at 683-84.

137. *Gilardi*, 733 F.3d at 1239 (Edwards, J., dissenting).

C. A Compelling Interest?

Once substantial burden is shown, the RFRA sets a high bar for the government to clear, and the contraception mandate simply falls short of reaching it. First, can the government establish a compelling interest?¹³⁸ The government in both cases listed the interests of “safeguarding the public health,” and “promoting gender equality.”¹³⁹ From a policy standpoint, these seem like legitimate and compelling interests worthy of consideration, protection, and furtherance. However, in the scope of winning the legal argument under the RFRA in these cases, the government has to meet the strict scrutiny legal standard, meaning the compelling interest must require a “high degree of necessity” and be a “close fit” in its targeting of that goal.¹⁴⁰ The numerous exemptions and broad generality asserted by the government undermine any chance of fitting these requirements and thus succeeding on a RFRA claim.

First, the many exemptions leave millions outside of the mandate’s protection. As both the *Gilardi* and *Korte* courts noted, the government will not enforce the mandate against certain employer’s insurance plans if the employer is a small business or has a qualifying grandfathered plan.¹⁴¹ As compelling as those dual interests the government asserts are, the Court has held that to truly prove a compelling interest, the law cannot “leave appreciable damage to that supposedly vital interest unprohibited.”¹⁴² Essentially, if the interest is of such vital importance, the government cannot poke millions of holes in the policy and hold it up to the court as passable under strict scrutiny.

Here, the mandate’s exemptions leave the kind of “appreciable damage” that the Court has recognized is not an interest of the highest order. The small business exemption is especially troublesome to the government’s argument. By a respected business website’s count, there are 5.8 million employer firms in the United States that employ 20 people or less (remember the employer mandate exempts all businesses with less than 50!)¹⁴³ Those small businesses make up about 20 percent of the private sector work-

138. 42 U.S.C. § 2000bb (1993).

139. *Gilardi*, 733 F.3d at 1220.

140. *Korte*, 735 F.3d at 685-86.

141. *Korte*, 735 F.3d at 685-86; see also *Gilardi*, 733 F.3d at 1220.

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

143. *Small Business Facts*, SMALL BUSINESS COUNCIL, <http://www.sbecouncil.org/about-us/facts-and-data/> (last visited June 1, 2014).

force in the entire United States.¹⁴⁴ That could mean that up to 20 million employees will not be covered by the mandate because of the size of their employer.¹⁴⁵ This is “appreciable” damage to the interests asserted by the government that are “compelling.” Further, the government has never explained why the mandate actually does not cover small businesses as well. If the interest is to promote health and gender equality, would not expanding coverage to the most possible employees be an even more effective way of achieving that goal?

Additionally, the grandfathered plan provision similarly works to hurt the government’s contention of having a compelling interest because it leaves millions outside the mandate’s coverage requirements. One such estimate by the government concluded that as the law rolls out in 2013, up to 98 million individuals would be enrolled in grandfathered plans.¹⁴⁶ In fairness, over time, the number of grandfathered plans will decrease as companies change plans, employees change jobs, and some of those old plans may have covered the contraceptive services. In fact, in November 2013, there was significant controversy over health plans being cancelled for not meeting other minimum standard regulations and those new plans will inevitably follow the mandate.¹⁴⁷ However, in the short term, the number of grandfathered plans substantially undermines the government’s arguments that it is furthering interests of “the highest order” because such a high number of individuals will be in plans that are exempt from the mandate as it takes effect.

As the *Gilardi* opinion emphasized, the mandate’s exemptions make it “self-defeating” because of the “under-inclusive” nature of

144. *Id.* Data for statistics keyed to employers of 50 or less employees is difficult to find but this website gives guidance (stating “according to U.S. Census Bureau data: Firms with fewer than 100 workers employ 34.5 percent of private sector payrolls, and those with less than 20 workers employ 17.9 percent. Firms with fewer than 500 workers employ 49.4 percent of private sector payrolls.”).

145. *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/econ/smallbus.html> (last visited June 1, 2014).

146. *Fact Sheet: Benefits for Women and Children of New Affordable Care Act Rules on Expanding Prevention Coverage*, available at http://cpehn.org/sites/default/files/resource_files/hhsprevwomenfam.pdf (last visited June 1, 2014).

147. Jonathon Weisman, *Cancellation of health care plans replace website as prime target*, N.Y. TIMES, Oct. 29, 2013, <http://www.nytimes.com/2013/10/30/us/politics/cancellation-of-health-care-plans-replaces-website-problems-as-prime-target.html>.

the regulation.¹⁴⁸ The dissent in *Gilardi* responded by arguing that it is critical to the functioning of the Act that exemptions exist to allow the new law to take effect.¹⁴⁹ Also, that one of the largest exemptions, the grandfather exemption, will decrease each year as plans are changed and lose their grandfather status, including the first year the Act takes effect.¹⁵⁰ The dissent further points out that the small business exemption is not limited to the contraception mandate, but from a wealth of other provisions including the employer mandate to provide coverage.¹⁵¹ This is a valid point, but it fails to recognize that the government has the burden to demonstrate the interests it seeks to further are of the “highest order,” and by exempting old “grandfathered” plans and a huge swath of small business employers, the government fails to satisfy its legal burden of proving a compelling interest because of the “appreciable damage” that the numerous exemptions cause to the theoretical “mandate.”

In evaluating the contraception mandate under the standards of the RFRA, it is important to distinguish and separate the policy and legal arguments. The government surely has a strong case that extending exemptions to so many parties serves the broad interests of both the law and the mandate. However, in court they have to satisfy statutory requirements that render such policy decisions problematic as allowing so many insurance plans to be exempt. This surely inflicts “appreciable damage” on the interest the government is attempting to prove as compelling. These twin cases illustrate the issue the government has had translating its seemingly strong policy position into a sufficiently effective legal argument.

D. A Restrictive Method

In many strict scrutiny cases, the Court employs the term “narrowly tailored,”¹⁵² and the RFRA’s language “least restrictive means,”¹⁵³ to how broadly the government can push in asserting an interest. The *Korte* court noted that in this litigation, the government had “no real response” to the question of whether there were

148. *Gilardi v. United States*, 733 F.3d 1208, 1222-23 (D.C. Cir. 2013).

149. *Id.* at 1240 (Edwards, J., dissenting).

150. *Id.*

151. *Id.* at 1241.

152. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013).

153. 42 U.S.C. § 2000bb (1993).

less restrictive means of furthering these interests of health and gender equality.¹⁵⁴ In that vacuum, the court itself asserted a few ideas of how the government could have achieved its goal without burdening religion.¹⁵⁵ The government could provide “a public option” for contraceptive insurance, grant tax exceptions to contraception suppliers to provide the services at no (or low) cost to consumers, or give tax credits to consumers of contraception and sterilization services.¹⁵⁶ These suggestions undermine the government’s ability to meet the restrictive means standard.

The key point is there are other options to increase contraceptive services other than a method that places a “substantial burden” on a plaintiff’s religious exercise.¹⁵⁷ The government routinely uses its tax and spending abilities to either directly fund, or subsidize and incentivize conduct that furthers interests it finds worthy of prioritizing.¹⁵⁸ The government (federal, state, and local) has an effective mechanism at its disposal, and routinely makes decisions in its budgeting that include choosing which industries and activities necessitate a tax or spending push, including those that involve promoting public health and gender equality. Taking it a step further, there is always the option of a public awareness campaign. For example, to promote public health in New York City, Mayor Michael Bloomberg has enacted a vast public campaign including advertisements and public service announcements on television, radio, and subway cars, warning of the health risks involved in consuming soft drinks, fast food, and smoking cigarettes.¹⁵⁹ This campaign has been wildly successful as smoking in New York City is at an all-time low,¹⁶⁰ and awareness of the calorie

154. *Korte v. Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013).

155. *Id.*

156. *Id.* at 686-87.

157. *Id.* at 687.

158. This is a purposefully broad assertion but widely known. For an example of a detailed account of how local governments subsidize and incentivize behavior see Louise Story, Tiff Fehr & Derek Watkins, *Explore the Data*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/12/01/us/government-incentives.html> (last visited June 1, 2014).

159. *Health Department Launches New Ad Campaign Spotting Increasing Portion Sizes and Their Devastating Consequences*, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, (Jan. 9, 2012), <http://www.nyc.gov/html/doh/html/pr2012/pr001-12.shtml>.

160. *Your Kids Could be Drinking Themselves Sick*, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, http://www.nyc.gov/html/doh/html/living/cdp_pan_pop.shtml (last visited June 29, 2014).

content of soda and other sugary drinks are at a high.¹⁶¹ The federal government could undertake a nation-wide campaign, or more realistically delegate to the states (although that may prove problematic in its own way given the variation of views from state to state on contraception and sterilization), a campaign to increase awareness about the benefits of having health care coverage that includes contraceptive services.

The only way the government countered the court's arguments in *Korte* was to say that the least-restrictive means test had never been applied to "require the government to subsidize private religious practices."¹⁶² This is true, but "lifting a regulatory burden" is not subsidizing a person's religious practices, it is peeling back a requirement that an individual has to meet.¹⁶³ Additionally, the court suggests subsidizing or crediting the coverage of contraceptive would be only one method of achieving the government's goal, not the only way.¹⁶⁴

The *Korte* dissent does little in persuading that this method is the least restrictive means. It argues simply that there are "[D]oubts about the feasibility of creating, let alone enacting, a public funded contraception plan . . ." ¹⁶⁵ Nor was the dissent convinced that "establishing a system of tax credits to contraceptive manufacturers or the women who use contraception" would accomplish the government's goals.¹⁶⁶ Skepticism of governmental competence is normal, but once again misses the mark of what the real issue in this case is. The government has the burden of proving that this chosen policy is the least restrictive method in achieving their goal, not that alternate plans would not be as effective from a policy standpoint. Because there are alternate means that would not burden religious exercise, the judicial inquiry stops there and the policy implications of the alternatives are left for the legislature to solve.

The combination of a lack of generality in asserting their interests, and the fact that the government has broad means in achieving a given goal that would not burden an individual's religious

161. *New York City Smoking Rates Fall to Lowest Rate on Record*, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, (May 5, 2009), <http://www.nyc.gov/html/doh/html/pr2009/pr023-09.shtml>.

162. *Korte*, 735 F.3d at 687.

163. *Id.*

164. *Id.*

165. *Id.* at 726-27 (Rovner, J., dissenting).

166. *Id.*

exercise right under the RFRA, creates a legally lethal combination for the contraception mandate.

V. CONCLUSION

The contraception mandate may well be effective policy that can help improve public health and other government interests. However, as a number of circuits have concluded, there are substantial issues with whether its means are permissible under the Religious Freedom Restoration Act. As this article has discussed, *Gilardi v. United States* and *Korte v. Sebelius* assert persuasive arguments as to why the contraception mandate fails under the RFRA because it creates a substantial burden on the plaintiff's religious exercise without sufficiently advancing a compelling interest through least restrictive means. Since federal circuits are striking down provisions of a federal law, the Supreme Court will eventually have to hear this issue. It is recommended that because of the high standard the government has to meet under the RFRA, that the Court should strike the mandate down because it fails to pass the required test.