**George Mason University School of Law**

2014 Law Journal Write-On Competition

**George Mason Law Review**

**Civil Rights Law Journal**

**Journal of Law, Economics & Policy**

**Journal of International Commercial Law**

**National Security Law Journal**

**2014 Write-On Competition**

The following are the instructions for the 2014 Write-On Competition for George Mason Law Review (GMLR), Civil Rights Law Journal (CRLJ), Journal of Law, Economics & Policy (JLEP), Journal of International Commercial Law (JICL), and National Security Law Journal (NSLJ). Unless otherwise noted, the following instructions apply to all five journals. This packet represents the final word on all matters pertaining to the Write-On Competition and supersedes anything you may have heard either at an information session or from a member of any journal. In particular, please note that all submissions must be hand-delivered or postmarked by **May 30th, 2014.** Hand deliveries must be made by no later than 5:00 pm EDT in the Records Office (3rd Floor of Hazel Hall).

The Write-On packet is prepared and managed by George Mason Law Review. Please direct all questions regarding the 2014 Write-On Competition to George Mason Law Review’s Senior Notes Editor, Cameron Green, at cgreen14@gmu.edu. DO NOT send any submissions to Cameron, as this would compromise blind grading. For electronic submissions, please see the journal-specific instructions that follow.

If you have questions unrelated to the Write-On Competition, please direct them to the appropriate journal:

George Mason Law Review: Amy Josselyn, Editor-in-Chief

ajossely@gmu.edu

Civil Rights Law Journal: Elizabeth Hohenstein, Editor-in-Chief

ehohenst@gmu.edu

Journal of Law, Economics & Policy: Daniel Russell, Editor-in-Chief

drusse11@gmu.edu

Journal of Int’l Com. Law: Jacqueline Nguyen, Editor-in-Chief jacqueline.mk.nguyen@gmail.com

National Security Law Journal: Alex Yesnik, Editor-in-Chief

alexander.yesnik@nslj.org

**I. TOPIC**

To participate in the competition, you must write a Comment (as defined below in Section III) on the sources included in this packet.

**II. CLOSED RESEARCH PROJECT**

The Write-On is a closed research project. Not all the materials included in the packet may be applicable to your analysis—you must decide what is relevant. You do not have to use all of the sources and you do not have to use any specific number of the sources. **You may not conduct any outside research, and you are limited to the materials contained in thIS packet.** The materials in this packet have been noticeably altered, and you may only use the sources as they appear in this packet (i.e., do not look up the listed sources on LexisNexis, Westlaw, or any other research tool, including Google). If you are found to violate this requirement, your entry will be automatically disqualified, and you will no longer be eligible for candidate membership with any journal. This restriction is for your benefit. It allows you to spend your time reading and writing rather than researching the issues.

Similar to LRWA rules, you may not discuss this project with other law students, law school faculty, attorneys, or anyone who has legal training. However, friends or family members who have no legal training and are not law students, law school faculty, or attorneys may proofread your Comment. Please be aware that the GMUSL Honor Code governs the Write-On Competition.

**III. COMMENT: DEFINITION AND TOPIC DISCUSSION**

Unlike a Casenote that examines one case in particular, a Comment surveys a specific, narrow area of the law. For this Write-On Competition, your Comment should generally focus on concerns surrounding the Religious Freedom Restoration Act’s (RFRA) application and how court decisions have shaped the area of law. This topic may encompass a variety of issues, so you have leeway to focus on one or more specific issues. We are not looking for an exhaustive analysis of this topic, as that would not be possible to achieve within the page limit. We do, however, expect a thorough legal analysis of whichever issue you choose within the broader topic.

**IV. FORMAT**

1. You must use proper *Bluebook* (19th edition) law review form[[1]](#footnote-1) for citations.

2. Your Comment must not exceed twelve (12) pages of typed, double-spaced text, including footnotes.

3. Pages must be numbered (centered at the bottom of each page).

4. The font must be 12-point Times New Roman.

5. Top, bottom, left, and right margins must be one inch.

6. Footnotes must be single-spaced, in 10-point Times New Roman font.

**V. ORGANIZATION**

Your Comment should conform as nearly as possible to Comments published in the George Mason Law Review. You may look at Comments in these publications without violating the closed-research requirements, but only for the purpose of determining proper format and style. In addition, please use the following framework:

A. Title

At the top of the first page, you **must** have an appropriate title.

B. Introduction

Your introduction should introduce the issue(s) you will discuss, briefly summarize how courts have treated the issue(s), and summarize any conclusions you have reached in your Comment. Your introduction should also provide a “road map” for the reader of the different sections of your Comment.

C. Background & Discussion

This section should trace the development of the area of law under discussion. Your discussion should briefly describe the courts’ approach to key issues in these cases and should juxtapose the arguments of the parties. The purpose is not to write a detailed analysis of the relevant cases but to give the reader enough knowledge to appreciate your discussion of these cases in your analysis section.

D. Legal Analysis

This part of the Comment constitutes the sole justification for writing the Comment and is the most important section. You should set forth your reasoning in detail. What we are looking for is well-reasoned legal analysis. You should focus on factors such as case holdings, consistencies or discrepancies among holdings, future consistent application of the law, etc. As you organize your analysis, you may wish to consider one or more of the following questions:

1. Can for-profit corporations bring a claim under the RFRA?
2. How should courts balance a substantial burden with a compelling government interest?
3. Should the court’s analysis of the RFRA as it applies to state law be the same as its analysis as the RFRA applies to federal law?
4. Does the government have a compelling interest in protecting the statutory rights of for-profit corporation employees?
5. Has the government satisfied the least restrictive means test?
6. Does a corporation qualify as a person for RFRA?

A successful piece will assess the sources listed in this packet and determine how they relate to one another. There is no formula for a successful write-on submission; however, you should aim to approach the topic succinctly and creatively. You should focus on the persuasiveness of your argument, conformance with formatting used in typical Comments, writing style, grammar, punctuation, and the proper use of citations. You need not use every source listed in this packet. Likewise, you need not avoid any particular source.

**VI. BLUEBOOKING EXERCISE**

In addition to writing a short Comment, write-on candidates must complete a brief Bluebooking Exercise to demonstrate their competence with Bluebook rules. Please cut and paste the text as provided in the Bluebooking Exercise into a separate Word document and correct the footnotes using proper Bluebook format. Additionally, below each footnote, please describe the changes you made.

**For Example**:

|  |  |
| --- | --- |
| FN 1 | *United States v. Moussaoui*, 382 F.3d 453 at 454 (4th Cir. 2004). |
| Your Corrected FN1 | United States v. Moussaoui, 382 F.3d 453, 454 (4th Cir. 2004). |
| List of Changes You Made | * Removed improper italicization per BB Rule 10. * Corrected pin citation form per BB Rule 3.2(a). |

You should **not** use the Track Changes function in Word. **DO NOT** check the authority of footnotes for accuracy or support, or check prior or subsequent history. This is a formatting exercise and should be based solely on your knowledge and the Bluebook rules. Remember that the Honor Code governs the Write-On Competition, and using LexisNexis or Westlaw to look up any of the cases or articles in the Bluebooking Exercise or the use of any software or website to correct the citation is against the rules of the competition. If you need additional information in order to properly correct a footnote, simply make a note explaining the information that you need. Please include this exercise in your electronic submission and in the packet with your Comment, grade release form, and contact sheet.

2014 Write-on Competition

Qualifications and Submission Instructions

I. QUALIFICATIONS

**A. George Mason Law Review**

All students applying for membership on George Mason Law Review must be in their first year of law school (1Ds & 1Es). To be eligible, students must at a minimum have a cumulative grade point average equivalent to the class mean, as determined by the GMUSL Records Office at the end of the Spring 2014 semester.

The George Mason Law Review editorial board will review each submission. There is neither a minimum nor a maximum number of positions available to students competing in the Write-On Competition, and the number of offers extended will depend on the quality of Write-On submissions. George Mason Law Review encourages all students to participate in the Write-On Competition. Students selected for candidate membership will be contacted after all Spring 2014 grades are posted.

**B. Civil Rights Law Journal**

First year students (1Ds & 1Es) and second year evening students (2Es) are eligible to apply for membership on the Civil Rights Law Journal. To be eligible, students must have a minimum cumulative grade point average of 2.75, as determined by the GMUSL Records Office at the end of the 2014 Spring Semester.

The Civil Rights Law Journal editorial board will review each submission. There is neither a minimum nor a maximum number of positions available to students competing in the Write-On Competition. The Civil Rights Law Journal encourages all students to participate in the Write-On Competition. Students selected for candidate membership will be contacted after all Spring 2014 grades are posted.

**C. Journal of Law, Economics & Policy**

All students applying for membership on the Journal of Law, Economics & Policy must be first year students (1Ds & 1Es) or second year evening students (2Es). JLEP requires all applicants to be in good academic standing, but the JLEP review committee considers GPA as a non-determinative factor in the admissions process.

The Journal of Law, Economics & Policy editorial board will review each submission. There is neither a minimum nor a maximum number of positions available to students competing in the Write-On Competition. The Journal of Law, Economics & Policy encourages all students to participate in the Write-On competition. Students selected for candidate membership will be contacted after all Spring 2014 grades are posted.

**D. Journal of International Commercial Law**

All students applying for membership on the Journal of International Commercial Law must be first year students (1Ds & 1Es), second year day students (2Ds), or second year evening students (2Es) that have completed Contracts I and Contracts II. JICL requires all applicants to be in good academic standing, but the JICL review committee considers GPA as one factor in the selection process.

The Journal of International Commercial Law editorial board will review each submission. There is neither a minimum nor a maximum number of positions available to students competing in the Write-On Competition. The Journal of International Commercial Law encourages all students to participate in the Write-On Competition. Students selected for candidate membership will be contacted after all Spring 2014 grades are posted.

**E. National Security Law Journal**

All students applying for membership on the National Security Law Journal must have at least one full academic year remaining in law school, including all first-year students (1Ds & 1Es), all second year students (2Ds & 2Es), and third year evening students (3Es) graduating next May or beyond.  To be eligible, students must have a minimum cumulative grade point average of 2.50, as determined by the GMUSL Records Office at the end of the 2014 Spring Semester.

The National Security Law Journal editorial board will review each submission. There is neither a minimum nor a maximum number of positions available to students competing in the Write-On Competition. The National Security Law Journal encourages all eligible students to participate in the Write-On Competition. Students selected for candidate membership will be contacted after all Spring 2014 grades are posted.

II. SUBMISSION PACKAGE CONTENTS

Prepare a separate submission package for each journal in accordance with the following directions.

**A. George Mason Law Review**

Inside a sealed envelope marked **George Mason Law Review**, please submit the following:

1. 6 copies of your Comment;
2. 1 copy of the Bluebooking Exercise; and
3. A separate, unmarked, sealed envelope that includes:
   1. A signed George Mason Law Review grade release form; and
   2. A contact information sheet.

Students **must also e-mail** an electronic copy of their Comment and Bluebooking Exercise to lrwriteon@gmail.com by May 30, 2014, at 5:00 pm EDT as indicated on the submission instructions below. If an electronic copy is not received prior to the deadline, the student’s submission will not be reviewed. Please enter “Write-on Competition Submission” in the subject line. Please identify yourself in the body of the e-mail, as it will be directed to a member of George Mason Law Review who is not judging the write-on submissions. Compliance with this deadline will be determined by the time the e-mail is sent.

**B. Civil Rights Law Journal**

Inside a sealed envelope marked **Civil Rights Law Journal**, please submit the following:

1. 4 copies of your Comment;
2. 1 copy of the Bluebooking Exercise; and
3. A separate, unmarked, sealed envelope that includes:
   1. A signed Civil Rights Law Journal grade release form; and
   2. A contact information sheet.

Students **must also e-mail** an electronic copy of their Comment and Bluebooking Exercise to write-on@civilrightslawjournal.com by May 30, 2014, at 5:00 pm EDT. If an electronic copy is not received prior to the deadline, the student’s submission will not be reviewed. Please enter “Write-on Competition Submission” in the subject line. Please identify yourself in the body of the e-mail, as it will be directed to a member of the Civil Rights Law Journal who is not judging the write-on submissions. Compliance with this deadline will be determined by the time the e-mail is sent.

**C. Journal of Law, Economics & Policy**

Inside a sealed envelope marked **Journal of Law, Economics & Policy**, please submit the following:

* + - 1. 1 copy of your Comment;
      2. 1 copy of the Bluebooking Exercise;
      3. 1 copy of the Optional Short Answer response;
      4. Optional - 5 copies of your résumé with your name and GPA redacted; and
      5. A separate, unmarked, sealed envelope that includes:
         1. A signed Journal of Law, Economics & Policy grade release form; and
         2. A contact information sheet.

Students **must also e-mail** an electronic copy of their Comment and Bluebooking Exercise to jlepwriteon@gmail.com by May 30, 2014, at 5:00 pm EDT. If an electronic copy is not received prior to the deadline, the student’s submission will not be reviewed. Please enter “Write-on Competition Submission” in the subject line. Please identify yourself in the body of the e-mail, as it will be directed to a member of the Journal of Law, Economics & Policy who is not judging the write-on submissions. Compliance with this deadline will be determined by the time the e-mail is sent.

**D. Journal of International Commercial Law**

Inside a sealed envelope marked **Journal of International Commercial Law**, please submit the following:

1. 3 copies of your Comment;
2. 1 copy of the Bluebooking Exercise;
3. 3 copies of the Optional Short Answer; and
4. A separate, unmarked, sealed envelope that includes:
   1. A signed Journal of International Commercial Law grade release form; and
   2. A contact information sheet.

Students **must also e-mail** an electronic copy of their Comment, Bluebooking Exercise, and optional short answer to gmusljicl@gmail.com by May 30, 2014, at 5:00 pm EDT. If an electronic copy is not received prior to the deadline, the student’s submission will not be reviewed. Please enter “Write-on Competition Submission” in the subject line. Please identify yourself in the body of the e-mail, as it will be directed to a member of the Journal of International Commercial Law who is not judging the write-on submissions. Compliance with this deadline will be determined by the time the e-mail is sent.

**E. National Security Law Journal**

Inside a sealed envelope marked **National Security Law Journal**, please submit the following:

1. 3 copies of your Comment;
2. 1 copy of the Bluebooking Exercise;
3. 2 copies of your statement of interest (optional; see instructions later in this packet)
4. 2 copies of your résumé with your name redacted (optional)
5. A signed National Security Law Journal Grade Release Form; and
6. A completed contact information sheet.

Students **must also e-mail** an electronic copy of their Comment, Bluebooking Exercise, statement of interest (optional), and résumé (optional) to writeon@nslj.org by May 30, 2014, at 5:00 pm EDT. If an electronic copy is not received prior to the deadline, your submission will not be reviewed. Please note that whatever optional materials you choose to include should be submitted in both hard copy *and* electronic format. Please enter “Write-On Competition Submission” in the subject line. Please identify yourself in the body of the e-mail, as it will be directed to a member of the National Security Law Journal who is not judging the write-on submissions. Compliance with this deadline will be determined by the time the e-mail is sent.

**III. ANONYMITY**

To ensure anonymity, you **MUST NOT IDENTIFY YOURSELF ANYWHERE ON YOUR COMMENT OR BLUEBOOKING EXERCISE.** If you do so, you will be disqualified. Your contact information and grade release form will be used to identify your submission. Any submission that does not include a grade release form and summer contact information form will not be reviewed.

**IV. SUBMISSION DUE DATE AND HARD COPY INSTRUCTIONS**

All submissions are due on **FRIDAY, MAY 30, 2014**.In addition to the electronic submissions, students may either hand deliver their submissions by 5:00 pm EDT on May 30, 2014, or submit them by mail, postmarked by May 30, 2014.

Hand Delivery

Students who choose to hand deliver their submissions must drop them off in the Records Office at the law school by 5:00 p.m. EDT on May 30, 2014. Students must be careful not to leave any identifying information on their submissions.

Mail Submissions

Students who choose to mail their submissions must postmark them by May 30, 2014. Please mail a separate submission to each journal to which you are applying. Mail your submissions to:

(Insert journal name here)

Write-on Competition

George Mason University School of Law

3301 N. Fairfax Drive

Arlington, Virginia 22201

George Mason Law Review

Grade Release Form

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GMU Identification #: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I authorize the George Mason University School of Law to release my cumulative grade point average and class rank to George Mason Law Review.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOR RECORDS OFFICE USE ONLY

This student’s GPA is \_\_\_\_\_\_\_\_.

This student’s class rank is \_\_\_\_\_\_\_\_.

Civil Rights Law Journal

Grade Release Form

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GMU Identification #: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I authorize the George Mason University School of Law to release my cumulative grade point average and class rank to the Civil Rights Law Journal.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOR RECORDS OFFICE USE ONLY

This student’s GPA is \_\_\_\_\_\_\_\_.

This student’s class rank is \_\_\_\_\_\_\_\_.

Journal of Law, Economics & Policy

Grade Release Form

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GMU Identification #: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I authorize the George Mason University School of Law to release my cumulative grade point average and class rank to the Journal of Law, Economics & Policy.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOR RECORDS OFFICE USE ONLY

This student’s GPA is \_\_\_\_\_\_\_\_.

This student’s class rank is \_\_\_\_\_\_\_\_.

Journal of International Commercial Law

Grade Release Form

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GMU Identification #: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I authorize the George Mason University School of Law to release my cumulative grade point average and class rank to the Journal of International Commercial Law.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOR RECORDS OFFICE USE ONLY

This student’s GPA is \_\_\_\_\_\_\_\_.

This student’s class rank is \_\_\_\_\_\_\_\_.

National Security Law Journal

Grade Release Form

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GMU Identification #: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I authorize the George Mason University School of Law to release my cumulative grade point average and class rank to the National Security Law Journal.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOR RECORDS OFFICE USE ONLY

This student’s GPA is \_\_\_\_\_\_\_\_.

This student’s class rank is \_\_\_\_\_\_\_\_.

**Summer 2014 Contact Information Sheet**

Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Summer Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Summer Phone Number: (Day) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Evening) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

E-mail Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Journals will extend offers in early to mid-July. Please provide any additional contact information necessary to ensure that we can contact you during that period.**

**Journal of Law, Economics & Policy**

**Optional Short Answer**

This portion of the JLEP application is entirely optional; it will not detract from your application if you choose not to complete this portion. However, this is an opportunity for you to show your creativity, writing ability, and knowledge of economics. Your responses are a way for us to know a bit more about you, as JLEP recognizes that individuals have valuable qualities that cannot be quantified.

**Directions:** Please read each prompt carefully, and be sure to address all elements within each prompt you choose to answer. You may answer as many or as few prompts as you like. Please limit the entirety of your responses to no more than two pages, double-spaced, one-inch margins, and 12-point Times New Roman font. **Only include these answers in your submission to JLEP.**

1. JLEP is interested in learning more about you. Please use this essay to relay information about you that cannot be found elsewhere on your application. You may choose to write about your future ambitions and goals, a special talent or unusual interest that sets you apart from your peers, or a significant event or relationship that has influenced you during your life.

2. Why do you consider JLEP a good match for you? Is there something in particular you anticipate contributing to the JLEP community?

**Journal of International Commercial Law**

**Optional Short Answer**

**Directions:**

The following short essay prompts are optional. No points will be deducted for failure to submit an answer, nor will points be added for submitting an answer. The purpose of these prompts is to give students an opportunity to provide additional information for the board to consider when making selections. Students should only answer one essay and neither essay should exceed 200 words.

**Prompts:**

JICL is devoted to advancing the study of International Commercial Law at George Mason. A focus on International and/or Commercial Law is not required for membership, but is considered a “plus” when evaluating applications for membership. Please describe, if applicable, any interest you have in Commercial Law, International Law, or prior experience that may aid your efforts while a member of JICL.

**OR**

International commercial law is a broad field of study. JICL is looking to facilitate scholarship on any aspect of international commerce. Examples include, but are not limited to: Intellectual property, international sales and trade, international contracts, international tax havens, international treaties, international privacy laws and consumer protection, banking, money laundering, fraud, conflict of laws, the World Trade Organization, anti-dumping measures, and anti-terrorism measures.

For this optional essay, please link any current event to some aspect of international commerce and explain that connection (this can be legal, political or economic). This prompt is not intended to test your knowledge of international commerce, but instead, your ability to draw connections and think creatively.

**National Security Law Journal**

**Optional Statement of Interest**

Please tell us what interest you in the National Security Law Journal*.* This portion of the NSLJ application is optional, and you will not be penalized if you choose not to submit a response. However, this is an opportunity for you to discuss your past experiences; your interest, if any, in national security law; and any skills or qualities that you might bring to NSLJ as a candidate member. Your response can help distinguish you as a potential Candidate Member and will be taken into consideration when extending offers.

Please limit your statement to 250 words or less. Your statement should be double-spaced in 12-point Times New Roman Font.

List of Sources for the 2014 Write-on Competition

**Please note that many of the sources below are edited. Please do not look up these sources to read the portions not included in the Write-On packet.**

**Please also note that the sources below may not be cited correctly. Please consult the Bluebook for proper citations and formatting.**

PRIMARY SOURCES:

1st Amendment of the United States Constitution

*Tinker Town Stores, Inc. v. Harper*, 723 F.3d 1114 (10th Cir. 2013)

*Cooper Wood Specialties v. Harper*, 724 F.3d 377 (3rd Cir. 2013)

*Autotech Corporation v. Harper*, 730 F.3d 618 (6th Cir. 2013)

*Church of the Lullimi, Inc. v. City of Nevaeh*, 508 U.S. 520 (1993)

*Okamoto v. Lacey*, 242 F.3d 950 (10th Cir. 2001)

*Rodriguez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)

*Warren v. State of Connecticut*, 310 U.S. 296 (1940)

*Bull v. Harper*, 735 F.3d 654 (7th Cir. 2013)

42 U.S.C. § 2000bb(1)-(4)

42 U.S.C. § 14132

**SECONDARY SOURCES:**

Eve M. Blanche, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 B.U.J. Sci. & Tech. L. 539 (2013).

Mark L. Rhubarb, *God and the Profits: Is there Religious Liberty for Moneymakers?*, 88 Geo. Wash. L. Rev. 59 (2013).

*Health Care Law’s “Contraception Mandate” Reaches the Supreme Court*, Pew Research Center (March 20, 2014), http://www.pewforum.org/files/2014/03/health-care-contraception-mandate-full-report.pdf.

*The Government’s ‘compelling’ interest in protecting contraceptive coverage*, The Washington Post (Mar. 29, 2014), http://www.washingtonpost.com/ the-governments-compelling-interest-in-protecting-contraceptive-coverage.

*Women’s Preventative Services*, U.S. Dep’t of Health & Human Servs., http://www.hrsa.gov/womensguidelines (last visited April 4, 2014).

NOTE: This is a closed research project. All of the sources that you should use are included in this packet. No outside research is allowed.

You may only cite to the above listed sources. However, if you wish to cite a source that is explained or quoted within the packet, please format the citation similar to one of the following examples:

*Johnson v. Quander*, 370 F.Supp.2d 79, 85-86 (2005) (quoting *United States v. Knights*, 534 U.S. 112 (2001))

*Johnson v. Quander*, 370 F.Supp.2d 79, 85-86 (2005) (citing *United States v. Knights*, 534 U.S. 112 (2001))

United States Code Annotated

Constitution of the United States

Annotated

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

U.S.C.A. Const. Amend. I-Full Text

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Pew Research Center**

**For release: March 20, 2014**

**Health Care Law’s “Contraception Mandate” Reaches the Supreme Court**

http://www.pewforum.org/files/2014/03/health-care-contraception-mandate-full-report.pdf

On March 25, the Supreme Court will hear oral arguments in two cases challenging regulations arising from the Affordable Care Act (ACA) of 2010 (sometimes referred to as “Obamacare”), which requires many employers to include free coverage of contraceptive services in their employees’ health insurance plans. Both cases – *Tinker Town Store*s, *Inc. v. Harper* and *Cooper Wood Specialties Corp. v. Harper*– involve challenges by for-profit businesses whose owners object to the mandate on religious grounds.

**How did these cases arise, and how did they reach the Supreme Court?**

Regulations arising from the ACA require many employers to include free coverage for contraceptive services in their employees’ health insurance plans. The regulations entirely exempt churches and provide religiously affiliated nonprofits, such as hospitals and charities, an alternative mechanism for ensuring that their employees are covered. But those accommodations do not extend to for-profit employers who may also object, for religious reasons, to providing their workers with some or all kinds of artificial birth control.

The owners of a number of these businesses – including arts-and-crafts retail chain Tinker Town and cabinet-maker Cooper – sued the federal government, claiming that the 1993 Religious Freedom Restoration Act (RFRA) entitles them to some form of relief from the mandate based on their religious objections.

In the case of Tinker Town, a federal district court ruled in 2010 that the company is not entitled to an exemption from the mandate. But that decision was later reversed by the 10th U.S. Circuit Court of Appeals, which ruled in favor of Tinker Town. Cooper also filed suit in federal district court and was denied relief. Unlike Tinker Town, Cooper then lost its appeal (in a decision by the 3rd Circuit). Both losing parties petitioned the Supreme Court for review, and on Nov. 26, 2013, the high court agreed to hear the two cases at the same time.

**What is the Religious Freedom Restoration Act, and why is it so important in these cases?**

The Religious Freedom Restoration Act was enacted by the U.S. Congress in 1993 in response to a 1990 Supreme Court decision, *Employment Division v. Smith*. In *Smith*, the court dramatically changed the way it assesses laws and government actions that may impose a burden on religious practice. Prior to the decision, an individual or group would be entitled to an exemption from a law that burdened a religious practice unless the government could show that enforcement of the law furthered a “compelling government interest,” such as protecting public safety, and that this interest could not be advanced without imposing the burden. *Smith* dispensed with the compelling interest test and, in its place, required the government to show only that the law in question did not discriminate against religion and that it advanced a “legitimate government interest,” a much less rigorous standard that could include virtually any public policy goal.

The 6-3 *Smith* decision prompted an outcry from religious groups and others, who claimed that the ruling would essentially gut religious liberty protections contained in the First Amendment to the U.S. Constitution. Congress responded by passing RFRA, which attempted to restore the pre- *Smith*, “compelling interest” standard. The statute directs courts to exempt any party who can show that the challenged law or government action substantially burdens his or her religious practice, unless the government shows that the law advances a compelling interest that cannot be achieved without imposing the burden on the person’s free exercise of religion.

In 1997, a lawsuit challenging RFRA (*City of Boerne v. Flores*) reached the Supreme Court, which struck down the law as applied to state and local governments. The decision rests on the principle of federalism: Congress does not have the power to impose the standard on state and local governments but is free to impose it on the federal government.

Because most religious accommodation cases involve state law, the court’s decision in *City of Boerne* has resulted in relatively few subsequent cases involving RFRA claims. However, the *Tinker Town* and *Cooper* cases involve the contraception mandate, which arises from a federal law. Before RFRA can be used to test the constitutionality of the mandate, the high court must first determine whether the 1993 law protects for-profit businesses.

\* \* \*

**What might be the broad significance of this case?**

If the government prevails and the Supreme Court holds that RFRA does not cover for-profit entities or their owners or managers, the decision would immediately end all religious-liberty- based challenges to the contraception mandate by for-profit businesses. It also would bar businesses from invoking RFRA in lawsuits challenging other laws. Such a ruling would not, however, have any impact on the pending challenges to the contraception mandate by religious nonprofit organizations.

If, however, the high court holds RFRA does apply to for-profit businesses but rules in favor of the government either because it decides the contraception mandate does not impose a “substantial burden” on the businesses’ religious exercise, or that the mandate furthers a “compelling governmental interest,” the decision would almost certainly impact those challenges to the mandate filed by religiously affiliated nonprofits. Indeed, a ruling by the court that the mandate does not impose a “substantial burden” on these businesses could make it difficult for religious nonprofits to show that the mandate substantially burdens them.

And a decision by the court that the government has a compelling interest in furthering the contraception mandate would insulate it from future RFRA challenges to the mandate from both for-profit and nonprofit entities. In addition, such a ruling also might indicate that the court has adopted a more relaxed standard in applying the “compelling interest” test. This, in turn, could lead to more decisions for the government in future religious accommodation cases.

If the court rules in favor of Tinker Town and Cooper , the decision would likely open the door for businesses to invoke RFRA in a wide range of challenges to federal statutes and regulations. For instance, one bill now pending in Congress that would almost certainly invite such challenges is the Employment Non-Discrimination Act, which would include sexual orientation among the protected characteristics in workplace discrimination cases. A decision in favor of Tinker Town and Cooper might give for-profit employers a strong foundation to raise religious objections to hiring gays and lesbians or to providing the same-sex spouses of employees with the same benefits extended to opposite-sex spouses.

*This report was written by David Masci, Senior Researcher at the Pew Research Center, and Robert W. Tuttle, David R. and Sherry Kirschner Berz Research Professor of Law & Religion at George Washington University Law School.*

Religious Freedom Restoration Act

42 U.S.C.A. § 2000bb

§ 2000bb. 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 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.

42 U.S.C.A. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

1. In general

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

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

1. is in furtherance of a compelling governmental interest; and

**(2)** is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2

§ 2000bb-2. Definitions

Effective: September 22, 2000

As used in this chapter—

1. the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

**(2)** the term “covered entity” means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

**(3)** the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and

**(4)** the term “exercise of religion” means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C.A. § 2000bb-3

§ 2000bb-3. Applicability

Effective: September 22, 2000

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C.A. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

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723 F.3d 1114

United States Court of Appeals,

Tenth Circuit.

TINKER TOWN STORES, INC, Plaintiffs–Appellants,

v.

HARPER, in her official capacity as Secretary of the United States Department of Health and Human Services

No. 12–6294. | June 27, 2013.

**Opinion**

TYMKOVICH, Circuit Judge.

This case requires us to determine whether the Religious Freedom Restoration Act and the Free Exercise Clause protect the plaintiffs—two companies and their owners who run their businesses to reflect their religious values. The companies are Tinker Town, a craft store chain, and Babylon, a Christian bookstore chain. Their owners, the Browns, run both companies as closely held family businesses and operate them according to a set of Christian principles. They contend regulations implementing the 2010 Patient Protection and Affordable Care Act force them to violate their sincerely held religious beliefs. In particular, the plaintiffs brought an action challenging a regulation that requires them, beginning July 1, 2013, to provide certain contraceptive services as a part of their employer-sponsored health care plan. Among these services are drugs and devices that the plaintiffs believe **\*1121** to be abortifacients, the use of which is contrary to their faith.

We hold that Tinker Town and Babylon are entitled to bring claims under RFRA, have established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm.

**I. Background & Procedural History**

***A. The Plaintiffs***

The plaintiffs in this case are the Browns and the businesses they collectively own and operate: Tinker Town Stores, Inc. and Babylon, Inc. David Brown is the founder of Tinker Town, an arts and crafts chain with over 500 stores and about 13,000 full-time employees. Tinker Town is a closely held family business organized as an S-corp. Steve Brown is president of Tinker Town, and his siblings occupy various positions on the Tinker Town board. Mart Brown is the founder and CEO of Babylon, an affiliated chain of thirty-five Christian bookstores with just under 400 employees, also run on a for-profit basis.

As owners and operators of both Tinker Town and Babylon, the Browns have organized their businesses with express religious principles in mind. For example, Tinker Town’s statement of purpose recites the Browns’ commitment to “[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.” JA 22–23a. Similarly, Babylon, which sells exclusively Christian books and materials, describes itself as “a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support.” JA 25a.

Furthermore, the Browns allow their faith to guide business decisions for both companies. For example, Tinker Town and Babylon stores are not open on Sundays; Tinker Town buys hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior,” JA 24a; and Tinker Town refuses to engage in business activities that facilitate or promote alcohol use.

As is particularly relevant to this case, one aspect of the Browns’ religious commitment is a belief that human life begins when sperm fertilizes an egg. In addition, the Browns believe it is immoral for them to facilitate any act that causes the death of a human embryo.

***B. The Contraceptive–Coverage Requirement***

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg-13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of “preventive care and screenings” for women “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA].” 42 U.S.C. § 300gg-13(a)(4). HRSA is an agency within the Department of Health and Human Services (HHS).

**\*1122** When the ACA was enacted, there were no HRSA guidelines related to preventive care and screening for women. As a result, HHS asked the Institute of Medicine (an arm of the National Academy of Sciences) to develop recommendations to help implement these requirements.

HRSA and HHS adopted this recommendation, meaning that employment-based group health plans covered by ERISA now must include FDA-approved contraceptive methods. The FDA has approved twenty such methods, ranging from oral contraceptives to surgical sterilization. Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg. The remaining methods function by preventing fertilization.

***C. Exemptions from the Contraceptive–Coverage Requirement***

A number of entities are partially or fully exempted from the contraceptive-coverage requirement.

\* \* \*

No exemption would extend to for-profit organizations like Tinker Town or Babylon. And the various government agencies responsible for implementing the exceptions to the contraceptive-coverage requirement have announced that no proposed exemption will extend to for-profit entities under any circumstances because of what the government considers an important distinction, discussed further below, between for-profit and non-profit status.

***D. The Expected Effect of the Contraceptive–Coverage Requirement***

The Browns run the Tinker Town health plan, a self-insured plan, which provides insurance to both Tinker Town and Babylon employees. The Browns object to providing coverage for any FDA-approved **\*1123** contraceptives that would prevent implantation of a fertilized egg. Because the Browns believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Tinker Town health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation (Ella, Plan B, and the two IUDs). The government does not dispute the sincerity of this belief.

The Browns present no objection to providing coverage for the sixteen remaining contraceptive methods. In other words, the Browns are willing to cover, without cost-sharing, the majority of FDA-approved contraceptive methods, from the original birth control pill to surgical sterilization. But if Tinker Town or Babylon employees wish to obtain Ella, Plan B, or IUDs, the Browns object to being forced to provide such coverage.

According to the plaintiffs, the corporations’ deadline to comply with the contraceptive-coverage requirement is July 1, 2013. If the Tinker Town health plan does not cover all twenty contraceptive methods by that date, the businesses will be exposed to immediate tax penalties, potential regulatory action, and possible private lawsuits. *See, e.g.,* 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. §§ 1132, 1185d.

The most immediate consequence for Tinker Town and Babylon would come in the form of regulatory taxes: $100 per day for each “individual to whom such failure relates.” 26 U.S.C. § 4980D(b)(1). The plaintiffs assert that because more than 13,000 individuals are insured under the Tinker Town plan (which includes Babylon), this fine would total at least $1.3 million per day, or almost $475 million per year. This assumes that “individual” means each individual insured under Tinker Town’s plan. If the corporations instead drop employee health insurance altogether, they will face penalties of $26 million per year. *See id.* § 4980H.

***E. Procedural History***

The plaintiffs filed suit on September 12, 2012, challenging the contraceptive-coverage requirement under RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act.

**II. The Religious Freedom Restoration Act**

Tinker Town and Babylon’s central claims here arise under the Religious Freedom Restoration Act. A plaintiff makes a prima facie case under RFRA by **\*1124** showing that the government substantially burdens a sincere religious exercise. Okamoto v. Lacey, 242 F.3d 950, 960 (10th Cir. 2001). The burden then shifts to the government to show that the “compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” Rodriguez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (quoting 42 U.S.C. § 2000bb-1(b)).

The principal questions we must resolve here include: (1) whether Tinker Town and Babylon are “persons” exercising religion for purposes of RFRA; (2) if so, whether the corporations’ religious exercise is substantially burdened; and (3) if there is a substantial burden, whether the government can demonstrate a narrowly tailored compelling government interest.

**III. Merits**

***A. Tinker Town and Babylon Are “Persons Exercising Religion” Under RFRA***

RFRA provides, as a general rule, that the “Government shall not substantially burden a *person’s* exercise of religion.” 42 U.S.C. § 2000bb-1(a) (emphasis added). The parties dispute whether for-profit corporations, such as Tinker Town and Babylon, are persons exercising religion for purposes of RFRA. We thus turn to the question of whether Tinker Town, as a family owned business furthering its religious mission, and Babylon, as a Christian bookstore, can take advantage of RFRA’s protections.

The government makes arguments for why this is not the case. The government argues that, as a matter of statutory interpretation, RFRA should be read to carry forward the supposedly preexisting distinction **\*1125** between non-profit, religious corporations and for-profit, secular corporations. Second, the government asserts that the for-profit/non-profit distinction is rooted in the Free Exercise Clause. It suggests Congress did not intend RFRA to expand the scope of the Free Exercise Clause. The government therefore concludes RFRA does not extend to for-profit corporations.

We reject both of these arguments. First, we hold as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA’s protections. Such corporations can be “persons” exercising religion for purposes of the statute.

FN 1: We recognize there is at least tentative disagreement among the courts of appeal on this question. Compare *Grote v. Harper,* 708 F.3d 850, 855-856 (7th Cir. 2013) (corporation is a “person” for purposes of RFRA) with *Cooper Wood Specialties Corp. v. Harper* (corporation is not a “person” under RFRA).

Second, as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations.

***1. Statutory Interpretation***

We begin with the statutory text. RFRA contains no special definition of “person.” Thus, our first resource in determining what Congress meant by “person” in RFRA is the Dictionary Act, which instructs: “In determining the meaning of any Act of Congress, unless the context indicates otherwise \* \* \* the word[ ] ‘person’ ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. § 1. Thus, we could end the matter here since the plain language of the text encompasses “corporations,” including ones like Tinker Town and Babylon.

In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants’ decision to use the corporate form. *See* Rodriguez v. O Centro Espirita Beneficente Uniao do Vegetal, 389 F.3d 973, 973 (10th Cir. 2004). (affirming a RFRA claim brought by “a New Mexico corporation on its own behalf”), *aff’d,* 546 U.S. 418 (2006).

**\*1126 *2. Free Exercise***

The government further argues that the “[t]he distinction between non-profit, religious organizations and for-profit, secular companies is rooted in the text of the First Amendment,” Aple. Br. at 12 (internal quotation marks omitted). It claims this understanding of the First Amendment informed what Congress intended by “person” in RFRA. Undoubtedly, Congress’s understanding of the First Amendment informed its drafting of RFRA, but we see no basis for concluding that such an understanding included a for-profit/nonprofit distinction.

***a. RFRA’s Purpose***

RFRA was Congress’s attempt to legislatively overrule Employment Division v. Smith, 494 U.S. 872 (1990). *Smith* had abrogated much of the Supreme Court’s earlier jurisprudence regarding whether a neutral law of general application nonetheless impermissibly burdened a person’s Free Exercise rights. The pre-*Smith* test exempted such a person from the law’s constraints unless the government could show a compelling need to apply the law to the person. *Id.* at 882-84*. Smith* eliminated that test on the theory that the Constitution permits burdening Free Exercise if that burden results from a neutral law of general application. *Id.* at 878-80.

Congress responded to *Smith* by enacting RFRA, which re-imposed a stricter standard on both the states and the federal government. The Supreme Court held that Congress could not constitutionally apply RFRA to the states, *City of Boerne v. Flores,* 521 U.S. 507 (1997),but RFRA still constrains the federal government, *Okamoto,* 242 F.3d at 959.

Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith.* There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence—including jurisprudence regarding who can bring Free Exercise claims. We therefore turn to that jurisprudence.

***b. Corporate and For–Profit Free Exercise Rights***

It is beyond question that associations—not just individuals—have Free Exercise rights: “An individual’s freedom to speak, *to worship,* and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984). (emphasis added). Therefore, courts have “recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion.* The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.” *Id.* at 618. (emphasis added): *see also Citizens United v. FEC,* 558 U.S. 310, 342-43 (2010) (“First Amendment protection extends to corporations ... [, and the Court] has thus rejected the argument that ... corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons.” (internal quotation marks omitted)).

Accordingly, the Free Exercise Clause is *not* a “ ‘purely personal’ guarantee[ ] ... unavailable to corporations and other organizations because the ‘historic function’ of the particular [constitutional] **\*1127** guarantee has been limited to the protection of individuals.” *Id.* As should be obvious, the Free Exercise Clause at least extends to associations like churches—including those that incorporate. *See, e.g., Church of Lullimi, Inc. v. City of Nevaeh,* 508 U.S. 520 (1993) (holding that a “not-for-profit corporation organized under Florida law” prevailed on its Free Exercise claim).

In addition, the Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses. See, e.g., United States v. Lee,* 455 U.S. 252 (1982). (considering a Free Exercise claim of an Amish employer); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (considering a Free Exercise claim by Jewish merchants operating for-profit).

In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate *and* fail to satisfy Internal Revenue Code § 501(c)(3). At that point, Free Exercise rights somehow disappear.

This position is not “rooted in the text of the First Amendment,” Aple. Br. at 12, and therefore could not have informed Congress’s intent when enacting RFRA. As an initial matter, the debates in Congress surrounding the adoption of the First Amendment demonstrate an intent to protect a range of conduct broader than the mere right to believe whatever one chooses. Indeed, at the time of the amendment’s inception in Congress, a competing formulation for the “free exercise of religion” was “rights of conscience.” *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1488 (1990) [hereinafter McConnell, The Origins]; As compared to *exercise,* which “strongly connoted action” in the language of the day, “conscience” suggested mere thoughts, opinions, or internal convictions. McConnell, *The Origins, supra* at 1489. Congress chose *exercise,* indicating that, as the Supreme Court has frequently held, the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct,* as well as religious belief. *Id.* at 1488–89.

The distinction gains force here because religious conduct includes religious expression, which can be communicated by individuals and for-profit corporations alike. *See Smith,* 494 U.S. at 877-78. For example, the Supreme Court has stated that the exercise of religion includes “proselytizing.” *Smith,* 494 U.S. at 877.

FN 2: “Proselytizing” means to convert or attempt to convert someone from one religion, belief, or opinion to another.

And, as discussed above, Tinker Town and Babylon—two for-profit corporations—proselytize by purchasing hundreds of newspaper ads to “know Jesus as Lord and Savior.” JA 24a. Because Tinker Town and Babylon express themselves for religious purposes, the First Amendment logic of *Citizens United,* 558 U.S. at 342-55., where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.

We also believe that a constitutional distinction would conflict with the Supreme Court’s Free Exercise precedent. First, we cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before. This cannot be about the protections of the corporate form, such as limited liability and tax rates. Religious associations can **\*1129** incorporate, gain those protections, and nonetheless retain their Free Exercise rights.

Moreover, when the Supreme Court squarely addressed for-profit individuals’ Free Exercise rights in *Lee* and *Braufeld*, its analysis did not turn on the individuals’ unincorporated status. Nor did the Court suggest that the Free Exercise right would have disappeared, using a more modern formulation, in a general or limited partnership, sole professional corporation, LLC, S-corp, or closely held family business like we have here.

In addition, sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit. Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices? The kosher butcher, of course, might directly serve a religious community—as Babylon, a Christian bookstore, does here. But we see no reason why one must orient one’s business toward a religious community to preserve Free Exercise protections. A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other.

We do not share this interpretation. The main point of the Court was that the Religion Clauses add to the mix when considering freedom of association. But it does not follow that because religious organizations obtain protections through the Religion Clauses, all entities not included in the definition of religious organization are accorded *no* rights.

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The government nonetheless raises the specter of future cases in which, for example, a large publicly traded corporation tries to assert religious rights under RFRA. That would certainly seem to raise difficult questions of how to determine the **\*1130** corporation’s sincerity of belief. But that is not an issue here. Tinker Town and Babylon are not publicly traded corporations; they are closely held family businesses with an explicit Christian mission as defined in their governing principles. The Browns, moreover, have associated through Tinker Town and Babylon with the intent to provide goods and services while adhering to Christian standards as they see them, and they have made business decisions according to those standards. And the Browns are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Tinker Town and Babylon. It is hard to compare them to a large, publicly traded corporation, and the difference seems obvious. Thus, we do not share any concerns that our holding would prevent courts from distinguishing businesses that are not eligible for RFRA’s protections.

We need not decide today whether any of these factors is necessary, but we conclude that their collective presence here is sufficient for Tinker Town and Babylon to qualify as “persons” under RFRA.

**IV.**

***A. Substantial Burden***

The next question is whether the contraceptive-coverage requirement constitutes a substantial burden on Tinker Town and Babylon’s exercise of religion.

The government urges that there can be no substantial burden here because “[a]n employee’s decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer.” Aple. Br. at 13. There are variations on this same theme in many of the amicus briefs supporting the government’s position, all of which stand for essentially the same proposition: one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties.

This position is fundamentally flawed because it advances an understanding of “substantial burden” that presumes “substantial” requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs. In isolation, the term “substantial burden” could encompass either definition, but for the reasons explained below, the latter interpretation prevails. Our only task is to determine whether the claimant’s belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.

No one disputes in this case the sincerity of Tinker Town and Babylon’s religious beliefs. And because the contraceptive-coverage requirement places substantial **\*1131** pressure on Tinker Town and Babylon to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA.

***1. The Substantial Burden Test***

Our most developed case discussing the substantial burden test is *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010). In *Abdulhaseeb*, we were required to resolve a RFRA claim brought by Madyun Abdulhaseeb, a Muslim prisoner who raised a religious objection to the prison’s failure to provide him a halal diet. Abdulhaseeb alleged that the prison cafeteria’s failure to serve halal food violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that adopts RFRA’s “substantial burden” standard.

In analyzing Abdulhaseeb’s claim, we held that a government act imposes a “substantial burden” on religious exercise if it: (1) “requires participation in an activity prohibited by a sincerely held religious belief,” (2) “prevents participation in conduct motivated by a sincerely held religious belief,” or (3) “places substantial pressure on an adherent ... to engage in conduct contrary to a sincerely held religious belief.” *Id.* at 1315. Our analysis in *Abdulhaseeb* only concerned the third prong of this test, related to “substantial pressure.” As we will explain below, the same is true here. Note that the substantial pressure prong rests firmly on Supreme Court precedent.

   \* \* \*

Given the foregoing, our first step in *Abdulhaseeb* was to identify the belief in question—the immorality of a non-halal diet—and to determine if the belief was sincerely held. Finding it was, we stated that “the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens *Mr. Abdulhaseeb’s* own exercise of his sincerely held religious beliefs.” 600 F.3d at 1314 (emphasis in original). We concluded that the prison cafeteria’s “failure to provide a halal diet either prevents Mr. Abdulhaseeb’s religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson’s choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat.” *Id.* at 1317. Thus, the plaintiff faced a substantial burden.

***2. Applying the Substantial Burden Test***

The claims of Tinker Town and Babylon are similar to those raised in *Abdulhaseeb* and the framework provided in those cases guides our analysis.

First, we must identify the religious belief in this case. The corporate plaintiffs believe life begins at conception. Thus, they have what they describe as “a sincere religious objection to providing coverage for Plan B and Ella since they believe those drugs could prevent a human embryo ... from implanting in the wall of the uterus, causing the death of the embryo.” JA 35a. And they allege a “sincere religious objection to providing coverage for certain contraceptive [IUDs] since they believe those devices could prevent a human embryo from implanting in the wall of the uterus, causing the death of the embryo.” *Id.* Further, Tinker Town and Babylon object to “participating in, providing access to, paying for, training others to engage in, or otherwise supporting” the devices and drugs that yield these effects. Aplt. Br. at 27 (citing JA 14a).

Second, we must determine whether this belief is sincere. The government does not dispute the corporations’ sincerity, and we see no reason to question it either.

Third, we turn to the question of whether the government places substantial pressure on the religious believer. Here, it is difficult to characterize the pressure as anything but substantial. To the extent Tinker Town and Babylon provide a health plan, they would be fined $100 per employee, per day the plan does not meet the contraceptive—coverage requirement. 26 U.S.C. § 4980(D)(b)(1). With over 13,000 employees, that comes to more than $1.3 million per day, or close to $475 million per year. And if Tinker Town and Babylon simply stop offering a health plan—dropping health insurance for more than 13,000 employees—then the companies must pay about $26 million per year, *see id.* § 4980(H)(c)(1) (fining employer $2,000 per employee per year), and put themselves “at a competitive disadvantage in [their] **\*1132** efforts to recruit and retain employees,” JA 40a.

With this dilemma created by the statute, we believe that Tinker Town and Babylon have made a threshold showing regarding a substantial burden. Tinker Town and Babylon incurred a substantial burden on their ability to exercise their religion because the law requires Tinker Town and Babylon to:

• compromise their religious beliefs,

• pay close to $475 million more in taxes every year, or

• pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees.

This is precisely the sort of Hobson’s choice described in *Abdulhaseeb,* and Tinker Town and Babylon have established a substantial burden as a matter of law.

***3. The Government’s Arguments***

The government resists this conclusion, contending the regulations place no burden on Tinker Town or Babylon. It insists the insurance coverage at issue is just another form of non-wage compensation—supposedly the equivalent of money—and therefore should not present problems under RFRA.

Such reasoning cannot be squared with the Supreme Court’s holding in *Thomas.* The Supreme Court emphasized that when the plaintiff drew a moral line between foundry and factory work, it was not the Court’s prerogative to determine whether the line he drew “was an unreasonable one.” *Thomas,* 450 U.S. at 715.

Just so here: Tinker Town and Babylon have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable. This is especially so given that Tinker Town and Babylon stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables someone else to behave in a manner he considered immoral. That is precisely the objection of Tinker Town and Babylon. It is not the employees’ health care decisions that burden the corporations’ religious beliefs, but the government’s demand that Tinker Town and Babylon enable access to contraceptives that Tinker Town and Babylon deem morally problematic. As the Supreme Court accepted the religious belief in *Lee*, so we must accept Tinker Town and Babylon’s beliefs.

Tinker Town and Babylon have therefore established a substantial burden to their sincerely held religious beliefs. We now turn to the final question: whether the government has presented a compelling **\*1133** interest implemented through the least restrictive means available.

***B. Compelling Interest and Least Restrictive Means***

As noted above, even at the preliminary injunction stage, RFRA requires *the government* to demonstrate that mandating a plaintiff’s compliance with the contraceptive-coverage requirement is “the least restrictive means of advancing a compelling interest.” *O Centro,* 546 U.S. at 423 (citing 42. U.S.C. § 2000bb-1(b). As the Supreme Court emphasized, this standard requires that we “look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize [ ] the asserted harm of granting specific exemptions to particular religious claimants.” *Id.* at 431.

The interest must also be narrowly tailored. “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—*the particular claimant* whose sincere exercise of religion is being substantially burdened.” *Id.* at 430 (emphasis added). Thus, the government must show with “particularity how [even] admittedly strong interest [s]” “would be adversely affected by granting [the] exemption” specifically requested by Tinker Town and Babylon. *Wisconsin v. Yoder,* 406 U.S. 205, 236 (1972)

***1. Compelling Interest***

The government asserts two interests here: “the interests in [1] public health and [2] gender equality.” Aple. Br. at 34. We recognize the importance of these interests. But they nonetheless in this context do not satisfy the Supreme Court’s compelling interest standards.

First, both interests as articulated by the government are insufficient under *O Centro* because they are “broadly formulated interests justifying the general applicability of government mandates.” 545 U.S. at 431 And the government offers almost no justification for not “granting specific exemptions to particular religious claimants.” *Id.*

Second, the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people. As noted above, this exempted population includes those working for private employers with grandfathered plans, for employers with fewer than fifty employees, and, under a proposed rule, for colleges and universities run by religious institutions. As the Supreme Court has said, “a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lullimi,* 508 U.S. 1t 547. The exemptions at issue here would yield precisely this result: they would leave unprotected **\*1134** all women who work for exempted business entities.

On this question, *O Centro* is particularly instructive. In that case, a religious group sought an exemption for the sacramental use of hoasca, a hallucinogen classified as a Schedule I(c) controlled substance under the Controlled Substances Act. The question in *O Centro* was limited to whether the government could show a compelling governmental interest under RFRA to justify what was indisputably a substantial burden on the plaintiffs’ exercise of religion. The government in part relied on its interest in promoting public health and safety and upon Congress’s determination that hoasca “ ‘has a high potential for abuse,’ ‘has no currently accepted medical use,’ and has ‘a lack of accepted safety for use ... under medical supervision.’ ” *O Centro,* 546 U.S. at 433 (1uoting 21 U.S.C § 812(b)(1)).

The Supreme Court refused to credit this argument, however, in part because the CSA and related regulations contained an exemption for the religious use of another substance categorized as a Schedule I hallucinogen, peyote. As the Court reasoned, “Everything the Government says about the [dangerous chemicals] in hoasca ... applies in equal measure to the [dangerous chemicals] in peyote.” *Id.* Because both the Executive Branch and Congress had decreed a religious exemption for Native American use of peyote, the Court concluded that “it [was] difficult to see how” those same concerns could “preclude any consideration of a similar exception for” the religious use of hoasca. *Id.* If the peyote exemption in *O Centro,* which applied to “hundreds of thousands of Native Americans,” was enough to undermine the government’s compelling interest argument in that case, we conclude the exemption for the millions of individuals here must dictate a similar result.

***2. Least Restrictive Means***

Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting Tinker Town and Babylon their requested exemption. Tinker Town and Babylon ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.

**Conclusion**

In sum, for all of these reasons, Tinker Town and Babylon have established they are likely to succeed on their RFRA claim. . . .

724 F.3d 377

United States Court of Appeals,

Third Circuit.

COOPER WOOD SPECIALTIES CORPORATION;

v.

HARPER, SECRETARY OF the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

No. 13–1144. | Argued May 30, 2013. | Filed: July 26, 2013.

**OPINION**

COWEN, Circuit Judge.

AppellantsCooper Wood Specialties Corporation (“Cooper ”), Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony Hahn, and Kevin Hahn (collectively, “the Hahns”) appeal from an order of the District Court denying their motion for a preliminary injunction. In their Complaint, Appellants allege that regulations promulgated by the Department of Health and Human Services (“HHS”), which require group health plans and health insurance issuers to provide coverage for contraceptives, violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (“RFRA”) and the Free Exercise Clause of the First Amendment **\*380** of the United States Constitution.

Before we can even reach the merits of the First Amendment and RFRA claims, we must consider a threshold issue: whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA. As we conclude that for-profit, secular corporations cannot engage in religious exercise.

**I.**

In 2010, Congress passed the Patient Protection and Affordable Care Act (“ACA”). The ACA requires employers with fifty or more employees to provide their employees with a minimum level of health insurance. The ACA requires non-exempt group plans to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration (“HRSA”), a subagency of HHS. *See* 42 U.S.C. § 300gg-13(a)(4).

The HRSA delegated the creation of guidelines on this issue to the Institute of Medicine (“IOM”). The IOM recommended that the HRSA adopt guidelines that require non-exempt group plans to cover “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.” These recommended guidelines were approved by the HRSA. Under the regulations, group health plans and health insurance issuers are required to provide coverage consistent with the HRSA guidelines in plan years beginning on or after August 1, 2012, unless the employer or the plan is exempt. Appellants refer to this requirement as the “Mandate,” and we use this term throughout this opinion. Employers who fail to comply with the Mandate face a penalty of $100 per day per offending employee. *See* 26 U.S.C. § 4980D. The Department of Labor and plan participants may also bring a suit against an employer that fails to comply with the Mandate. *See* 29 U.S.C. § 1132.

**II.**

The Hahns own 100 percent of the voting shares of Cooper . Cooper is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees. The Hahns practice the Mennonite religion. According to their Amended Complaint, the Mennonite Church “teaches that taking of life which **\*381** includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable.” (Am. Compl. ¶ 30.) Specifically, the Hahns object to two drugs that must be provided by group health plans under the Mandate that “may cause the demise of an already conceived but not yet attached human embryo.” (*Id.* at ¶ 45.) These are “emergency contraception” drugs such as Plan B (the “morning after pill”) and *ella* (the “week after pill”). The Amended Complaint alleges that it is immoral and sinful for Appellants to intentionally participate in, pay for, facilitate, or otherwise support these drugs. (*Id.* at ¶ 32.) Cooper has been subject to the Mandate as of January 1, 2013, when its group health plan came up for renewal. As a panel of this Court previously denied an injunction pending appeal, Cooper is currently subject to the Mandate, and in fact, Appellants’ counsel represented during oral argument that Cooper is currently complying with the Mandate.

**III.**

**A.**

First, we turn to Cooper ’s claims under the First Amendment. Under the First Amendment, “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.” The threshold question for this **\*382** Court is whether Cooper , a for-profit, secular corporation, can exercise religion. In essence, Appellants offer two theories under which we could conclude that Cooper can exercise religion directly, under the Supreme Court’s recent decision in *Citizens United.*

In *Citizens United,* the Supreme Court held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity,” and it accordingly struck down statutory restrictions on corporate independent expenditure. *Citizens United c. Fed. Election Comm’n,* 558 U.S. 310, 365 (2010). *Citizens United* recognizes the application of the First Amendment to corporations generally without distinguishing between the Free Exercise Clause and the Free Speech Clause, both which are contained within the First Amendment. Accordingly, whether *Citizens United* is applicable to the Free Exercise Clause is a question of first impression. *See Tinker Town Stores, Inc. v. Harper, \_\_\_\_ U.S. \_\_\_\_ (2012).* (Sotomayor, Circuit Justice) (“This court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders....”).

While “a corporation is ‘an artificial being, invisible, intangible, and existing only in contemplation of law,’ ... a wide variety of constitutional rights may be asserted by corporations.” *Consol. Edison Co. of N.Y., Inc. v. Pataki,* 292 F.3d 228 (2d Cir. 2002). In analyzing whether constitutional guarantees apply to corporations, the Supreme Court has held that certain guarantees are held by corporations and that certain guarantees are “purely personal” because “the ‘historic function’ of the particular guarantee has been limited to the protection of individuals.” *Id.*

In *Citizens United,* the Supreme Court pointed out that it has “recognized that First Amendment protection extends to corporations.” *Citizens United,* 558 U.S. at 432. It then cited to more than twenty cases, from as early as the 1950’s, including landmark cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court recognized that First Amendment free speech rights apply to corporations.

We must consider the history of the Free Exercise Clause and determine whether there is a similar history of courts providing free exercise protection to corporations. We conclude that there is not. In fact, we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights. Such a total **\*383** absence of caselaw takes on even greater significance when compared to the extensive list of Supreme Court cases addressing the free speech rights of corporations.

After all, as the Supreme Court observed in *Schempp,* the purpose of the Free Exercise Clause “is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.” *Sch. Dist. Of Abington Twp. V. Schempp*, 374 U.S. 203 (1963) (emphasis added). And as the District Court aptly noted in its opinion, “[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely ‘human’ rights provided by the Constitution.” *Cooper ,* 917 F.Supp.2d at 408. We do not see how a for-profit “artificial being, invisible, intangible, and existing only in contemplation of law,” that was created to make money could exercise such an inherently “human” right.

We are unable to determine that the “nature, history, and purpose” of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under this particular constitutional provision. Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion. As another court considering a challenge to the Mandate noted:

General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.

*Tinker Town Stores, Inc. v. Harper,* 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *see also Tinker Town Stores, Inc.*, 723 F.3d at 1174-75, 2013 Wl 3216103, at \*51 (Briscoe, C.J., concurring in part and dissenting in part (questioning “whether a corporation can ‘believe’ at all, *see Citizens United,* 130 S.Ct. at (‘It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.’) (Stevens, J., concurring in part and dissenting in part).”).

In urging us to hold that for-profit, secular corporations can exercise religion, Appellants, as well as the dissent, cite to cases in which courts have ruled in favor of free exercise claims advanced by religious organizations. *See, e.g., Rodriguez v. O Centro Expirita Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006); *Church of the Lullimi, Inc. v. Nevaeh,* 508 u.S. 520 (1993). None of these cases involve secular, for-profit corporations. We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion. As the Supreme Court recently noted, “the text of the First Amendment ... gives special solicitude to the rights of religious organizations.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC,* 132 S.Ct. 694, 706 (2012). That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections.

**B.**

Next, we consider Cooper ’s RFRA claim. Under the RFRA, “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability [unless the burden] (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(a)-(b). As with the inquiry under the Free Exercise Clause, our preliminary inquiry is whether a for-profit, secular corporation can assert a claim under the RFRA. Under the plain language of the statute, the RFRA only applies to a “person’s exercise of religion.” *Id.* at § 2000bb-l(a).

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

**IV.**

As Appellants have failed to show that they are likely to succeed on the merits of their Free Exercise Clause and RFRA claims, we need not decide whether Appellants have shown that they will suffer irreparable harm, that granting preliminary relief will not result in even greater harm to the Government, and that the public interest favors the relief of a preliminary injunction. Therefore, we will affirm the District Court’s order denying Appellants’ motion for a preliminary injunction.

We recognize the fundamental importance of the free exercise of religion. As Congress stated, in passing the RFRA and restoring the compelling interest test to laws that substantially burden religion, “the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.” 42 U.S.C. 2000bb(a). Thus, our decision here is in no way intended to marginalize the Hahns’ commitment to the Mennonite faith. We accept that the Hahns sincerely believe that the termination of a fertilized embryo constitutes **\*384** an “intrinsic evil and a sin against God to which they are held accountable,” (Compl. ¶ 30), and that it would be a sin to pay for or contribute to the use of contraceptives which may have such a result. We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself. A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners.

730 F.3d 618

United States Court of Appeals,

Sixth Circuit.

AUTOTECH CORPORATION

v.

Grace HARPER in her official capacity as Secretary of Health and Human Services;

No. 12–2673. | Argued: June 11, 2013. | Decided and Filed: Sept. 17, 2013.

**Opinion**

JULIA SMITH GIBBONS, Circuit Judge.

Autotech Corporation and Autotech Medical, LLC (collectively, “Autotech”) are for-profit, secular corporations engaged in high-volume manufacturing for the automotive and medical industries. The companies are owned and controlled by members of the Kennedy family, all of whom are practicing Roman Catholics. Pursuant to regulations implementing the Patient Protection and Affordable Care Act of 2010 (“ACA”), Autotech’s health care plan is required to cover, without cost-sharing, “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling” for female employees enrolled in its health plan. *See* Health Res. & Servs. Admin, *Women’s Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines (last visited August 5, 2013).

Autotech and the Kennedys claim that compliance with this directive—popularly known as “the mandate”—will force them to violate the teachings of the Kennedys’ church, but failure to comply with it will result in significant fines against Autotech. They sued the Cabinet departments and secretaries responsible for implementing the ACA’s mandatory coverage requirements on a variety of constitutional, statutory, and procedural grounds, and moved for a preliminary injunction that would relieve Autotech of its duty to provide the disputed coverage to its employees. The district court denied the motion. On appeal, Autotech and the Kennedys argue that they have a strong likelihood of success on their claim that the mandate violates the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb. Our sister circuits that have considered whether for-profit corporations may be exempted from compliance with the mandate under RFRA have split on the proper answer to the question.

FN 1: Compare *Tinker Town Stores, Inc. v. Harper,* 723 F.3d 1114 (10th Cir. 2013) (holding that plaintiff’s demonstrated a likelihood of success on the merits of their RFRA claims) *with Cooper Wood Specialties Corp v. Harper.,* 724 F.3d 377 (3rd Cir. 2013) (affirming district court’s judgment denying a preliminary injunction on both Free Exercise Clause and RFRA grounds).

For the reasons that follow, we dismiss the claims of the individual plaintiffs on standing grounds and otherwise affirm the judgment of the district court. **\*620**

**I.**

The Kennedy family members named in the complaint own “a controlling interest” in the two corporate entities that comprise Autotech. John Kennedy serves as Autotech’s CEO and president and is primarily responsible for “setting ... policies governing the conduct of all phases” of Autotech’s business. The two companies have 1,500 employees in fourteen facilities worldwide, including 661 employees in the United States. The Kennedys “believe that they are called to live out the teachings of Christ in their daily activity and witness to the truth of the Gospel by treating others in a manner that reflects their commitment to human dignity,” which includes their business dealings. They characterize Autotech as a for-profit, secular corporation and “the business form through which [they] endeavor to live their vocation as Christians in the world.” One of the ways that the Kennedys believe they **\*621** manifest this commitment is by providing their employees with health coverage. Autotech is “self-insured and provide[s] health benefits to [its] employees by virtue of a jointly administered benefits plan which features a group insurance plan used to provide benefits to full-time employees.”

The Kennedys claim that the same religious beliefs that motivate them to provide Autotech employees with health coverage also limit the scope of the coverage they are able to provide. They accept their church’s teaching that artificial contraception and sterilization are immoral. They also believe that they become morally responsible for the use of contraception by others when they “directly pay for the purchase of drugs and services ... in violation of [their] beliefs.” This teaching is sometimes referred to by the plaintiffs as “material cooperation.” In applying these teachings to their ownership and operation of Autotech, the Kennedys believe that they cannot direct their closely held company’s health insurance plan to “provide, fund, or participate in health care insurance that covers artificial contraception, including abortifacient contraception, sterilization, and related education and counseling.” The plaintiffs “do not seek to control what an employee or his or her dependants do with the wages and healthcare dollars” they provide because they do not consider themselves morally responsible for the choices of employees in the way plaintiffs believe they are responsible when they provide insurance coverage for services they find morally objectionable.

If required to comply with the mandate, Autotech’s health plan would have “to directly pay for the purchase of drugs and services” that the Kennedys find objectionable. The Kennedys believe that compliance with this law would constitute impermissible “material cooperation.” But failure to comply with the mandate would lead to serious financial consequences. The ACA’s primary enforcement mechanism for bringing employers into compliance with the mandate is a “tax” on the employer when its health plan fails to meet the requirements of the ACA. 26 U.S.C. § 4980 (D)(a). The amount of additional “tax” is “$100 for each day in the noncompliance period with respect to each individual to whom such failure relates.” *Id.* § 4980(D)(b)(1). If it chooses not to comply with the mandate, Autotech estimates that it will be assessed fines of $19 million per year. The Kennedys also allege that directing Autotech to drop health care coverage entirely is not an option because (1) they believe their faith obligates them to provide health benefits in a manner consistent with their beliefs; and (2) Autotech would still face substantial financial penalties if it chose to drop coverage entirely because it is required to provide health insurance to its employees due to the company’s size. *Id.* § 4980H

**II**

We now turn to the merits of Autotech’s request for a preliminary injunction.

**\*622 A.**

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment does not enjoin legislatures from passing “a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a person’s] religion prescribes (or proscribes).’ ” 494 U.S. at 879. Congress responded to *Smith* by enacting RFRA, which President Clinton signed into law in 1993. In the text of the statute, Congress noted its concern that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2). Its stated purposes in passing RFRA were “to restore the compelling interest test” for free-exercise cases that prevailed prior to *Smith* and “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” *Id.*§ 2000bb(b)(1)-(2). To that end, RFRA requires that government action “not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” *Id.* § 2000bb-1(a). Congress defined “exercise of religion” broadly to encompass “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc–5(7); *see also id.* § 2000bb–2(4) (incorporating § 2000cc–5(7) into RFRA).

RFRA provides that “[a] person whose religious exercise has been burdened ... may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government,” subject to the requirements of Article III standing. *Id.* § 2000bb-1(c RFRA claims proceed in two steps. First, the plaintiff must make out a *prima facie* case by establishing Article III standing and showing that the law in question “would (1) substantially burden (2) a sincere (3) religious exercise.” *O Centro Espirita*, 546 U.S. at 428. If the plaintiff makes out a *prima facie* case, it falls to the government to “demonstrate[ ] 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.” *Id.* § 2000bb-1(b). The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice. *Id.* § 2000bb–2(3).

**B.**

RFRA affords a cause of action to any “person whose religious exercise has been burdened.” 42 U.S.C. § 2000bb-1(c). Autotech’s claim fails at the outset because Autotech is not a “person” capable of “religious exercise” in the sense RFRA intended. This is a matter of first impression in our court and the subject of a recent split among our sister circuits. *Compare Tinker Town,* 723 F.3d at 1120(holding “as a matter of statutory interpretation ... Congress did not exclude for-profit corporations from RFRA’s protections”) *with Cooper ,* 724 F.3d at 388-89(“Since [a for-profit, secular corporation] cannot exercise religion, it cannot assert a RFRA claim.”). In this case, we agree with the government that Autotech is not a “person” capable of “religious exercise” as intended by RFRA and affirm the district court’s judgment on this basis. In so holding, **\*623** we do not reach the government’s arguments that the mandate fails to impose a substantial burden on Autotech or that the mandate can be justified under RFRA’s strict scrutiny test.

Congress did not define the term “person” when it enacted RFRA, so our analysis begins with the Dictionary Act, which provides default definitions for many commonly used terms in the U.S. Code. According to the Dictionary Act, “unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. § 1. The relevant “context” courts should look to when construing terms found in the Dictionary Act is “the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts.” *Rolwand v. Cal. Men’s Colony, Unit II Men’s Adivosry Council*, 506 U.S. 194 (1993). When considering RFRA, that “context” includes “the body of free exercise case law that existed at the time of RFRA’s passage,” which Congress explicitly invoked in the statute’s text. *Tinker Town,* 723 F.3d at 1166-68 (Briscoe, C.J., concurring in part and dissenting in part). The statute being construed only has to “indicate” a definition of the contested term contrary to the baseline provided by the Dictionary Act, rather than “require” or “necessitate” such a result. *Rowland*, 506 U.S. at 200-01. (“[A] contrary ‘indication’ may raise a specter short of inanity, and with something less than syllogistic force.”).

Looking to RFRA’s relevant context, we find strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as “persons” under RFRA. Again, Congress’s express purpose in enacting RFRA was to restore Free Exercise Clause claims of the sort articulated in *Sherbert* and *Yoder,* claims which were fundamentally personal. 42 U.S.C. § 2000bb(b)(1); *Yoder*, 406 U.S. at 207 (Amish parents objecting to compulsory schooling laws); *Sherbert*, 374 U.S. at 399-401 (Seventh–Day Adventist denied unemployment compensation benefits after she refused her employer’s request to work on a Saturday). Congress did not intend to expand the scope of the Free Exercise Clause.

Reading the term “person” in the manner suggested by Autotech would lead to a significant expansion of the scope of the rights the Free Exercise Clause protected prior to *Smith.* “[D]uring the 200–year span between the adoption of the First Amendment and RFRA’s passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations.” *Tinker Town*, 723 F.3d at 1168 (Briscoe, C.J., concurring in part and dissenting in part); *see also Cooper* , 724 F.3d at 385-86(“[W]e are not aware of any case preceding the commencement of litigation about the [m]andate[ ] in which a for-profit, secular corporation was itself found to have free exercise rights.”). While the Supreme Court has recognized the rights of sole proprietors under the Free Exercise Clause during this period, it has never recognized similar rights on behalf of corporations pursuing secular ends for profit. **\*624** Moreover, the Supreme Court has observed that the purpose of the Free Exercise Clause “is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.” *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) (emphasis added); *see also Cooper* , 724 F.3d at 385-86 (“[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion.”).

We recognize that many religious groups organized under the corporate form have made successful Free Exercise Clause or RFRA claims, and our decision today does not question those decisions. Furthermore, we acknowledge that our sister circuits have held that on very rare occasions, a “corporate entit[y] which [is] organized expressly to pursue religious ends ... may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking.” *Grote*, 708 F.3d at 856 (Rovner, J., dissenting); But we need not “draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion.” *Cooper,* 724 F.3d at 385. The absence of any authority for the latter proposition suggests that Congress did not adopt it when it enacted RFRA.

Our interpretation is also supported by RFRA’s legislative history. When enacting RFRA, Congress specifically recognized that individuals and religious organizations enjoy free exercise rights under the First Amendment and, by extension, RFRA. *See, e.g.,* Religious Freedom Restoriation Act of 1993, S. Rep. No. 103-111, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 (“The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the *individual* to government and to God.”) In contrast, the legislative history makes no mention of for-profit corporations. This is a sufficient indication that Congress did not intend the term “person” to cover entities like Autotech when it enacted RFRA.

Autotech’s attempt to fill this void by relying on freedom of speech cases, most notably *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), is unavailing. In Citizens United, the Court “recognized that First Amendment protection extends to corporations” and collected a significant number of cases recognizing this rule. 558 U.S. at 342. But these cases all arose under the Free Speech Clause. No analogous body of precedent exists with regard to the rights of secular, for-profit corporations under the Free Exercise Clause prior to the enactment of RFRA. The Free Exercise Clause and Free Speech Clause of the First Amendment have historically been interpreted in very different ways. Therefore, the Court’s recognition of rights for corporations like Autotech under the Free Speech Clause nearly twenty **\*625** years after RFRA’s enactment does not require the conclusion that Autotech is a “person” that can exercise religion for purposes of RFRA.

We agree with the government that Autotech has not carried its burden of demonstrating a strong likelihood of success on the merits in this action. Accordingly, we need not consider the remaining preliminary injunction factors in order to conclude that the district court’s decision to deny the relief sought by Autotech was proper.

**III.**

For these reasons, we affirm the district court’s denial of Autotech’s motion for a preliminary injunction.

113 S.Ct. 2217

Supreme Court of the United States

CHURCH OF THE LULLIMI, INC. and Ernesto Pichardo, Petitioners,

v.

CITY OF NEVAEH.

No. 91–948. | Argued Nov. 4, 1992. | Decided June 11, 1993.

**Opinion**

Justice KENNEDY delivered the opinion of the Court.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty,* 435 U.S. 618 (1978). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation’s essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

**I**

Petitioner Church of the Lullimi, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church’s priest and holds the religious title of *Italero,* the second highest in the Santeria faith. In April 1987, the Church leased land in **\*526** the City of Nevaeh, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church’s goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church’s efforts at obtaining the necessary licenses and permits were far from smooth, it appears that it received all needed approvals by early August 1987.

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption,” and prohibited owning or possessing an animal “intending to use such animal for food purposes.” It restricted application of this prohibition, however, to any individual or group that “kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.” The ordinance **\*527** contained an exemption for slaughtering by “licensed establishment[s]” of animals “specifically raised for food purposes.” Declaring, moreover, that the city council “has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community,” the city council adopted Ordinance 87–71. That ordinance defined sacrifice as had Ordinance 87–52, and then provided that “[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Nevaeh, Florida.” The final Ordinance, 87–72, defined “slaughter” as “the killing of animals for food” and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of “small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action. Named as defendants were the city of Nevaeh and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners’ rights under, *inter alia,* the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief.

**\*528 II**

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see *Warren v. Connecticut,* 210 U.S. 296 (104), provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*....” (Emphasis added). The city does not argue that Santeria is not a “religion” within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Jones,* 450 U.S. 707 (1981). Given the historical association between animal sacrifice and religious worship petitioners’ assertion that animal sacrifice is an integral part of their religion “cannot be deemed bizarre or incredible.” *Frazee v. State of Illinois* , 480 U.S. 820 (1989).]Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners’ professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners’ First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance **\*529** that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

**A**

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” *Brown v. Roy*, 476 US. 693 (1986) (opinion of Burger, C.J.). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel,* for example, we invalidated a State law that disqualified members of the clergy from holding certain public offices, because it “impose[d] special disabilities on the basis of ... religious status,” On the same principle, in *Fowler,* we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah’s Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

**1**

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept of Human Resources of Oregon v. Smith,* 494 U.S. at 878-879, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words **\*530** “sacrifice” and “ritual,” words with strong religious connotations. Brief for Petitioners 16–17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words “sacrifice” and “ritual” have a religious origin, but current use admits also of secular meanings. See Webster’s Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 (“[T]he word *sacrifice* ultimately became very much a secular term in common usage”). The ordinances, furthermore, define “sacrifice” in secular terms, without referring to religious practices.

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 The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words “sacrifice” and “ritual” does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council’s enactments discloses the improper attempt to target Santeria. **\*534** Resolution 87–66, adopted June 9, 1987, recited that “residents and citizens of the City of Nevaeh have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and “reiterate[d]” the city’s commitment to prohibit “any and all [such] acts of any and all religious groups.” No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances’ operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as “to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the **\*535** primary purpose of food consumption.” The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas,* not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the “possess [ion], sacrifice, or slaughter” of an animal with the “inten[t] to use such animal for food purposes.” This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in “any type of ritual” and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, “any licensed [food] establishment” with regard to “any animals which are specifically raised for food purposes,” if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of “any type of ritual,” it again falls outside the prohibition; and if **\*536** the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals “specifically raised for food purposes.” A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87–40 incorporates the Florida animal cruelty statute, Fla. Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing “[w]hoever ... unnecessarily ... kills any animal.” The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13–14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See *id.,* at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of “individualized governmental assessment of the reasons for the relevant conduct,” *Smith,* 494 U.S. at 884. As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Id.* Respondent’s application of the ordinance’s test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. **\*537** Thus, religious practice is being singled out for discriminatory treatment. *Bowen v. Roy,* 476 U.S. at 722, n. 17.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also *id.,* at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city’s interest **\*538** in the public health. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city’s interest in preventing cruelty to animals. With regard to the city’s interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city’s concern, not a prohibition on possession for the purpose of sacrifice.

The Ordinances must be invalidated because if functions to suppress Santeria religious worship.

\* \* \*

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

**B**

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Smith*, 494 U.S. at 879-881. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause “protect[s] religious observers against unequal treatment,” *Hobbie v. Unemployment Appeals Comm’n of Fla.* 480 U.S. 136 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that **\*539** the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city’s proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Nevaeh, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions **\*540** euthanasia of “stray, neglected, abandoned, or unwanted animals,” Fla. Stat. § 828.058 (1987); destruction of animals judicially removed from their owners “for humanitarian reasons” or when the animal “is of no commercial value,” § 828.073(4)(c)(2); the infliction of pain or suffering “in the interest of medical science,” § 828.02; the placing of poison in one’s yard or enclosure, § 828.08; and the use of a live animal “to pursue or take wildlife or to participate in any hunting,” § 828.122(6)(b), and “to hunt wild hogs,” § 828.122(6)(e).

The city concedes that “neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals.” Brief for Respondent 21. It asserts, however, that animal sacrifice is “different” from the animal killings that are permitted by law. *Ibid.* According to the city, it is “self-evident” that killing animals for food is “important”; the eradication of insects and pests is “obviously justified”; and the euthanasia of excess animals “makes sense.” *Id.,* at 22. These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city’s interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city’s interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. **\*541** Improper disposal is a general problem that causes substantial health risks, but which respondent addresses only when it results from religious exercise. The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city’s ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for “any person, group, or organization” that “slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” See Fla. Stat. § 828.24(2) (1991). Respondent has not explained why commercial operations that slaughter “small numbers” of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Nevaeh’s ordinances pursues the city’s governmental interests only against conduct motivated by religious belief. The ordinances “ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.” *Florida Star v. B.J.F.,* 491 U.S. 524 (1989). This **\*542** precise evil is what the requirement of general applicability is designed to prevent.

**III**

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “ ‘interests of the highest order’ ” and must be narrowly tailored in pursuit of those interests. *Mcdaniel v. Paty,* 435 U.S. at 628 (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972)). The compelling interest standard that we apply once a law fails to meet the *Smith* Requirements is not “water[ed] ... down” but “really means what it says.” *Smith,* 494 U.S. at 888. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see *supra,* at 16–18, 21–24, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible **\*543** measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that “a law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Florida Star v. B.J.F.,* 491 U.s. at 541-42. (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). The ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

**IV**

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

*Reversed.*

242 F.3d 950

United States Court of Appeals,

Tenth Circuit.

Yu OKAMOTO, Plaintiff–Appellant,

v.

John M. LACEY, E.J. Gallegos, Defendants–Appellees,

United States of America, Intervenor.

No. 99–1284. | March 9, 2001.

**Opinion**

MURPHY, Circuit Judge.

**I. INTRODUCTION**

Plaintiff, a federal prisoner, brought suit against Defendants, prison wardens, for their denial of his requests for certain pastoral visits, alleging violations of his First and Fifth Amendment rights and statutory rights under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1. Plaintiff moved for a temporary restraining order and a preliminary injunction preventing Defendants from denying the requested pastoral visits. The district court denied Plaintiff’s motion, reasoning that Plaintiff had not demonstrated a substantial likelihood of success on the merits or that he would suffer irreparable harm absent an injunction. Because the district court committed legal error in holding Plaintiff did not have a substantial likelihood of success on his RFRA claim and would not be irreparably harmed absent an injunction, this court **affirms** in part, **reverses** in part, and **remands** to the district court for further proceedings consistent with this opinion.

**II. FACTS AND PROCEDURAL HISTORY**

Plaintiff-appellant Yu Okamoto is an inmate in the United States Penitentiary, Administrative Maximum, at Florence, Colorado (the “Penitentiary”). Defendant John Lacey is Warden at the Penitentiary, and Defendant E.J. Gallegos is an Associate Warden at the Penitentiary. In early September 1997, the Reverend C. Harold Rickard, a retired United Methodist minister, sent a letter to Plaintiff. Rickard explained in the letter that he had heard about Plaintiff through the Reverend S. Michael Yasutake, a mutual friend of Plaintiff and Rickard, and that he had served as a missionary in Japan for numerous years. Rickard asked Plaintiff, who is originally from Japan, if Plaintiff would accept a pastoral visit from him. Plaintiff replied to Rickard, indicating that he would welcome the visit and encouraging Rickard to contact prison officials to request the visit. Rickard’s request to visit Plaintiff was denied by prison officials.

During the next several months Plaintiff, Rickard, and Yasutake repeatedly contacted prison officials, hoping to persuade them to allow pastoral visits from Rickard. **\*954** On December 23, 1997, Defendant Gallegos denied the requests. Defendant Lacey then sent letters to Plaintiff and Yasutake explaining that the requests were denied because they did not meet the criteria for pastoral visits established by Bureau of Prisons (“BOP”) regulations. *See* 28 C.F.R. § 548.19. Defendant Lacey interprets the regulations to allow pastoral visits if (1) the inmate initiates the request and (2) the clergy person or representative is from the inmate’s faith group. According to BOP regulations, inmates are also allowed non-pastoral visits from representatives of civic and religious organizations if there is an established relationship prior to confinement, although wardens are given the power to waive the requirement of an established pre-confinement relationship. *See id.* § 540.47.

Plaintiff appealed the denial of the visits through the appropriate administrative appeals, but the original decision denying the visitation requests was upheld. Defendant Lacey, who reviewed one of the administrative appeals by Plaintiff, explained that Plaintiff did not meet the criteria for a pastoral visit because Plaintiff had not initiated the request and because “Reverend Rickard is of the Methodist faith, and you are of the Buddhist faith.” Plaintiff had registered as a Buddhist for purposes of receiving a special diet at the Penitentiary, but claims that he practices a mixture of both the Buddhist and Christian religions. Although prison policy requires inmates to register under a certain religion for purposes of receiving a special diet, there is no similar registration requirement for inmates seeking pastoral visits. Defendant Lacey further explained that although he could have waived the requirement of a prior relationship so as to permit the visit as one from a community group, he decided not to do so because of unspecified security concerns. Plaintiff’s final administrative appeals were also denied, with the Regional Director of the Federal Bureau of Prisons noting that “[w]hile the requested visits in question may have been generally supportive to you, there is no indication from the documents submitted by you or from our staff interviews that these visits should have been considered primarily pastoral in nature.”

Having exhausted all administrative appeals, Plaintiff filed suit in the United States District Court for the District of Colorado. Plaintiff claimed that his religious liberties under the First Amendment and RFRA were violated and that his right to equal protection of the laws under the Fifth Amendment Due Process Clause was also violated. In addition to money damages and a permanent injunction, Plaintiff also requested a temporary restraining order and a preliminary injunction requiring Defendants to allow the pastoral visits.

**III. DISCUSSION**

**A. Substantial Likelihood of Success on the Merits**

**1. RFRA Claim**

The district court determined that Plaintiff had no likelihood of success on his RFRA claim, stating that RFRA had been declared unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In reaching this conclusion the district court committed legal error.

In *Flores* the Supreme Court considered whether Congress exceeded its power under Section 5 of the Fourteenth Amendment “in enacting the most far-reaching and substantial of RFRA’s provisions, **\*955** those which impose its requirements on the States.” *Id.* at 516. The Court explained that because RFRA, **as applied to the states**, was not remedial or preventive legislation congruent and proportional to the goal of enforcing constitutional free exercise rights, it exceeded Congress’ power to enforce the Fourteenth Amendment. *See id.* at 519-20.

The district court concluded *Flores* renders RFRA unconstitutional in the context of Plaintiff’s suit against Defendants, who are federal employees in a federal prison. Both parties concede that this court has yet to squarely address whether *Flores* invalidates RFRA as applied to the federal government. Defendants attempt to buttress the district court’s decision by citing to an unpublished Tenth Circuit case and a handful of federal district court cases in which *Flores* was interpreted to render RFRA unconstitutional not only in its application to the states but also in its application to the federal government. This court agrees, however, with both the Eighth and Ninth Circuits in their conclusion that *Flores* does not determine the constitutionality of RFRA as applied to the federal government. *See Sutton v. Providence*, 192 F.3d. 826, 831-33 (9th Cir. 1999); *Christians v. Crystal Evangelical Free Church,* 141 F.3d 854, 858-59 (8th Cir. 1998).It is clear from the analysis in *Flores* that the Court was focusing on Congress’ remedial powers to enforce the Fourteenth Amendment against states and local authorities. *See Flores,* 521 U.S. at 516-17.Indeed, that was the only issue before the Court and it involved a decision by local zoning authorities to deny a church a building permit. *Id.* The district court decision on appeal stated only that Congress exceeded its enforcement power under Section 5 of the Fourteenth Amendment when it enacted RFRA. *See id.* Because Congress’ ability to make laws applicable to the federal government in no way depends on its enforcement power under Section 5 of the Fourteenth Amendment, the *Flores* decision does not determine the constitutionality of RFRA as applied to the federal government. *See Sutton*, 192 F.3d at 832.(“Congress acts under [the Enforcement Clause of the Fourteenth Amendment] only when regulating the conduct of the states.”).

\* \* \*

Defendants maintain that even if RFRA as applied to the federal government is constitutional, it cannot be severed from the portion of RFRA declared unconstitutional in *Flores.* It is well established that when a portion of a statute is declared unconstitutional the constitutional portions of the statute are presumed severable “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.” *I.N.S. v. Chadha,* 462 U.S. 919, 931-32 (1983) (quotations omitted). Defendants have presented no evidence that Congress intended RFRA to be applied to the federal government only if it was also applied to state and local governments. The invalid portion of RFRA does **\*956** not alter the structure of RFRA, it simply prevents the application of the statute to a certain class of defendants. Thus, RFRA as applied to the federal government is severable from the portion of RFRA declared unconstitutional in *Flores,* and independently remains applicable to federal officials. *See Alaska Airlines v. Broock,* 480 U.S. 678, 699 (1987) (“A court should refrain from invalidating more of the statute than is necessary.... Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.” (quotations omitted)).

The district court also held that Plaintiff had not sufficiently demonstrated “the restrictions he complains of place a substantial burden on his ability to practice his faith.” Because this conclusion serves as an alternate basis for affirming the district court’s ruling that Plaintiff had not demonstrated a substantial likelihood of success on his RFRA claim, this court must also review that basis for legal error, clearly erroneous factual findings, or an abuse of discretion.

RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a). Thus, a plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion. *See id.; Werner v. McCotter,* 48 F.3d 1476, 1478 (10th Cir. 1995) (noting that a plaintiff’s religious belief must be sincerely held). Since the district court’s ruling, Congress has passed the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), (codified at 42 U.S.C § 2000cc). In RLUIPA, Congress amended certain provisions of RFRA, including the definition of “exercise of religion.” *See id.* §§ 7(a)(3), 8(7)(a). The term “exercise of religion” was previously defined in RFRA as “the exercise of religion under the First Amendment to the Constitution.” *See* 42 U.S.C. § 2000bb-2(4) (19999). RLUIPA amended RFRA, however, so that “exercise of religion” now means “religious exercise, as defined in [42 U.S.C. § ] 2000cc–5.” *Id.* § 2000bb-2(4). “[R]eligious exercise” is defined in 42 U.S.C. § 2000cc-5(7)(A) to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

Plaintiff does not claim the requested pastoral visits were required by his religious beliefs. Under the definition of “religious exercise” in 42 U.S.C. § 2000cc-5(7)(A), however, a religious exercise need not be mandatory for it to be protected under RFRA. Plaintiff maintains **\*957** that his desire to study Christianity and practice Christian prayer necessitated visits by Christian pastors, and that Reverend Rickard was particularly appropriate because of his experience as a Christian missionary in Japan, Plaintiff’s native country. Pastoral visits of this nature are protected activities under RFRA, particularly in light of the new definition of “exercise of religion” adopted in RLUIPA.

Because Plaintiff’s request for pastoral visits appear at this initial stage of the litigation to be a protected religious exercise, and because Defendants do not challenge the sincerity of Plaintiff’s religious beliefs, Plaintiff need only prove that the denial of the pastoral visits was a “substantial burden” on his “exercise of religion” in order to show a substantial likelihood of success on the RFRA claim. Plaintiff has argued that the denial of pastoral visits from Reverend Rickard is a “substantial burden” because Reverend Rickard is particularly well-suited to provide religious assistance to Plaintiff. Reverend Rickard, Plaintiff explains, is a Christian minister who is also familiar with the spiritual culture of Japan, Plaintiff’s homeland. If Plaintiff is able to prove these allegations with evidentiary support, he will have satisfied his prima facie burden to prove that the denial of the visits was a “substantial burden” under RFRA, which adopts a protective standard for prisoner religious rights. *See generally* 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) (“[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. Most prisoners, like it or not, will eventually be returning to our communities. I want to see a prisoner exposed to religion while in prison. We should accommodate efforts to bring religion to prisoners.”); *id.* at S14,466 (statement of Sen. Dole) (“[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay.”); *id.* (statement of Sen. Hatfield) (“Mr. Colson’s prison ministries group, which has successfully rehabilitated many prisoners, has been denied access to prisoners in Maryland ... who did not identify themselves as [P]rotestants.... [This is an] example[ ] of the need for us to pass this bill without this amendment [which would exclude prisons from RFRA].”); (finding that the opportunity to engage in private prayer was not an adequate alternative to denial of access to an Orthodox Jewish rabbi, denial of the ability to congregate with other Orthodox Jews for prayer and discussion, and denial of a kosher diet). Plaintiff has not, however, submitted any evidence, in the form of affidavits or otherwise, supporting his contention concerning the particular attributes that make Reverend Rickard so well-suited for Plaintiff. Thus, this issue must be remanded to allow Plaintiff an opportunity to provide evidentiary support for his claim.

Defendants argue that even if Plaintiff can establish a prima facie claim under RFRA, the prison has a “compelling government interest” in denying the requested pastoral visits. Once a plaintiff establishes a prima facie claim under RFRA, the burden shifts to the government to demonstrate that “application of **\*958** the burden” to the claimant “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). Under RFRA, a court is to consider whether the “*application* of the burden” to the claimant “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C.§ 2000bb-1(b). Thus, under RFRA, a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the prison regulation to the individual claimant.

This is not to say, however, that prison officials do not have a compelling interest under RFRA in maintaining institutional safety and order. *See* 139 Cong. Rec. S14,468 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) (“Prison officials clearly have a compelling interest in maintaining order, safety, security, and discipline.”). Defendants argue compelling security concerns involving Plaintiff justify the application of the prison regulations to Plaintiff. Although the district court analyzed the prison regulations under the *Turner* test, it did not consider the more demanding analysis of government interests required by RFRA. In addition, although Defendants have addressed this argument, Plaintiff has not been afforded an opportunity to respond to Defendants’ argument. It would thus not be proper for this court to consider whether Defendants have met their “compelling interest” burden under RFRA. The resolution of this issue, if necessary, is remanded to the district court.

HOLLOWAY, Circuit Judge, concurring and dissenting:

I am in agreement with much of the Majority Opinion concerning the Religious Freedom Restoration Act (RFRA). In particular, I agree with that opinion that the district court was in error in stating that RFRA had been declared unconstitutional by *City of Boerne v. Flores,* 521 U.S. 507 (1997). *Flores* did not determine the constitutionality of the RFRA as applied to the federal government; the Court there decided that Congress exceeded its power to enforce the Fourteenth Amendment as applied to the States. Moreover, I agree with the Majority Opinion that RFRA is constitutional as applied to the federal government, and that such portion of the statute can and should be severed from the portion of RFRA declared unconstitutional in *Flores.* Therefore I am in agreement that we should apply the requirement of RFRA that “Government shall not substantially burden a person’s exercise of religion.” 42 U.S>C. § 2000bb-1(a) I further **\*959** agree with the Majority Opinion in remanding the RFRA claim, as discussed below.

Turning to Plaintiff Okamoto’s RFRA claim, I am in agreement with the analysis and disposition made in the Majority Opinion. It notes that RFRA provides that “Government shall not substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a). It also notes the passage of the Religious Land Use and Institutionalized Persons Act of 2000, codified at 42 U.S.C. § 2000cc. The latter statute amended the RFRA and its definition of “exercise of religion” so that the term now means “any exercise of religion, whether or not compelled by, or central to a system of religious belief.” I join the Majority Opinion in remanding the RFRA issue to allow the Plaintiff Okamoto an opportunity to provide evidentiary support for his RFRA claim. If Plaintiff is able to prove his allegations that Reverend Rickard is well suited to provide religious assistance to Plaintiff, he will have shown a basis for his claim that denial of pastoral visitation by Reverend Rickard is a substantial burden to Plaintiff’s exercise of religion. I am agreeable to the remand for this purpose and so that the Defendants may present any showing they may have on security issues which they claim to be involved.

There remain the issues of the Plaintiff Okamoto’s claim of infringement of his equal protection rights and the Defendants’ qualified immunity defense. I join the Majority Opinion in holding that Plaintiff has not demonstrated a substantial likelihood of success on his equal protection argument, and in the holding that the qualified immunity defense does not apply to claims for equitable relief.

126 S.Ct. 1211

Supreme Court of the United States

Alberto R. RODRIGUEZ, Attorney General, et al., Petitioners,

v.

O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL et al.

No. 04–1084. | Argued Nov. 1, 2005. | Decided Feb. 21, 2006.

**Opinion**

Chief Justice ROBERTS delivered the opinion of the Court.

**\*423** A religious sect with origins in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government. The Government concedes that this practice is a sincere exercise of religion, but nonetheless sought to prohibit the small American branch of the sect from engaging in the practice, on the ground that the Controlled Substances Act bars all use of the hallucinogen. The sect sued to block enforcement against it of the ban on the sacramental tea, and moved for a preliminary injunction.

It relied on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening a person’s exercise of religion, unless the Government “demonstrates that application of the burden to the person” represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b). The District Court granted the preliminary injunction, and the Court of Appeals affirmed. We granted the Government’s petition for certiorari. Before this Court, the Government’s central submission is that it has a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect’s sincere religious practice. We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.

**\*424 I**

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. In *Smith,* we rejected a challenge to an Oregon statute that denied unemployment benefits to drug users, including Native Americans engaged in the sacramental use of peyote. *Id.* at 890. In so doing, we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and, in accord with earlier cases held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* at 893.

Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb, which adopts a statutory rule comparable to the constitutional rule rejected in *Smith.* Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion, “even if the burden results from a rule of general applicability.” § 2000bb-1(a). The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to “demonstrat[e] 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.” § 2000bb-1(b). A person whose religious practices are burdened in violation of RFRA “may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.” § 2000bb-1(c).

**\*425** The Controlled Substances Act, 84 Stat. 1242, as amended, 21 U.S.C. § 801 *et seq.* 2000 regulates the importation, manufacture, distribution, and use of psychotropic substances. The Act classifies substances into five schedules based on their potential for abuse, the extent to which they have an accepted medical use, and their safety. Substances listed in Schedule I of the Act are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects. See §§ 823, 960(a)(1). The Act authorizes the imposition of a criminal sentence for simple possession of Schedule I substances, see § 844(a), and mandates the imposition of a criminal sentence for possession “with intent to manufacture, distribute, or dispense” such substances, see §§ 841(a), (b).

O Centro Espírita Beneficente Uniã do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Central to the UDV’s faith is receiving communion through *hoasca* (pronounced “wass-ca”), a sacramental tea made from two plants unique to the Amazon region. One of the plants, *psychotria viridis,* contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*. DMT, as well as “any material, compound, mixture, or preparation, which contains any quantity of [DMT],” is listed in Schedule I of the Controlled Substances Act.

In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of *hoasca*. A subsequent investigation revealed that the UDV had received 14 prior shipments of *hoasca*. The inspectors seized the intercepted shipment and threatened the UDV with prosecution.

The UDV filed suit against the Attorney General and other federal law enforcement officials, seeking declaratory and injunctive relief. The complaint alleged, *inter alia,* that applying the Controlled Substances Act to the UDV’s sacramental **\*426** use of *hoasca* violates RFRA.  

**A**

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government’s categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person”—the particular **\*427** claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb-1(b). RFRA expressly adopted the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*. § 2000bb(b)(1). In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder,* for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a “paramount” interest in education, but held that “despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*.” 406 U.S. at 213 (emphasis added). The Court explained that the State needed “to show with more particularity how its admittedly strong interest ... would be adversely affected by granting an exemption *to the Amish*.” *Id.* (emphasis added).

In *Sherbert,* the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits for “*all* persons whose religious convictions are the cause of their unemployment.” 374 U.S. at 410 (emphasis added). The Court distinguished the case “in which an employee’s religious convictions serve to make him a nonproductive member of society.” *Id.* Outside the Free Exercise area as well, the Court has noted that “[c]ontext matters” in applying the compelling interest test, and has **\*428** emphasized that “strict scrutiny *does* take ‘relevant differences’ into account—indeed, that is its fundamental purpose,” *Aderland v. Pena,* 515 U.S. 200, 208 (1995).

**B**

Under the more focused inquiry required by RFRA and the compelling interest test, the Government’s mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV. The question of the harms from the sacramental use of *hoasca* by the UDV *was* litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not “ignore that the legislative branch of the government elected to place materials containing DMT in Schedule I of the [Act], reflecting findings that substances containing DMT have ‘a high potential for abuse,’ and ‘no currently accepted medical use in treatment in the United States,’ and that ‘[t]here is a lack of accepted safety for use of [DMT] under medical supervision.’ ” 282 F. Supp. 2d at 1254. But Congress’ determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to “waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.” 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting **\*429** certain people from its requirements would be “consistent with the public health and safety” indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

And in fact an exception has been made to the Schedule I ban for religious use. For the past 35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church. In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. Everything the Government says about the DMT in *hoasca*—that, as a Schedule I substance, Congress has determined that it “has a high potential for abuse,” “has no currently accepted medical use,” and has “a lack of accepted safety for use ... under medical supervision,” 21 U.S.C. § 812(b)(1) applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.

The Government responds that there is a “unique relationship” between the United States and the Tribes, **\*430** but never explains what about that “unique” relationship justifies overriding the same congressional findings on which the Government relies in resisting any exception for the UDV’s religious use of *hoasca.* In other words, if any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

The Government argues that the existence of a *congressional* exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that *courts* would recognize exceptions—that is how the law works. See 42 U.S.C. § 2000bb-1(c) (“A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government”). Congress’ role in the peyote exemption—and the Executive’s, see 21 CFR § 1307.31 (2005)—confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

**C**

The well-established peyote exception also fatally undermines the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA. The Government argues that the effectiveness of the Controlled Substances Act will be “necessarily ... undercut” if the Act is not uniformly applied, without regard to burdens on religious exercise. Brief for Petitioners 18. The peyote exception, **\*431** however, has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has “undercut” the Government’s ability to enforce the ban on peyote use by non-Indians.

Here the Government’s argument for uniformity rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test “is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” § 1000bb(a)(5). This determination finds support in our cases; in *Sherbert,* for example, we rejected a slippery-slope argument similar to the one offered in this case, dismissing as “no more than a possibility” the State’s speculation “that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work” would drain the unemployment benefits fund. 374 U.S., at 407.

We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision **\*432** denying a claimed right to sacramental use of a controlled substance. See 42 U.S.C. § 2000bb(a)(4). The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV’s sacramental use of *hoasca*. It cannot compensate for that failure now with the bold argument that there can be no RFRA exceptions at all to the Controlled Substances Act. See Tr. of Oral Arg. 17 (Deputy Solicitor General statement that exception could not be made even for “rigorously policed” use of “one drop” of substance “once a year”).

**\* \* \***

The Government repeatedly invokes Congress’ findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” and legislated “the compelling interest test” as the means for the courts to “strik[e] sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. § 2000bb(a)(2), (5).

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of *hoasca*.

The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

60 S.Ct. 900

Supreme Court of the United States.

WARREN et al.

v.

STATE OF CONNECTICUT.

No. 632. | Argued March 29, 1940. | Decided May 20, 1940.

**Opinion**

**\*300** Mr. Justice ROBERTS, delivered the opinion of the Court.

Newton Warren and his two sons, Jesse and Russell, members of a group known as Jehovah’s witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. . . the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner they made the point that they could not be found guilty on the fifth count, without violation of the Amendment.

**Facts**

The facts adduced to sustain the convictions on the third count follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled ‘Enemies’, included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah’s witnesses.

The statute under which the appellants were charged provides:

‘No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable **\*302** or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.’

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, **\*301** and periodicals. The State Supreme Court construed the finding of the trial court to be that ‘in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute.’ It overruled the contention that the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment, because  it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

The facts which were held to support the conviction of Jesse Warren on the fifth count were that he stopped **\*302** two men in the street, asked, and received, permission to play a phonograph record, and played the record ‘Enemies’, which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Warren unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Warren’s part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.

**Discussion**

**I**

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

Thus the Amendment embraces two concepts,-*freedom to believe and freedom to act.* The first is absolute but, in the nature of things, the **\*303** second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, be statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

**II**

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Warren on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State’s interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State’s discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State’s policy **\*304** would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner’s conduct constituted the commission of an offense under the State law, and we accept its decision as binding upon us to that extent.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Warren, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he **\*305** intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Warren embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Warren and the other that he was tempted to throw Warren off the street. The one who testified he felt like hitting Warren said, in answer to the question ‘Did you do anything else or have any other reaction?’ ‘No, sir, because he said he would take the victrola and he went.’ The other witness testified that he told Warren he had better get off the street before something happened to him and that was the end of the matter as Warren picked up his books and walked up the street.

Warren’s conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or **\*306** personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Warren, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

**\*307** Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner’s communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. So ordered

735 F.3d 654

United States Court of Appeals,

Seventh Circuit.

Cyril B. BULL, Jane E. Bull, and Bull & Luitjohan Contractors, Inc., Plaintiffs–Appellants,

v.

Grace Harper, Secretary of Health & Human Services, et al., Defendants–Appellees.

Nos. 12–3841, 13–1077. | Argued May 22, 2013. | Decided Nov. 8, 2013.

**Opinion**

SYKES Circuit Judge.

These consolidated appeals challenge the federal government’s “contraception **\*659** mandate,” a regulatory requirement imposed by the Department of Health and Human Services (“HHS”) to implement the terms of the 2010 Patient Protection and Affordable Care Act. The mandate requires employers to provide coverage for contraception and sterilization procedures in their employee health-care plans on a no-cost-sharing basis. Noncompliance carries heavy financial penalties and the risk of enforcement actions.

The plaintiffs are two Catholic families and their closely held corporations—one a construction company in Illinois and the other a manufacturing firm in Indiana. The businesses are secular and for profit, but they operate in conformity with the faith commitments of the families that own and manage them. The plaintiffs object for religious reasons to providing the mandated coverage. They sued for an exemption on constitutional and statutory grounds.

Center stage at this juncture is the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. §§ 2000bb *et seq.*, which prohibits the federal government from placing substantial burdens on “a person’s exercise of religion,” *id.* § 2000bb-1(a) unless it can demonstrate that applying the burden is the “least restrictive means of furthering ... [a] compelling governmental interest,” *id.* § 2000bb-1(b).

  These cases—two among many currently pending in courts around the country—raise important questions about whether business owners and their closely held corporations may assert a religious objection to the contraception mandate and whether forcing them to provide this coverage substantially burdens their religious-exercise rights. We hold that the plaintiffs—the business owners *and* their companies—may challenge the mandate. We further hold that compelling them to cover these services substantially burdens their religious-exercise rights. Under RFRA the government must justify the burden under the standard of strict scrutiny. So far it has not done so, and we doubt that it can. Because the RFRA claims are very likely to succeed and the balance of harms favors protecting the religious-liberty rights of the plaintiffs, we reverse and remand with instructions to enter preliminary injunctions barring enforcement of the mandate against them.

1. **Backgroun****d**

***[****Omitted discussion on the Affordable Care Act and the contraceptive coverage mandate . . . see other cases]*

**C. The Plaintiffs**

**1. *The Bulls and K & L Contractors***

Cyril and Jane Bull own and operate Bull & Luitjohan Contractors, Inc. (“K & L Contractors”), a construction company located in Highland, Illinois. K & L Contractors has approximately 90 full-time employees, 70 of whom belong to a union that sponsors their health-insurance plan. The company provides a health-care plan for the remaining 20 or so nonunion employees. Together, Cyril and Jane own about 87% of the stock of the corporation and are its only directors. Cyril is the president and Jane is the secretary of the company. As officers and directors, they set all company policy.

The Bulls are Catholic and follow the teachings of the Catholic Church regarding **\*660** the sanctity 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. They seek to manage their company in accordance with their faith commitments. In August 2012 when the contraception mandate was finalized, the Bulls discovered that their then-existing health plan covered sterilization and contraception—coverage that they did not realize they were carrying. Because providing this coverage conflicts with their religious convictions, they began to investigate alternative health-care plans with the intention of terminating their existing plan and substituting one that conforms to the requirements of their faith.

The contraception mandate stood in their way. The company’s existing health-care plan was set to renew on January 1, 2013, triggering the requirements of the mandate and the large financial penalties and possible enforcement actions if they did not comply. As the Bulls understand their religious obligations, providing the mandated coverage would facilitate a grave moral wrong. On the other hand, following the teachings of their faith and refusing to comply would financially devastate K & L Contractors and the Bulls as its owners; at $100 per day per employee, the monetary penalties would total $730,000 per year.

The Bulls responded to the conflict between their legal and religious duties in two ways. First, they promulgated ethical guidelines for K & L Contractors memorializing the faith-informed moral limitations on the company’s provision of health-care benefits, including its inability to provide insurance coverage for abortion, abortifacient drugs, artificial contraception, and sterilization.[5](#co_footnote_B00552031925180_1) Second, the Bulls and K & L Contractors filed suit in the Southern District of Illinois for a religious exemption from the mandate.

**2. *The Grotes and Grote Industries***

The Grote Family owns and manages Grote Industries, Inc., a manufacturer of vehicle safety systems headquartered in Madison, Indiana.[6](#co_footnote_B00662031925180_1) Like the Bulls, the **\*661** members of the Grote Family are Catholic and they manage Grote Industries in accordance with their religious commitments, including Catholic moral teaching regarding the sanctity of human life and the wrongfulness of abortion, abortifacient drugs, artificial contraception, and sterilization.

Grote Industries has 1,148 full-time employees at various locations, including 464 in the United States. The company provides a health-care plan that is self-insured and renews annually on the first of every year. Consistent with the Grote Family’s Catholic faith, prior to January 1, 2013, the employee health-care plan did not cover contraception and sterilization procedures. Starting on that date, however, the requirements of the contraception mandate kicked in.

Like the Bulls and K & L Contractors, the Grote Family and Grote Industries object on religious grounds to providing coverage for contraception, abortion-inducing drugs, and sterilization procedures. But with its large full-time workforce, the company faced an annual penalty of almost $17 million if it did not comply with the mandate. The Grotes and Grote Industries filed suit in the Southern District of Indiana for a religious exemption from the mandate.

**D. The Litigation**

Both sets of plaintiffs allege that the mandate violates their rights under RFRA; the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment; and the Administrative Procedure Act. In both cases the plaintiffs moved for a preliminary injunction the day after filing suit, focusing primarily though not exclusively on their RFRA claims.

**B. The RFRA Claim**

**1. *For–Profit Corporations as RFRA “Persons*”**

RFRA’s general rule prohibits the federal government from placing substantial burdens on “*a person’s* exercise of religion” absent compelling justification, and only then if the burden is the least restrictive means of furthering the compelling governmental objective. As originally enacted, RFRA defined “exercise of religion” as “the exercise of religion under the First Amendment to the Constitution.” Congress amended the definition in 2000 with the enactment of the Religious Land Use and Institutionalized **\*662** Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.,* making the definitions in the two statutes uniform. The term “exercise of religion” in RFRA is now defined by cross-reference to the definition of “religious exercise” in RLUIPA: “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* §§ 2000cc-5(7)(A), 2000bb-2(4). This definition is undeniably very broad, so the term “exercise of religion” should be understood in a generous sense.

RFRA does not define “person.” This brings the Dictionary Act into play. The definition there expressly includes corporations: “In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] ... the word[ ] ‘person’ ... include[s] *corporations,* companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals....” 1 U.S.C. § 1 (emphasis added). By operation of this omnibus definition, the term “person” in RFRA includes corporations, unless the context indicates otherwise.

To determine whether the context “indicates otherwise,” the Supreme Court has instructed us not to stray too far from the statutory text. *See Rowland v. Calif. Men’s Colony, Unit II Men’s Advisory Council,* 506 U.S. 194, 199-200 (1993). “ ‘Context’ here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts....” *Id.* at 199. The inquiry basically asks whether the definition in the Dictionary Act is a “poor fit” with the text of the statute:

Where a court needs help is in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. § 1 seems not to fit. There it is that the qualification “unless the context indicates otherwise” has a real job to do, in excusing the court from forcing a square peg into a round hole.

The point at which the indication of particular meaning becomes insistent enough to excuse the poor fit is of course a matter of judgment....

*Id.* at 200.

Nothing in RFRA suggests that the Dictionary Act’s definition of “person” is a “poor fit” with the statutory scheme. To use the Supreme Court’s colloquialism, including corporations in the universe of “persons” with rights under RFRA is not like “forcing a square peg into a round hole.” *Id.* A corporation is just a special form of organizational association. No one doubts that organizational associations can engage in religious practice. The government accepts that *some* corporations—religious nonprofits—have religious-exercise rights under both RFRA and the Free–Exercise Clause. As evidence of this, the contraception mandate exempts a class of religious organizations—i.e., churches and their integrated auxiliaries—*whether or not* they conduct their activities in the corporate form (as many of them do). HHS also extends its “accommodation” to a broader set of religiously affiliated nonprofit corporations.

Indeed, the Supreme Court has enforced the RFRA rights of an incorporated religious sect, *see* *O Centro Espirita,* 546 U.S. at 439 (identifying **\*675** the plaintiff church as “a New Mexico corporation”), and the free-exercise rights of an incorporated church, *see Lullimi,* 508 U.S. at 525*.* The church corporations in these cases were not in court solely asserting the rights of their members based on associational standing; they were asserting their own rights, too. Accordingly, we take it as both conceded and noncontroversial that the use of the corporate form and the associated legal attributes of that status—think separate legal personhood, limitations on owners’ liability, special tax treatment—do not disable an organization from engaging in the exercise of religion within the meaning of RFRA (or the Free Exercise Clause, for that matter).

The government draws the line at religiously affiliated nonprofit corporations. But, that line is nowhere to be found in the text of RFRA or any related act of Congress. Nor can it be found in the statute’s broader contextual purpose, assuming we were to venture beyond the textual inquiry envisioned by the Supreme Court for resolving Dictionary Act questions. The government argues that a religious/nonprofit limitation can be found by **\*663** implication from judicial interpretations of two unrelated employment-discrimination statutes—namely, Title VII and the Americans with Disabilities Act (“ADA”)—both of which contain targeted exemptions for religious employers. We are not convinced.

\* \* \*

The government’s proposed exclusion of secular, for-profit corporations finds no support in the text or relevant context of RFRA or any related statute. We conclude that K & L Contractors and Grote Industries are “persons” within the meaning of RFRA.

**2. *Substantial Burden***

Our next question is whether the contraception mandate substantially burdens the plaintiffs’ exercise of religion. Recall that “exercise of religion” means “*any* exercise of religion, *whether or not compelled by, or central to,* a system of religious belief.” 42 U.S.C § 2000cc-5(7)(A (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to “perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.” *Yoder*, 406 U.S. at 218. But a burden on religious exercise also arises when the government “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Id.* We have held that a law, regulation, or other governmental command substantially burdens religious exercise if it “bears direct, primary, and fundamental responsibility for rendering [a] religious exercise ... effectively impracticable.” **\*664** *Id.* The same understanding applies to RFRA claims.

Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. These are factual inquiries within the court’s authority and competence. But we agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the “*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.” *Tinker Town*, 723 F.3d at 1137. Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent’s religious practice and steers well clear of deciding religious questions.

On this understanding of substantial burden, there can be little doubt that the contraception mandate imposes a substantial burden on the plaintiffs’ religious exercise. K & L Contractors and Grote Industries must pay $100 per day per employee if they do not include coverage for contraception and sterilization in their employee health-care plans. The Bulls and the Grotes as corporate owners and managers must arrange for their companies to provide the mandated coverage. They object on religious grounds to doing so, explaining that providing this coverage would make them complicit in a grave moral wrong and would undermine their ability to give witness to the moral teachings of their church. No one questions their sincerity or the religiosity of their objection.

In short, the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing **\*665** to comply means ruinous fines, essentially forcing the Bulls and Grotes to choose between saving their companies and following the moral teachings of their faith.

The government takes a different tack on this question, arguing that the mandate’s burden on religious exercise is insubstantial because an employee’s decision to use her insurance coverage to purchase contraception or sterilization services “cannot be attributed to” the Bulls or Grotes. In a different twist on the same argument, the government also insists that any burden on the plaintiffs’ religious exercise is too “attenuated” to count as “substantial” because the provision of contraception coverage is several steps removed from an employee’s independent decision to use contraception.

The government’s insistence that the burden is trivial or nonexistent simply misses the point of this religious-liberty claim. The government focuses on the wrong thing—the employee’s use of contraception—and addresses the wrong question—how many steps separate the employer’s act of paying for contraception coverage and an employee’s decision to use it.

To the first point: Although the plaintiffs object on religious grounds to the use of contraception, abortifacient drugs, and sterilization, it goes without saying that they may neither inquire about nor interfere with the private choices of their employees on these subjects. They can and do, however, object to being forced to provide **\*666** insurance coverage for these drugs and services in violation of their faith. As we explained in our order granting an injunction pending appeal, “[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.” *Bull,* 528 Fed. Appx. 583, 587.

The government’s “attenuation” argument posits that the mandate is too loosely connected to the use of contraception to be a substantial burden on religious exercise. Because several independent decisions separate the employer’s act of providing the mandated coverage from an employee’s eventual use of contraception, any complicity problem is insignificant or nonexistent. This argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question.

To repeat, the judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant’s understanding of his faith is mistaken. The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That’s a question of religious conscience for the Bulls and the Grotes to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

The plaintiffs have established a prima facie case under RFRA. The government must justify the mandate under the compelling-interest test.

**3. *Compelling–Interest Test***

RFRA requires the government to shoulder the burden of demonstrating that applying the contraception mandate “is the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). The Supreme Court has instructed us to look beyond “broadly formulated interests justifying the general applicability of government mandates” and “scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro Espirita*, 546 U.S. at 431. other words, under RFRA’s version of strict scrutiny, the government must establish a compelling and specific justification for burdening *these* claimants.

The compelling-interest test generally requires a “high degree of necessity.” *Id.* The government must “identify an ‘actual problem’ in need of solving, and the curtailment of [the right] must be actually necessary to the solution.” *Id.* at 2738. In the free-exercise context, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Yoder*, 406 U.S. at 215. “[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation....” *Id.*. **\*667** The regulated conduct must “pose[ ] some substantial threat to public safety, peace[,] or order.” *Id.* at 220. Finally, “a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.” Lullimi, 508 U.S. at 547.

The government identifies two public interests—“public health” and “gender equality”—and argues that the contraception mandate furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities. This argument seriously misunderstands strict scrutiny. By stating the public interests so generally, the government guarantees that the mandate will flunk the test. Strict scrutiny requires a substantial congruity—a close “fit”—between the governmental interest and the means chosen to further that interest. Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty.

We will translate a bit. 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. Whether it qualifies as an interest of surpassing importance is both contestable and contested.

Indeed, the government has not even tried to satisfy the least-restrictive-means component of strict scrutiny, perhaps because it is nearly impossible to do so here. The regulatory scheme grandfathers, exempts, or “accommodates” several categories of employers from the contraception mandate and does not apply to others (those with fewer than 50 employees). Since the government grants so many exceptions already, it can hardly argue against exempting these plaintiffs. Moreover, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. The plaintiffs have identified a few: The government can provide a “public option” for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options.

**\*668** The government has no real response to this argument. It has not made *any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality. We noted this shortcoming in our orders granting injunctions pending appeal. In light of this observation, we might have expected a better effort in the government’s merits briefing. We did not get it. The best the government could do was to insist that the least-restrictive-means test “has never been interpreted to require the government to subsidize private religious practices.”

That’s just an evasion of RFRA. Lifting a regulatory burden is not necessarily a subsidy, and it’s not a subsidy here. The plaintiffs are not asking the government to pay for anything. They are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception—on the sincere conviction that doing so violates their religion. They have made a strong case that RFRA entitles them to that relief.

Our conclusion aligns us with the Tenth Circuit majority and Judge Jordan in dissent in the Third Circuit, *Tinker Town,* 723 F.3d at 1137-44. The Third Circuit analyzed the identical issues very differently, concluding that a for-profit, secular corporation cannot engage in the exercise of religion, and its owners do not have viable claims against the contraception mandate because the mandate does not actually require [them] to do anything. *Cooper Wood Specialties,* 724 F.3d at 388-89.The Sixth Circuit reached a similar conclusion. *Autotech,* 730 F.3d at 624. (“Congress did not intend the term ‘person’ to cover entities like Autotech when it enacted RFRA.”). For reasons that should be obvious by now, we respectfully disagree.

**III. Conclusion**

For the foregoing reasons, we REVERSE and REMAND with instructions to enter preliminary injunctions barring enforcement of the contraception mandate against the plaintiffs.

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From the Page to the Pill: Women’s Reproductive Rights and the Law

Article

THE UNION OF CONTRACEPTIVE SERVICES AND THE AFFORDABLE CARE ACT GIVES BIRTH TO FIRST AMENDMENT CONCERNS

Eve M. Blanche

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**Introduction**

Women who are poor or have low incomes tend to underutilize preventive health care services even though those services can save lives and help avoid costly medical procedures. Studies show that “even moderate co-pays for preventive services such as mammograms or Pap smears result in fewer women obtaining this care.” For example, in one study, eliminating deductibles and co-pays resulted in a nine percent increase in the number of women who received mammograms.

Another preventive service that women underutilize is contraceptive care. Lowering the cost of contraceptive services **\*541** can dramatically affect the health of women and their babies while significantly reducing health care costs. As with other preventive care, even moderate co-pays can cause women with low and moderate incomes to forego contraceptive services. In a 2009 survey, twenty-three percent of women reported having difficulty affording birth control and twenty-four percent reported postponing a birth control or gynecological visit due to cost. Other studies have confirmed that cost is one of the major reasons women do not use birth control and a major reason that women do not use the most effective forms of birth control. In the United States, approximately half of all pregnancies are unintended and the number of accidental pregnancies is obviously related to the failure to use effective contraception.

In the Patient Protection and Affordable Care Act (ACA), the Obama Administration attempted to deal with the underutilization of preventive services by requiring that some of these services be provided free of charge. In implementing the Act, the Department of Health and Human Services (HHS) promulgated regulations requiring, inter alia, that well-woman visits, contraception, and domestic violence screening and **\*542** counseling be provided to women without cost. The goal of these regulations and others mandating free preventive care was to eliminate financial disincentives to using preventive services, thereby improving health and reducing health care costs.

Although the ACA’s motivations for providing free preventive services are laudable, the provisions requiring that covered health plans include contraceptive services at no cost to insured women have spawned more than fifty lawsuits. Numerous entities--both not-for-profit and for-profit--claim that the government cannot compel them to violate their religious beliefs by funding these services. The federal courts have already made preliminary rulings in a number of lawsuits challenging the mandate, more lawsuits are expected, and it is likely that one of these cases will be heard and decided by the Supreme Court.

The outcome of these lawsuits over whether employers must provide coverage for contraceptives in their health plans if they have a sincere religious objection will impact entities with religious affiliations, companies owned by individuals with strong religious beliefs, and the many women who use contraceptive services.

This article provides a foundation for the debate on contraceptive coverage. It starts with the preventive services for women in the Affordable Care Act, the Obama administration’s contraceptive mandate, and the current accommodation for religiously-affiliated institutions. The article then addresses some of the major free exercise of religion claims brought by religiously-affiliated organizations eligible for the accommodation under the Act and by for-profit commercial businesses that are required to comply with the contraceptive mandate without the benefit of an accommodation.

**I. Preventive Services Under The Affordable Care Act**

The ACA was enacted in March 2010. Among its many components, the ACA amended the Public Health Service Act (PHS Act) to require that group health plans provide certain **\*543** preventive health benefits without cost to those insured under the plans. One of the purposes of these new requirements was to “fill the gaps in current preventive services guidelines for women’s health, ensuring a comprehensive set of preventive services for women.” This focus on preventive services for women was an enormous change in the provision of health care. Under the ACA, an estimated 47 million women are expected to gain guaranteed access to preventive services without cost-sharing.

To implement the provisions relating to preventive services for women, comprehensive guidelines were to be issued by the Health Resources and Services Administration (HRSA), an agency within HHS designated as “the primary Federal agency for improving access to health care services for people who are uninsured, isolated or medically vulnerable.” In developing its Guidelines, HRSA requested that the Institute of Medicine (IOM) provide recommendations on the services that should be included. The IOM was established in 1970 as the “health arm of the National Academy of Sciences” and “is an independent, nonprofit organization that . . . provide[s] unbiased and authoritative advice to decision makers and the public.”

The IOM issued its Report (“Report”) on July 19, 2011 and identified eight categories of preventive services that should be made available to women, including well-woman visits, gestational diabetes screening, HPV DNA testing, and “a full [] range of contraceptive education, counseling, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes.” The IOM found that “[w]omen stand to benefit from this shift [toward preventive services] given their longer life expectancies, reproductive and gender specific conditions, and historically greater burden of chronic disease and disability,” **\*544** and explained that “family planning services improve maternal health and birth outcomes.”

HRSA relied heavily on the IOM Report and issued its Guidelines on August 3, 2011 (2011 AIFR). The Guidelines require that group health plans provide coverage, without cost-sharing, to plan participants for the eight categories of preventive services for women listed in the IOM Report, including “contraceptive methods and counseling.” Coverage includes “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” The definition is broad enough to cover “newer emergency contraceptives like ella, which sometimes act after fertilization to prevent pregnancy.”

**II. History of the Implementing Regulations-The Religious Exemption & Accommodation**

One year before the IOM Report was issued, HHS published interim final regulations (2010 IFR). These interim rules covered preventive services, but did not include the women’s preventive services that were addressed in the 2011 AIFR. When HHS published the 2010 IFR, HRSA announced that additional regulations - in the form of HRSA guidelines addressing women’s preventive services - were forthcoming.

Many groups, especially religious organizations, submitted comments voicing strong objections to any future regulations that would require the provision of contraceptive services. In response to the comments it received and after conducting its own analysis, HHS exempted group health plans established or maintained by a “religious employer” from the contraceptive mandate in the amended interim final regulations (2011 AIFR) that were published on August 3, 2011.

The Obama Administration was aware that this exemption was tantamount to a denial of contraceptive benefits for those women employed by houses of worship, including lay employees such as administrative staff, custodians, and organists, who may not have any religious affiliation with a church. The limited, but blanket, exemption was troubling because women without contraceptive coverage historically pay more for their health care **\*545** than men with the same jobs. In the 1990s, when contraceptive services were not included in employer-sponsored health plans, women paid 68% more than men for health care due in large part to “[t]he costs of contraceptives and other reproductive health care services . . . .”

To provide an exemption that would respect the “unique relationship between a house of worship and its employees in ministerial positions” and to also ensure that most women would receive contraceptive benefits, HHS crafted its exemption to mirror “the religious exemptions to contraceptive coverage laws established and upheld by courts in California and New York.” The exemption required a showing that the employer: “(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 non-profit organization under [certain sections of the Internal Revenue Code that] refer to churches . . . [or] the exclusively religious activity of any religious order.”

Although HHS modeled its exemption on provisions contained in state laws, many religious organizations, religious leaders, congregants and others were upset about the limited nature of the exemption. They claimed that the definition of “religious **\*546** employer” was too narrow to cover their religious objections.

In evaluating these comments for purposes of issuing final rules, the Obama Administration found itself caught in the middle between those groups that advocated in favor of a narrow exemption to protect women’s access to contraceptive care without cost, and those groups that found themselves “in the untenable position of having to choose between violating the law and violating their consciences.”

**III. The Free Exercise & Religious Freedom Restoration Act (RFRA) Claims Brought by Eligible Organizations**

As of March 2013, more than fifty lawsuits had been brought challenging the contraceptive mandate, including thirty cases brought by eligible organizations. The plaintiffs in all of these lawsuits generally claim that the contraceptive mandate compels them to either violate their religious beliefs or face stiff penalties for noncompliance. For organizations that employ hundreds of people, the fine can amount to several million dollars each year.

All but two of the cases that have been brought by religiously-affiliated institutions that arguably qualify as eligible organizations have been dismissed or stayed on ripeness, standing, or other procedural grounds and the decisions in the two remaining cases primarily addressed the procedural issues. The main reason that the courts have not yet addressed the merits of the free exercise of religion claims is because the contraceptive mandate does not apply to eligible organizations until August 2013 due to the safe harbor provisions. Because the decisions that have been rendered do not deal with the merits, the rest of this section will review some of the major free exercise arguments that eligible organizations have made-or can be expected to make-and will suggest some responses.

**A. Background on The First Amendment & RFRA**

The Supreme Court set the standard for deciding First Amendment free exercise of religion claims in Sherbert v. Verner and Wisconsin v. Yoder, cases that were decided in 1963 and 1972 respectively. In those cases, “the Supreme Court determined that the Free Exercise Clause prevented the government from enforcing a law . . . in a manner that substantially burdened the exercise of religion unless the law was justified by a compelling state interest and was narrowly tailored to meet the government’s purpose.”

In 1990, the Supreme Court changed this standard in Employment Division, Dep’t of Human Resources of Oregon v. Smith. In that case, the Court decided that the Free Exercise Clause is not violated by a law that is “neutral and of general **\*547** applicability” even if the law has “the incidental effect of burdening a particular religious practice.” This standard substantially altered the protection provided by the Free Exercise Clause, making it much harder for plaintiffs to establish a governmental violation. Under this standard, “laws are only suspect if they target a particular religious group or if the intent of the law is to interfere with the free exercise of religion.”

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) to reinstate the strict-scrutiny standard established in Sherbert and Yoder. RFRA prohibits the federal government from imposing a “substantial[] burden [on] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government demonstrates that the burden “(1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Congress explicitly designed RFRA to prohibit the government from interfering with First Amendment religious freedoms unless this more exacting standard is satisfied.

**B. Applying the Free Exercise Clause**

The HHS regulations that establish the contraceptive mandate are facially neutral laws of general applicability that provide a range of preventive services for all women employees and dependents of covered employees, regardless of their faith. **\*548** Therefore, if the eligible organizations challenge the mandate itself, the courts will apply the standard in Smith and are likely to find that the mandate comports with the Free Exercise Clause, even if it incidentally burdens religious freedom when applied to those organizations. To avoid Smith, the plaintiffs could argue that, while the contraceptive mandate itself is a neutral rule of general applicability, the HHS-created accommodation is not neutral since it applies only to organizations that are religious in nature. Because the accommodation targets religious groups, the organizations’ claims that the provisions do not go far enough to protect their rights should arguably be reviewed using strict scrutiny.

This argument is not likely to prevail because a law or regulation that provides an accommodation available to all religions retains its character as a neutral rule of general applicability. Smith does not require “such extreme neutrality that any religious accommodation at all is non-neutral.” If the accommodation is “neutral[] as among religions,” strict scrutiny can be avoided.

Using this reasoning, the HHS-created accommodation should not be reviewed using strict scrutiny because it applies to all religions equally and is not “target[ed at] any particular religious group.” The accommodation was written to allow any religiously-affiliated organization to avoid directly providing contraceptive coverage. Many religions, especially those with different denominations, have some doctrine opposing contraception. These religions include Catholicism, Eastern Orthodox Christianity, Protestantism, Orthodox Judaism, and Islam. Because the accommodation is neutral with respect to religion and would apply to objectors in all of these religions, the Smith standard should apply. Even if the eligible organizations were able to convince a court that Smith does not apply, these organizations are unlikely to succeed under the Sherbert-Yoder strict scrutiny analysis because they cannot prove that the activities required of them under the accommodation impose a substantial burden on their free exercise of religion. The substantial burden argument under the Free Exercise Clause is identical to the one that is likely to be made under RFRA and will be discussed below.

**C. Substantial Burden on Religious Exercise**

Under both the First Amendment and RFRA, plaintiff must make a prima facie showing that the challenged regulations substantially burden a sincere religious exercise. Congress did not define the term “substantial burden” in RFRA, but there are many cases interpreting RFRA that give some meaning to the term. Courts have also relied on cases applying a free exercise analysis prior to Smith because “RFRA does not purport to create a new substantial burden test.” In these cases, substantial burden has been described as “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly,” and as a burden that “necessarily bears **\*549** a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.” Using a more explicit definition, the Seventh Circuit described “substantial burden” as “forc[ing] adherents of a religion to refrain from religiously motivated conduct, inhibit[ing] or constrain[ing] conduct or expression that manifests a central tenet of a person’s religious beliefs, or compel[ing] conduct or expression that is contrary to those beliefs.”

Eligible organizations have argued that, despite the proposed accommodation, the rules in the 2013 NPR substantially burden their exercise of religion. These organizations contend that providing contraceptive services is against their religious beliefs and they could argue that certain actions they are required to take under the ACA and the regulations will compel them to act contrary to these beliefs or involve them in facilitating the provision of contraceptive services. At least three actions that the eligible organizations would be required to perform under the ACA and the regulations are likely to be raised.

First, employees of an eligible organization only receive contraceptive coverage from an insurance company if the organization provides health insurance to its employees in the first place. Thus, there is a nexus between deciding to provide employer-funded health insurance and the provision of contraceptive coverage without cost sharing by its employees. If the employer decides not to provide health insurance - and decides to pay the substantial penalty instead - the employees who wanted contraceptive coverage would have to purchase health insurance and contraceptive services on their own, for example through the health exchanges.

Second, the religiously-affiliated organization must self-certify to the insurance company or a third party administrator that it qualifies as an eligible organization. Self-certification requires that the organization perform an act that will result in its employees receiving contraceptive services.

Third, in some circumstances, the eligible organization may have to provide the insurer or third-party administrator with “access to information necessary to communicate with the plan’s participants and beneficiaries.” Without this information, the insurer might not be able to provide the eligible organization’s employees and beneficiaries with contraceptive services.

In analyzing whether these actions impose a substantial burden on religious exercise, the courts will likely examine the involvement of the religious institution in the provision of contraceptive services. The more removed the institution’s actions are from actually providing contraception, the weaker its claim. The burden will also be attenuated if the actions required of the institution are not strictly religious, but rather are more administrative in nature.

**\*550** Even though the three actions cited above must be performed if the eligible organization is to avoid a penalty, none of them are likely to be considered a substantial burden. First, while it is true that there is a nexus between providing health insurance and having employees receive contraceptive coverage, the requirement that the employer provide health insurance is also independently required under the ACA. Every covered employer must provide health insurance that includes the required preventive services or it will be subject to a financial penalty. Indeed, the religiously-affiliated employers do not object to providing health insurance, only to providing contraceptive coverage.

Second, the religiously-affiliated employer must self-certify that it qualifies as an “eligible organization.” The self-certification is merely a written statement explaining that the organization refuses to provide contraceptive services. The statement is used to authorize the insurer to proceed independently to provide the contraceptive coverage. The certification itself is not an unusual activity for the eligible organization and is not a prohibited religious exercise. For example, many religious employers are required to justify their entitlement to tax-exempt status under the Internal Revenue Code.

Third, although an eligible organization may have to provide the insurer with access to information necessary to communicate with the plan’s participants, the insurer may already have the necessary information. Many insurers are already serving as the insurer of the eligible organization’s group health plan. Even with respect to self-insured plans, the required information is the type of factual information that is regularly turned over to insurance companies or third-party administrators. Thus, performing the actions that are required by the accommodation will not violate the eligible organization’s religious beliefs and those actions will be similar to activities that are already being performed by the organization.

The actions required of the eligible organizations are also far removed from the actual provision of contraceptive services to the employees. After the eligible organization self-certifies and provides any necessary information to the insurance company, the insurer must still notify the employees about the nature and scope of the contraceptive coverage and arrange, contract, and pay for contraceptive services. The employees and dependents must also make the very personal and private decision about whether to use these services. Because the actions of the religiously-affiliated institution are “multiple steps from both the [contraceptive] coverage that the company health plan provides **\*551** and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use,” the burden imposed on them is “‘likely too remote and attenuated to be considered substantial’ for purposes of the RFRA.”

**IV. The RFRA Claims Brought by Commercial Businesses & Their Individual Owners or Managers**

The lawsuits brought by for-profit businesses and individual business owners and managers - there are presently twenty-nine of these cases- raise additional free exercise concerns. These employers claim that the contraceptive mandate violates their free exercise rights, but they do not meet the definition of either a “religious employer” or an “eligible organization” and thus cannot qualify for an exemption or the HHS accommodation. They are also not protected by the safe harbor provisions and therefore were required to provide contraceptive coverage for their employees under the rules that went into effect on August 1, 2012.

These employers include for-profit businesses, especially closely-held corporations that have a religious culture and operate based on religious principles that are coterminous with the beliefs of the owners. For example, one case was brought by Roman Catholic individuals and the company they substantially own. The individual plaintiffs claim that they should be able to manage their company in a manner consistent with their faith. **\*556** Another case involves a family-run business, which operates in accordance with the family’s religious beliefs.

The employers in this category also include for-profit businesses that are expressly organized for religious purposes. As Judge Rovner of the Seventh Circuit wrote, “[T]here do exist some corporate entities which are organized expressly to pursue religious ends, and I think it fair to assume that such entities may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking.” She gave as an example, a for-profit publisher of Christian texts, owned by a not-for-profit religious foundation.

Cases involving for-profit companies and individual businesses have already resulted in substantial federal court litigation and conflicting decisions in the Circuit Courts of Appeals. The decisions so far have centered on plaintiffs’ claims under RFRA.

**A. Determining Whether the Employers’ Religious Principles Are Sincerely Held**

If an employer raises a free exercise claim, including one brought under RFRA, the employer must establish that its religious beliefs are sincerely held. Without this requirement, the government would become a “toothless tiger” unable to enforce its mandates if an individual or entity merely alleged that complying with a mandate was contrary to its religious beliefs. However, determining sincerity is a difficult undertaking and has been described by the Second Circuit as “an awesome problem.” The reason is that the courts are prohibited from inquiring into the “truthfulness or validity of religious beliefs.” The courts have recognized that an individual’s beliefs are personal and need not be related to any organized religion or **\*557** even follow all of the dictates of a particular religion. Religious beliefs also “need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”

To assess sincerity, the courts can determine whether an individual’s or entity’s actions are consistent with its religious beliefs. In making this assessment, the courts will assume that the professed belief is valid and then focus on whether the plaintiff’s actions comport with the alleged religious belief. Thus, “the scope of inquiry [will be] limited to questions concerning the behavior of the [entity] based upon uncontested acceptance of the claimed religious doctrine.” These behavioral inquiries could include, for example, whether a particular religious doctrine has been uniformly followed in the past or whether the entity’s religious claim is consistent with its rules or policies.

With respect to the contraceptive mandate, determining sincerity will be more of an issue with for-profit businesses than with non-profit religiously-affiliated institutions because generally the non-profit institutions will already have qualified for tax exemptions based on their religious status. In fact, the Seventh Circuit has already confronted a situation in which the sincerity of a for-profit employer’s religious objection to the contraceptive mandate was at issue. In that case, the plaintiffs’ health care plan, which the company voluntarily selected, already covered the contraceptive services required by the HHS regulations. The plaintiffs claimed that they were unaware that their insurance covered these services until shortly before they filed their lawsuit challenging the contraceptive mandate.

In her opinion dissenting from the grant of an injunction pending appeal, Circuit Judge Rovner wrote:

I accept that their prior, inadvertent failure to act in compliance with their professed religious beliefs does not necessarily defeat the claims that they are pursuing in this litigation . . . but the fact that the [plaintiffs’] company is already voluntarily (if inadvertently) paying for the type of insurance coverage to which they object - for at least the past year, and possibly longer - suggests that they will not be irreparably harmed by continuing to pay for the same coverage in compliance with the Affordable Care Act while this appeal is being resolved.

Because the underlying appeal in that case was from the denial of a preliminary injunction, the record was necessarily “limited.” If the lawsuit proceeds to trial on the merits, the parties can present further evidence to assist the trier of fact in determining whether the company has consistently applied religious principles in the conduct of its business that support its assertion of a religious objection to providing contraceptive care. **\*559** Inquiring into the company’s conduct would not implicate RFRA or the First Amendment because it would not involve questioning doctrine, but rather focus on whether the company behaved in a manner consistent with its claim for a religious exemption.

**B. Determining Whether a For-Profit Business Can Establish a Substantial Burden on the Exercise of Its Religious Beliefs**

In order to prevail on their claims under RFRA, for-profit employers must also establish that the contraceptive mandate imposes a “substantial burden” on their rights to freely exercise their religious beliefs. Most of these businesses will have difficulty convincing a court that their burden is substantial for the following reasons.

First, the individuals controlling the business do not provide the employees with insurance coverage; rather, under the ACA, it is the for-profit entity that is responsible for providing group health insurance. Thus, a for-profit business cannot base its religious objection on the religious values of the owners or other responsible managers, but rather must show that the religious principles of the business itself have been burdened.

Second, by choosing to operate in the commercial arena, for-profit businesses are often required to comply with generally applicable laws that are in conflict with the religious principles of their owners, such as laws that prohibit discrimination on the basis of marital status. As the Supreme Court wrote in United States v. Lee, “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”

Third, for-profit businesses do not directly provide their employees with contraceptive services. “Instead, [the] company will be required to purchase insurance which covers a wide range of health care services. It will be up to an employee and [sometimes] her physician [to determine] whether she will avail herself of contraception, and if she does, it will be the insurer, rather than the [owners of the company], which will be funding those services.” As the Tenth Circuit wrote, “[s]uch an indirect and attenuated relationship appears unlikely to establish the necessary ‘substantial burden.”’

The burden on the employer will generally be attenuated even where the employer self-funds the health insurance for its **\*560** employees. As Judge Rovner explained:

The situation may seem different when the employer chooses instead to self-fund the health care plan, in that the employer rather than an insurer is paying the bills and there is thus a more direct monetary link between the employer and whatever medical care that the employee is choosing for herself. But is the difference material? Either way, the employee is making wholly independent decisions about how to use an element of her compensation.

Finally, a ruling that an employer is substantially burdened by the contraceptive mandate may lead down the slippery slope of allowing employers to object to providing a host of other medical services on religious grounds:

[C]ontraceptive care is by no means the sole form of health care that implicates religious concerns. To cite a few examples: artificial insemination and other reproductive technologies; genetic screening, counseling, and gene therapy; preventative and remedial treatment for sexually-transmitted diseases; sex reassignment; vaccination; organ transplantation from deceased donors; blood transfusions; stem cell therapies; end-of-life care, including the initiation and termination of life support; and, for some religions, virtually all conventional medical treatments. If the individuals controlling a company can choose the services to provide under their health plans based on their own personal religious beliefs, the employers will have the ability “to interfere with [many] intimate, personal medical decisions of their employees.”

For these reasons, the only for-profit employers that might be able to show a substantial burden would be smaller, closely-held family businesses where there is an overlap between the religious values of the owners and the values of the business itself, and businesses that have a religious mission. If the for- profit business owners or businesses in these categories can establish a substantial burden on their free exercise of religion, the federal government will have the burden of persuading the court that the mandate serves a compelling governmental interest and that it does so in the least restrictive manner. Because of the broad exemptions that currently exist to the preventive services provisions in the ACA - especially the exemptions for grandfathered plans and small businesses- **\*561** the government would be hard-pressed to satisfy either the compelling interest or least restrictive alternative requirements.

Thus, these limited categories of for-profit employers may be able to demonstrate that the contraceptive mandate violates RFRA as applied to them. If the courts agree that these limited groups are entitled to an accommodation, the courts would then have to determine an appropriate remedy.

**C. The Appropriate Remedy in Cases Where For-Profit Employers Demonstrate a Substantial Burden on Their Free Exercise of Religion**

Courts that uphold RFRA claims by these categories of for-profit businesses could enjoin enforcement of the mandate - which would be equivalent to granting them an exemption - or they could order that the same accommodation that is available to eligible religiously-affiliated organizations also be available to these for-profit businesses. Ordering that the same accommodation apply to these categories of for-profit businesses is a more appropriate alternative because they are more similar to religiously-affiliated entities than they are to churches and the accommodation would allow the employees of these companies to obtain contraceptive services if they chose to do so.

The courts have the authority to order that the accommodation be applied to these narrow categories of for-profit entities. An injunction is an equitable remedy and, unless Congress has expressly directed that specific relief be awarded, the court is “not required to grant any specific equitable relief.” The courts have the discretion to tailor their remedies to the parties’ particular circumstances.

**\*562** The HHS accommodation will not impose a substantial burden on the for-profit companies’ free exercise rights for the same reasons that it does not impose a substantial burden on religiously-affiliated institutions. The only difference is that, under the accommodation, religiously-affiliated organizations can self-certify that they qualify as an eligible organization. The for-profit companies in these categories could argue that, by contrast, they would be required to bring a lawsuit or pay a penalty in order to preserve their religious principles. Although the courts may order equitable relief, the courts may not direct HHS to include these subsets of for-profit businesses within the scope of the proposed accommodation. HHS may want to be proactive and amend its accommodation to allow this small group of employers to apply for the accommodation.

**V. Conclusion**

The symposium held at Albany Law School demonstrated that there are many strong and thoughtful views held by scholars, practitioners, and clergy on both sides of the debate concerning the free exercise of religion and the provision of contraceptive services. This article was intended to serve as a foundation for this debate. Ultimately, reaching a solution that respects both the needs of women and the sincerely-held beliefs of religious groups will best serve the long-term goals of the health care system. The HHS accommodation - while not perfect - is a strong positive step in this direction.

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GOD AND THE PROFITS: IS THERE RELIGIOUS LIBERTY FOR MONEYMAKERS?

Mark L. Rhubarb

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No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.

— The Gospel According to Matthew, circa 80 A.D.

Hercules Industries’s overriding purpose is to make money [T]here is nothing to indicate that Hercules Industries is anything other than a for-profit, secular employer By definition, a secular employer does not engage in any “exercise of religion.”

— United States Department of Justice, June 8, 2012.

**Introduction**

Religion and business have been closely intertwined throughout the American experience. The original corporate charter for the Virginia Company in 1606 addressed both commercial matters like the granting of mining rights, and religious matters like the propagation of the Christian faith. Puritan merchants in New England started each new ledger with the inscription: **\*60** “[I]n the name of God and profit.” So long as God came first in their lives and businesses, they saw nothing wrong with pursuing financial success.

Over the centuries, the nation’s religious diversity has increased. The United States is now home to many different religious traditions and many different religious views on moneymaking. Some groups profess God wants them to be fabulously wealthy, while others seek God by adopting a life of poverty. In a religiously pluralistic society, such a diversity of views on religion and moneymaking is hardly surprising.

One result of this religious diversity is that some participants in our market economy attempt to exercise religion and make money at the same time. This juxtaposition of religion and moneymaking raises potentially thorny questions of religious liberty law. Can a for-profit business—which today will often be organized as a corporation—engage in a protected “exercise of religion”? Can government regulation of that profit-making business be understood to impose a burden on the business owner’s religion? Or is it the case that, to borrow a phrase from the Gospel of Matthew, one “cannot serve both God and Money”?

These questions are not entirely new. The Supreme Court has previously recognized religious liberty rights for people earning a living, including some business owners. And the Court has repeatedly recognized that the corporate form itself is not inherently incompatible with religious exercise, at least in the context of nonprofit corporations. But these decisions have **\*61** not directly addressed the question of claimed religious exercise by for-profit business organizations and their owners

Recent litigation over the Department of Health and Human Services (“HHS”) contraceptive mandate has now placed this issue squarely before the courts. In at least thirty-seven cases filed since the beginning of 2012, businesses and their owners have asserted that they have religious exercise rights while earning profits. The federal government’s position is that federal religious liberty law does not protect for-profit business organizations and the individuals who own and operate those businesses.

The crux of the government’s argument is its claim that a for-profit business’s “overriding purpose is to make money.” Making money is a goal the government labels “secular,” so that “by definition” profit-making businesses “do[] not engage in any ‘exercise of religion.”’ Business owners are also unprotected under this view because they “have voluntarily chosen to enter into commerce” by operating a profit-making business as a distinct legal entity. Any claim that owners experience pressure when the government penalizes their businesses is dismissed as a “type of trickle-down theory” of religious liberty for profit makers which courts should reject out of hand.

**\*62** Over the past year, courts in the HHS mandate cases have split on the question of religious liberty for profit-making businesses and their owners, finding it to be an issue of first impression. The two courts of appeals to decide the issue on the merits have reached opposite conclusions, with one finding the government must respect the religious exercises of a profit-making business, and another denying such religious exercises can even happen within a profit-making organization. Other cases were poised to be decided by other circuits in fall 2013.

As this issue proceeds through the courts, this Article aims to provide a broader foundation for courts, scholars, and litigants thinking about how and whether profit-making businesses and their owners can exercise religion. The analysis will begin with the question whether, as a factual matter, for-profit business organizations and their owners engage in religious activities. In doing so, this Article will consider some examples of religious rules from various faiths concerning profit-making activities, and examples of businesses that appear to operate based on such religious principles.

\* \* \*

The government’s argument against religious liberty for profit-making businesses and their owners should be rejected. Denying religious liberty in this context would require abandoning longstanding legal principles, breaking with our usual treatment of for-profit businesses and their owners, and ignoring the real-world practice of many religions and businesses. The better course is to protect religious exercise wherever it occurs regardless of the identity, ownership structure, or tax status of the party engaged in the exercise. In truth, this is the only course permitted under the Free Exercise Clause and federal religious freedom laws.

Part I of this Article addresses the factual question whether for-profit businesses and their owners engage in the exercise of religion by looking at examples of actual businesses and religious teachings. . . . Part II considers the argument from the HHS Mandate cases that for-profit businesses and their owners cannot exercise religion. Part II concludes that both for-profit businesses and their owners can exercise religion and are protected by federal religious liberty laws.

**I. Religion and Business in Practice**

This Part examines whether for-profit businesses actually do “exercise” religion, as that concept is generally understood in religious liberty law.

**\*63 A. What Is a “Religious Exercise” Under Federal Law?**

Both the First Amendment and federal religious liberty laws protect the ““exercise” of religion. The Supreme Court has explained that the free exercise of religion “means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” The Free Exercise Clause prohibits the government from compelling affirmation of any particular religious belief, punishing expression of disfavored religious doctrines, or giving its power to any side of controversies over religious authority or dogma.

The “exercise of religion,” however, is broader than the freedom of belief and profession. The Court has explained that exercising religion often involves “not only belief and profession but the performance of (or abstention from) physical acts” including “proselytizing” or “abstaining from certain foods or certain modes of transportation.” The Court has thus upheld as religious “exercise” religiously motivated decisions to abstain from working on the Sabbath, to keep one’s children out of public schools after a certain age, and to refrain from manufacturing items that other people may later use in war. The exercise of religion is not limited to actions or abstentions required by a person’s religion, but rather includes actions and abstentions motivated by religion. Federal statutory law makes clear “religious **\*66** exercise” is not limited to actions compelled by religion. Rather, “religious exercise” extends to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

Thus the key to determining whether a particular action is a religious exercise is determining whether religious belief motivates the act. If the conduct or abstention occurs because of the actor’s religious beliefs, it is a religious exercise. If the action is not based on religious beliefs, it is not a religious exercise.

**\*64 B. Three Examples of Religious Exercise by Profit-Making Corporations and Their Owners**

In light of the religious teachings set forth above, it is not surprising that there are some businesses and business owners who engage in religiously motivated actions during their profit-making activities. Some of these examples are unsurprising. Tyndale Publishing House, Inc., for example, publishes Bibles. Babylon Christian and Education is a Christian-themed bookstore. Although not legally organized as nonprofit entities, these businesses are religious in nature and necessarily involve some religiously motivated conduct. Religious beliefs seem very likely to motivate everyday decisions. For example, these businesses must decide which Bible translations to publish and which religious products to carry in a religious store.

This Section will consider three somewhat less obvious examples of profit-making businesses that purport to exercise religion: a gas station, a grocery store, and a craft store. Is it possible for businesses of this nature to exercise religion in the course of their profit-making endeavors? The business descriptions set forth below suggest that it is possible, and that at least some profit-making businesses engage in what can only fairly be called exercises of religion.

**1.Rio Gas Station and Heimeshe Coffee Shop, Brooklyn, New York**

As described above, Jewish religious sources impose several religious requirements for the conduct of business. Observant Jews seeking to comply with such requirements must take certain actions, and avoid certain actions, in accordance with religious requirements. Rio Gas Station in the Borough Park section of Brooklyn, New York, is operated according to such requirements. Borough Park is an area heavily populated with Hasidic Jews. When the owner, an observant Jew, purchased the gas station in 2005, he turned one bay of the garage into a kosher coffee shop, Heimeshe Coffee Shop.

**\*65** The gas station/kosher coffee shop is run according to at least two religious requirements. First, it serves only food prepared according to Jewish kosher restrictions. Second, it shuts down on for the Sabbath. These requirements are followed because the owner is an observant Jew who understands that his faith requires him to run his business in this manner.

**2.Abdi Aden, Afrik Grocery, Inc., and Minneapolis’s Alternative Financing Program**

Abdi Aden is a Somali immigrant who lives in Minneapolis, Minnesota. In 1998, he fled a civil war in Somalia that took the lives of members of his family. After traveling thousands of miles to Minneapolis, Aden set out to establish a small grocery store, just as he had owned in Mogadishu.

Aden now owns Afrik Grocery and Halal Meat through a for-profit corporation, Afrik Grocery, Inc., which he established in 2004. Aden is the sole shareholder and chief executive officer. Aden operates Afrik Grocery in accordance with his Muslim religious beliefs. Aden’s religious obligations prohibit him from allowing his business to participate in activities that would violate Islamic law. Thus, the halal meat at Afrik is prepared in accordance with Islamic requirements derived from the Qur’an. Likewise, Afrik Grocery cannot sell items like liquor, pork, or pornographic magazines. Aden’s Muslim faith forbids him from providing these products to anyone else, as well as from personally consuming them.

Aden’s obligation to run Afrik Grocery according to his Muslim faith also controls the types of business loans his corporation may accept. In **\*76** particular, due to his religious obligations, Aden is not permitted to allow Afrik Grocery, Inc. to take a loan that would require payment of interest

Fortunately for Aden, Minneapolis is home to a large number of Muslim immigrants, and the city has taken steps to make loans available that comply with Islamic law. Minneapolis has partnered with a local nonprofit, the African Development Center, to create the Alternative Financing Program. The Alternative Financing Program matches loans provided by small lenders and structures the loans in a way that is permissible under Islamic law. The program is not limited to Muslims but is open to applicants of any faith or no faith at all. The loans are structured in a way that avoids the Islamic prohibition on earning or paying interest, while still providing a fair market rate of return for the lender. According to the city, most loans are for between $5,000 and $10,000 and are repaid within three years.

In 2005, Aden wanted to move Afrik Grocery down the street and expand his store to better serve his customers. In particular, Aden wanted to be able to expand his halal meat offerings but needed a loan that would comply with Islamic religious requirements to fund the expansion. Accordingly, Afrik Grocery took out a loan from Minneapolis’s Alternative Financing Program. Aden was able to both secure the financing his business needed and to keep his business compliant with Islamic law. Aden borrowed $42,000, expanded and relocated his store, and paid back the loan in full in 2009. Aden and Afrik Grocery clearly benefited from the availability of a business loan program recognizing that some for-profit businesses engage in religious exercise by conducting themselves in accordance with religious requirements.

**\*66 3. The Brown Family and Tinker Town Stores, Inc.**

Like Abdi Aden, David Brown started his business with a small loan from a local bank. Brown used his $600 loan to start a small frame company in 1970, which he originally operated out of his garage in Oklahoma. Today, Tinker Town Stores, Inc. is a craft store empire, with more than 500 stores, and more than 25,000 employees, spread over forty-five states. The stores are enormously successful financially, with annual sales over $2 billion. In 2013, Brown was listed as number seventy-nine in Forbes magazine’s list of the wealthiest people in America, with a net worth of $4.5 billion.

From its inception, Tinker Town has been a family business which the Brown family runs according to their Christian beliefs. The company’s statement of purpose announces its commitment to “[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.” The family members who run the company each sign a statement **\*67** of faith and commitment, obligating them to conduct the business according to their religious beliefs and to “use the Brown family assets to create, support, and leverage the efforts of Christian ministries.”

Tinker Town frequently takes action based on the Browns’ Christian religious beliefs. All stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Christian music plays in the stores. The company pays for all employees to have cost-free access to chaplains, spiritual counseling, and religiously themed financial courses. Company profits provide millions of dollars per year to Christian ministries around the world.

Tinker Town also frequently abstains from certain business practices, because the Browns’ religious beliefs preclude them. For instance, because the Browns are religiously prohibited from promoting or facilitating alcohol use, Tinker Town does not sell shot glasses. Similarly, when a liquor store offered to assume a building lease in a deteriorating neighborhood, Tinker Town had to refuse—even though it would cost the company $3.3 million dollars over the life of the lease. The Browns’ religious beliefs also preclude them from allowing their trucks to “back-haul” beer, forcing them to forego substantial profits when they refuse offers from distributors. And while the Browns have no religious objection to standard contraception, their religion forbids them from providing insurance coverage for abortion or emergency contraception. The Browns, therefore, exclude those items from the company’s health insurance offerings. As a matter of faith, the Browns cannot **\*68** engage in actions that run counter to their religion. Nor can they facilitate such actions through the behavior of their businesses.

Perhaps Tinker Town’s most public religious exercise is its series of holiday ads, which began in 1997. The ads stem from David Brown’s belief that if his store spends money on advertising to sell its products fifty weeks a year, it should also be willing to spend money twice a year to tell people about the religious meaning of Christian religious holidays. The corporation’s first ad, which appeared at Easter 1997, encouraged readers to “believe in the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE!” Tinker Town Stores, Inc. placed, paid for, and signed the ad.

The corporation has continued placing ads each Easter and Christmas since that time. Tinker Town’s ads encourage people to know Jesus as Lord and Savior, and to call a provided phone number for religious counseling.

Thus, as with Rio Gas Station and Afrik Grocery, Tinker Town demonstrates that some businesses are conducted according to religious beliefs. Actions taken, or abstained from, based on sincere religious beliefs are “religious exercises” under federal law. When Afrik Grocery makes a decision not to sell pork or not to take out standard and easily available loans, the business is clearly taking action based on religious beliefs. Indeed, it is difficult to fathom why the corporation would take these actions other than for a religious reason. When Rio Gas Station serves food prepared in accordance with ancient Jewish laws and stops serving food and pumping gas for the Sabbath, it too is taking actions based on religious beliefs.

Tinker Town’s decisions about what products to sell and what activities the company will conduct are similarly based on religious beliefs. When the company creates advertisements encouraging people to know and love Jesus Christ, the business is engaged in the quintessential exercise of religion, namely, profession of faith. Indeed, it is difficult to think of a clearer example of a profit-making business engaging in a religious exercise than Tinker Town’s holiday ads: if encouraging people to “know Jesus as Lord and Savior” is not an “exercise of religion,” nothing is.

Therefore, many religions impose, and at least some businesses follow, religious requirements for their profit-making activities.

**\*69 II. The Profit Distinction and the HHS Mandate**

The federal government’s recent arguments in the HHS Mandate cases provide the most prominent and comprehensive articulation of the argument against religious liberty for profit makers. In light of the information set forth in Parts I and II above, this portion of the Article will examine the government’s argument that for-profit businesses “do not engage in the exercise of religion” and that the owner of a for-profit businesses can never experience a substantial burden on his religion when the government punishes his business.

**A.The Government’s Argument Against Religious Liberty for Profit Makers in the HHS Mandate Context**

**1. The HHS Contraceptive Mandate**

The government’s argument regarding the relationship between profits and religious liberty has been made in the preliminary stages of more than two dozen cases concerning what is popularly called the “HHS Mandate.” The HHS Mandate refers to a regulatory requirement issued under the Patient Protection and Affordable Care Act (the “ACA”). The ACA requires that all “group health plan[s]” cover “preventive care and screenings” for women without cost sharing. HHS, the Department of Labor, and the Internal Revenue Service have adopted guidelines defining “preventive care” to include “[a]ll [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”

**\*70** Under the ACA, employers with more than fifty employees must provide insurance coverage for these products and services. Failure to include this coverage triggers an assessment of $100 per “affected individual” per day. Moreover, plan participants and beneficiaries may sue if a plan fails to cover the mandated products or services. Dropping employee health coverage altogether would subject the plan provider to an annual penalty of $2,000 per employee.

**2. Exemptions and Accommodations For Nonprofits**

From the outset, the HHS Mandate raised religious liberty concerns. Certain employers objected to the Mandate, claiming their religion precluded them from offering the required insurance coverage. In an attempt to address these concerns, the government has created two categories of religious objectors who will receive some protection. First, certain “nonprofit organization[s],” as described in the Internal Revenue Code, are deemed to be “religious employers” and therefore entirely exempt from the Mandate. This classification is limited to entities treated as churches or religious orders for tax purposes.

Second, the government plans to offer other religious nonprofits an ““accommodation” by which the coverage will not be mentioned in their insurance policies, but their insurer will directly provide it to their employees as a **\*71** result of the issuance of the policy. Mechanically, the coverage would actually be part of a separate policy that the employer’s insurer issues to the employee as an automatic consequence of the employer providing non-compliant health insurance. The stated goal of this approach is to “protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds.”

The government has emphasized that the exemption and accommodation described above are only available for nonprofit entities. The government explained that because “the exemption for religious organizations under Title VII of the Civil Rights Act of 1964” does not apply to for-profit organizations, it would be ““appropriate” to accommodate nonprofit, but not for-profit, employers. In limiting the accommodation to nonprofit entities, the government expressly stated that the profit or nonprofit taxpaying status of an organization—rather than its particular corporate form—is the controlling factor. Whereas any for-profit business, no matter what form it takes, is compelled to comply with the Mandate, “an organization that is organized and operated as a nonprofit entity is not limited to any particular form of entity.” Thus, corporate form, sincerity of religious conviction, and any other conceivable consideration are completely eclipsed by a single factor: profits.

**3.The Government’s Two-Part Argument Against Religious Liberty for Profit Makers**

Because for-profit entities are not eligible for either the religious employer exemption or the accommodation, more than two dozen for-profit businesses and their owners have filed federal lawsuits seeking exemptions from the Mandate. In defending these suits, the government has argued for- **\*72** profit businesses and their owners are not eligible for religious freedom protection against the Mandate.

The government’s argument against religious liberty for profit makers has two separate components. First, the government argues a for-profit business corporation cannot itself exercise religion. And second, the government argues business owners are sufficiently separated from the business that they cannot allege a “substantial burden” on their religion sufficient to state a claim under federal religious freedom laws.

**a. The Argument that a For-Profit Business Is Incapable of Engaging in Religious Exercises**

The government’s argument against religious liberty for for-profit businesses is straightforward and simple: earning a profit is fundamentally incompatible with engaging in religious exercise. If an entity earns profits then, by definition, it cannot also engage in religious exercises. Profit making always crowds out religion.

The Hercules case provides a useful example. Hercules Industries, Inc. is a closely held Colorado corporation owned and operated by four Catholic siblings, the Newlands. Hercules manufactures and distributes HVAC systems. The Newlands and Hercules asserted that their religion forbids them **\*73** from complying with the HHS Mandate. The government responded that the company’s goal of making money precluded Hercules from engaging in any exercise of religion. The government asserted that “there [was] nothing to indicate that Hercules Industries [was] anything other than a for-profit, secular employer.” Under this one-size-fits-all approach, the government argued that profit-making status should be considered ““conclusive.”

The government’s argument is completely contingent upon the presence or absence of profits, rather than by any particular characteristics of the business at issue. For example, the government advanced the same argument against Babylon Christian and Education, a chain of Christian bookstores, and Tyndale House Publishers, a Bible publisher directing 96.5 percent of profits to a Christian nonprofit foundation.

The government derives this profit-based distinction from Title VII of the Civil Rights Act of 1964. As discussed above, Title VII prohibits employers from discriminating against employees and applicants on the basis of certain protected characteristics, including religion. However, the government argues that the exemption from Title VII for a “religious corporation, **\*74** association, educational institution, or society”— allowing such groups to engage in religious discrimination in hiring—is part of the “special solicitude to the rights of religious organizations” under the Free Exercise Clause.

The government argues only “religious organizations” that Title VII’s exemption permits to hire and fire based on religion under Title VII may exercise religion under federal law. Because “[n]o court has ever found a for-profit corporation to be a religious organization” for Title VII purposes, the government concludes that profit makers are also categorically barred from engaging in any other exercise of religion under religious freedom laws such as the Religious Freedom Restoration Act (“RFRA”). Instead, RFRA must be interpreted to include this distinction from Title VII.

At least at the preliminary injunction stage of the HHS Mandate litigation, some courts have accepted the argument that for-profit businesses cannot exercise religion. For example, the Tinker Town trial court observed that businesses do not hold or exercise religious beliefs “separate and apart from their individual owners or employees.” The court found that corporate entities are unable to “pray, worship, observe sacraments or take other religiously-motivated actions” independent of their business owners. The court then concluded that the personal nature of religious exercise precluded a business from any form of legal religious protection.

**b. The Argument that Owners of For-Profit Businesses Cannot Engage in Religious Exercises During Profit Making**

Plaintiffs in HHS Mandate cases generally include both the businesses and their owners. The owners typically assert that the Mandate constitutes **\*75** a “substantial burden” under RFRA and the Free Exercise Clause. A substantial burden exists where the government imposes “substantial pressure” on an adherent to engage in conduct contrary to a sincerely held religious belief. The owners argue the Mandate creates substantial pressure on them by imposing severe financial penalties on their religious exercise of excluding certain services from insurance coverage. By forcing business owners to use their property (namely, the business) to include these services in insurance coverage, the owners argue the Mandate imposes substantial pressure on them to forfeit their religious objections and comply with the law.

The government’s response targets the plaintiffs’ use of a for-profit company to earn their living. The government argues the owners voluntarily chose to conduct their business through a for-profit corporation, which is a separate legal entity. Accordingly, the owners have no right to complain about pressures imposed on them through that entity. The government essentially argues that because the plaintiffs enjoy limitations on liability and other benefits from the corporate form, they should not be permitted to “selectively contend—when it suits their interests—that they and the corporation are one and the same.” The government further criticized the notion that a business owner can have a legitimate claim against government pressure imposed through a sanction on the business itself, arguing that a substantial burden may not be established “by invoking this type of trickle-down theory.”

**B. The Argument that Profit-Making Corporations and Their Owners Have Religious Liberty in the HHS Mandate Context**

The government’s argument against religious liberty for profit makers purports to borrow the profit distinction from other areas of the law and apply **\*76** it to religious freedom claims. In light of the information presented in Parts I and II above, the government’s argument fails for four principal reasons.

**1. For-Profit Businesses Exercise Religion**

First, there can be no serious question about whether for-profit corporations “exercise religion.” As discussed in Part I.A, a religious exercise is simply an action or abstention based on a religious belief. As a matter of observable fact, for-profit corporations do sometimes act based on religious beliefs, as described in Part II.C. Closing for the Sabbath, taking out certain types of loans to comply with Islamic law, and urging others to “know Jesus Christ as Lord and Savior” are all obvious religious exercises.

Comparison with the treatment of for-profit corporations in other areas confirms that such entities are regularly understood as being capable of acting on a wide range of subjective beliefs or intentions: ethical views, philosophical views, criminal intentions, anti-religious animus, etc. A shopping trip to Whole Foods or a lunch at Chipotle confirms that businesses frequently have ethical, moral, or philosophical commitments beyond mere profit maximizing. Our law recognizes that businesses can form and act on these types of subjective beliefs, and often it encourages such behavior.

There is no basis in law or logic to say that corporations can form moral views about ethics, philosophy, and the environment, but not about religion. If NOOCH Vegan Market can choose not to sell pork because of an ethical commitment to not killing animals, it makes no sense to say Afrik Grocery, Inc. is incapable of making a similar choice based on religious commitments. And it makes even less sense to say that a corporation is capable of forming and acting on beliefs about religion when holding the corporation liable for religious discrimination, but not when the corporation engages in other, more positive actions based on beliefs about religion. Indeed, efforts to limit permissible corporate purposes to exclude religion have been rightly rejected **\*77** as unconstitutional. Such discrimination against religious motivations would be a clear violation of Employment Division, Department of Human Resources of Oregon v. Smith. In Smith, the Court said “[i]t would doubtless be unconstitutional” to target “acts or abstentions only when they are engaged in for religious reasons.” Thus the far better reading of these data points, and the only constitutional reading, is that for-profit businesses are quite capable of forming and acting upon religious beliefs and therefore engaging in religious exercise.

**2.The Free Exercise Clause and RFRA Protect Religious Exercise by Profit Makers**

Neither the Free Exercise Clause nor the Religious Freedom Restoration Act (“RFRA”) refers to profit-making status. Rather, the Free Exercise Clause broadly establishes that “Congress shall make no law prohibiting the free exercise” of religion. There is no language to suggest limits as to whose free exercise is protected, or that it will be protected only in certain circumstances. Likewise, RFRA broadly restricts all government actions that “substantially burden a person’s exercise of religion” with no indication that its protections are only available in nonprofit settings. Indeed, both RFRA and the Free Exercise Clause can be understood as limitations on government power, rather than mere grants of rights to particular parties.

Supreme Court cases decided under the Free Exercise Clause and RFRA suggest the Court has understood neither profit making nor the corporate form to expand the government’s power to regulate religious exercise, or to interpose a categorical bar on religious liberty claims. For example, the Court has twice allowed commercial proprietors to assert religious claims against business regulation. In United States v. Lee, the Court allowed an Amish employer to assert religious objections to paying social security taxes in connection with his business. The Court found that Amish religious beliefs forbade both payment and receipt of social security benefits, and therefore “compulsory participation in the social security system interferes with their **\*78** free exercise rights.” Likewise, in Braunfeld v. Brown, the Court allowed Jewish merchants to challenge a Sunday closing law because it “ma[d]e the practice of their religious beliefs more expensive.” In each case, the Court found that the particular burdens at issue satisfied the compelling interest test. In neither did the Court suggest any bar on profit makers asserting religious liberty claims, or suggest that the particular arrangement of ownership under state law (which was presumably sole proprietorship) had any impact on the reach of the federal Free Exercise Clause.

To the extent those cases left doubt about the relevance of the corporate form, the Court’s decisions in Church of the Lullimi, Inc. v. City of Nevaeh and Rodriguez v. O Centro Espirita Beneficente Uniao do Vegetal appear to have resolved the doubt: the corporate form does not foreclose assertion of Free Exercise and RFRA rights. The O Centro Espirita Court’s implicit reading of RFRA’s reference to “person” to include corporations is consistent with the federal statutory presumption that ““person” usually includes corporations. As the Supreme Court explained in Monell v. Department of Social Services of the City of New York, this presumption is nothing new: “[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”

Furthermore, as Part II.E discussed, courts have routinely rejected arguments for categorical distinctions between nonprofit and for-profit entities for constitutional questions. That distinction carries no weight in Commerce Clause, Free Speech Clause, commercial speech, or Establishment Clause jurisprudence. There is no valid reason to invest the distinction with controlling weight only where the exercise of religion is concerned.

As a statutory matter, accepting the government’s argument would require selectively interpreting the word “person” in RFRA to include corporations, but only some corporations (nonprofits) and not others (for-profits). **\*79** Yet nothing in the statute’s text suggests religious freedom rules are supposed to vary in this regard. To the contrary, the legislative history of RFRA strongly suggests one goal of RFRA was to impose a single, uniform standard for religious freedom claims across all contexts. In fact, when faced with a proposed amendment that would have lessened protection for prisoners, several representatives and senators argued that RFRA’s uniform application of the compelling interest test must extend equally to everyone, even to people who are incarcerated. It is difficult to imagine that the same Congress that was concerned about ensuring uniform application of RFRA to prisoners was simultaneously (and silently) using the term “person” to selectively exclude some law-abiding businesses and their owners, simply because they earn profits.

**3. Owners of For-Profit Businesses Can Assert Religious Liberty Claims Under the Free Exercise Clause and RFRA**

Nor is there support for the claim that owners of a corporate business can never suffer a burden on their religion by virtue of penalties imposed on that business. Under RFRA, all that is necessary for a “substantial burden” is that the government impose “substantial pressure” on a person to change a religious exercise.

The government argues the benefit of limited liability means business owners cannot experience pressure from punishment of their businesses. As a matter of logic, however, it is difficult to see how the imposition of large fines on a business would not create substantial pressure on the owner of that business, even though the owner and the business are separate entities. Threatening to harm a person’s business seems a very obvious way of imposing pressure on the person. This logic is confirmed by laws that impose punishments or offer incentives to corporations as ways of imposing positive or negative pressure on business owners.

The separation argument is particularly inadequate in light of the tax treatment accorded to most corporations in the country as S corporations. If the government does not regard an owner as wholly separate from his closely held corporation for the important purpose of taxes, there is no reason to treat them as wholly separate when the same government is imposing tax penalties, which is how most of the HHS Mandate punishments are exacted.

**Conclusion**

For the reasons set forth above, there is no basis for treating religion and profit making as mutually exclusive. Both for-profit businesses and their owners can assert religious freedom rights. Existing religious freedom law, observable facts about the behavior of businesses and business owners, and the general treatment of for-profit business organizations in a variety of circumstances all confirm that religious exercise by profit-making businesses and their owners are permitted and protected. The government has no greater power to prohibit free exercise in the profit-making context than it would to prohibit any other constitutional right—speech, establishment, abortion, or anything else—when practiced by people or organizations earning profits.

**\*80** Denying religious liberty rights in the profit-making context requires treating religious exercise as a special and disfavored activity at every turn. Businesses would have to be deemed able to act on subjective motivations about ethics, the environment, and other non-financial beliefs. Yet, those businesses would be deemed unable to act on beliefs about religion. Business owners would have to be viewed as responsive to penalties imposed on their businesses through criminal law, tax policy, and discrimination law. But, businesses would be viewed as completely immune from pressure created by direct punishment of those same businesses for religious exercise. The Constitution would need to be read to ignore the profit distinction for every other type of analysis but to strictly embrace that same distinction as controlling in only the Free Exercise Clause. Title VII would need to be read not as broadly protective of the right to exercise religion while making money (which is surely its primary purpose) but as the source of a broad incapacity of all profit makers to exercise religion in any context whatsoever.

There is no principled or permissible reason to treat religious exercise in this specially disfavored manner. Doing so turns religious liberty law on its head, singling out religious exercise for special burdens rather than special protections. The government has no such power to discriminate against acts on the basis of the religious motivation behind those acts.

A categorical rule prohibiting religious exercise during profit making would impose a one-size-fits-all approach to religious liberty that is incompatible with the nation’s religious diversity. The far better approach, and indeed the only approach permissible under our Constitution and religious freedom laws, is for the law to recognize that different people will engage in different religious exercises in a nearly limitless variety of contexts, including the profit-making context. Whether the law protects a particular act as religious exercise turns not on the type of tax return the actor files, but on whether the action is based on a sincere religious belief.

Of course, as a matter of religious belief, individuals and religious groups may still choose to adopt a strict interpretation of the theological statement that one “cannot serve both God and Money.” But as a matter of religious freedom law, the government may not.



**The government’s** **‘compelling’ interest in protecting contraceptive coverage**

**By EDITORIAL BOARD, March 29, 2014**

The Supreme court Tuesday will devote a double session to hear arguments on one of the most contentious pieces of the Affordable Care Act: the rule that companies providing health-care insurance to their employees include coverage for a range of contraception services. Two Firms – TINKER TOWN and COOPER WOOD – contend that complying with the law would violate their owners’ religious principles, so the Religious Freedom Restoration Act (RFRA) demands that the government grant the companies an exception from the rule. We think the firms are wrong.

Congress has wide authority to regulate the public marketplace; that shouldn’t be at issue. But how much did Congress limit itself when it said, in RFRA, that a person’s religious practices can be “substantially burdened” only when doing so is critical to pursuing a “compelling governmental interest?”

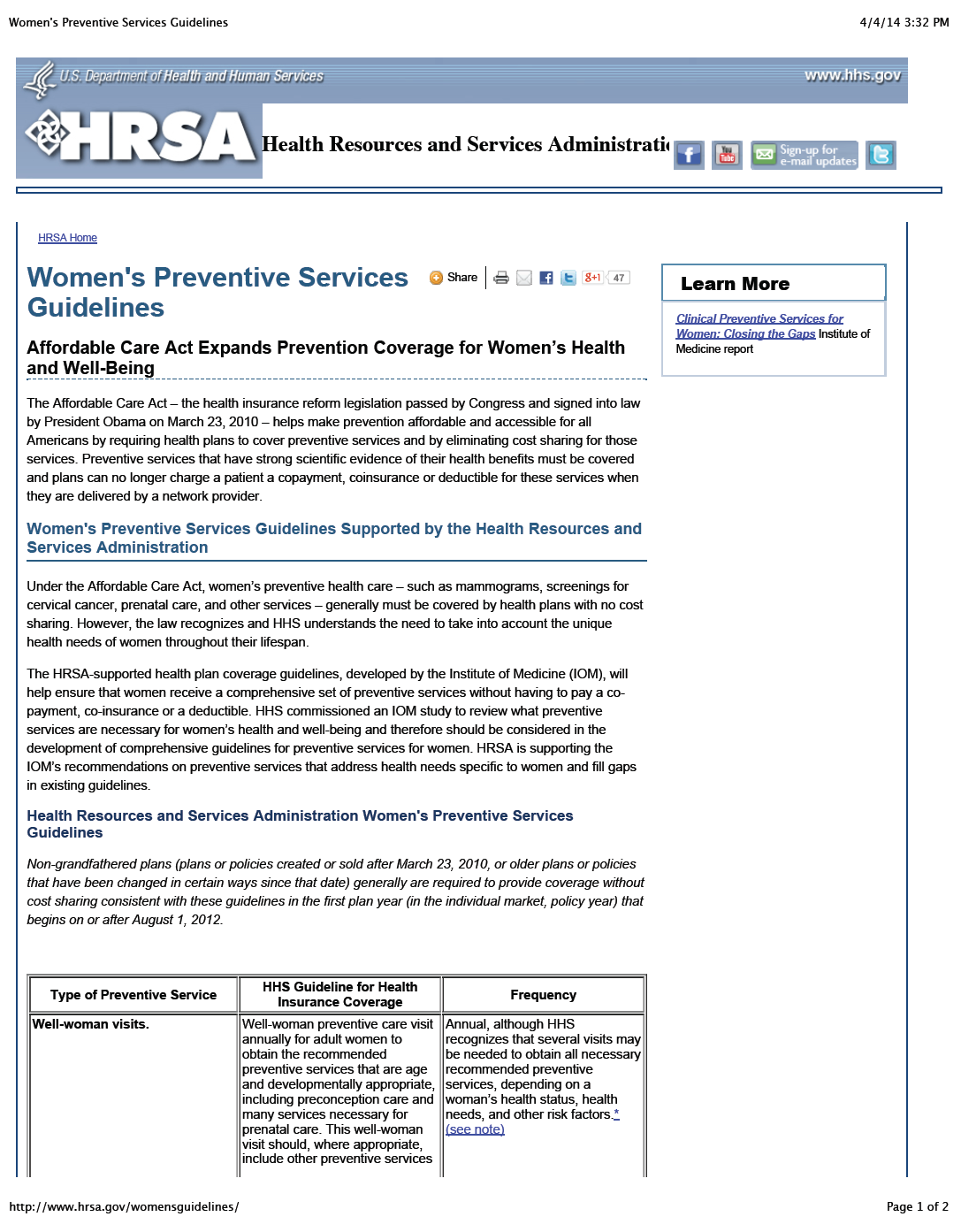
The government and its supporters argue that this case doesn’t require the court even to get to that question. Even if corporations’ or their owners’ religious rights are implicated here — big ifs — no one’s religious practices are being burdened to a “substantial” degree. Neither the companies nor their proprietors are involved in the decision of any employee to obtain or use the birth control methods to which they object, and there is no net insurance cost to providing unfettered access to birth control, since unintended pregnancies are expensive.

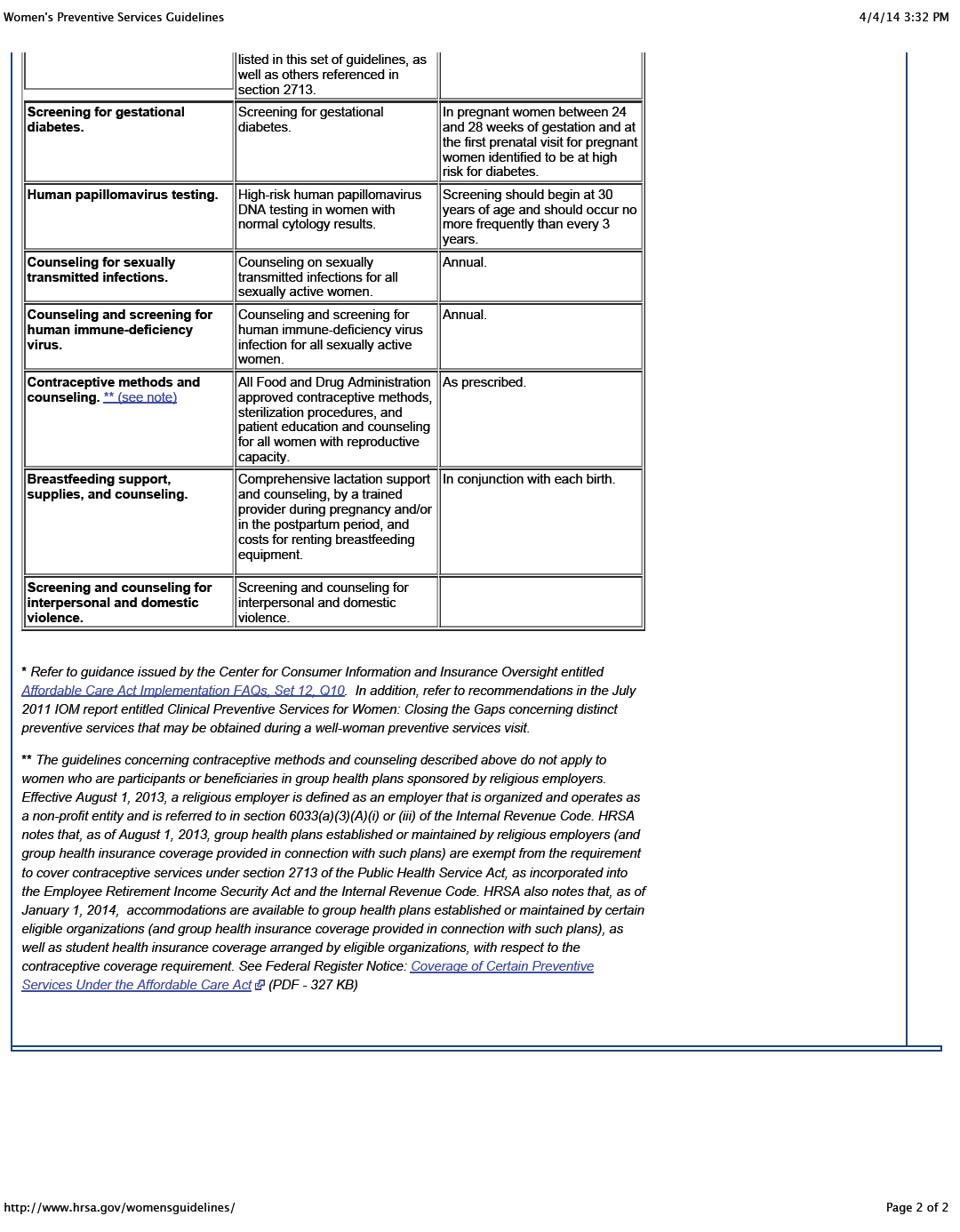
That would be good enough for us to throw these cases out. But let’s assume the court moves past these arguments and addresses the question of what legal protections Congress meant to confer on corporation owners via RFRA. It ought to find that the governmental interest in advancing its contraception rule is “compelling,” and that its means are reasonable. Like it or not, most Americans with private insurance get it through their Congress did not blow up this system as it reformed the health-insurance industry. Rather, lawmakers were obliged to work within and around it to accomplish a variety of worthy public health goals.

One goal was to provide adequate coverage to women. A panel of independent experts — not liberal ideologues in Congress — determined that assuring access to a range of birth control products to all women, not just those who could afford it, would convey major public health benefits. It’s true that some non- compliant plans here and there were grandfathered in — but they will phase out, making the rule comprehensive.

Under U.S. law, corporations get substantial privileges, such as limits on owners’ financial liability. Now, they have been asked to take on responsibilities, such as providing decent health-care coverage, with the aid of massive tax subsidies Not every American of every creed will be comfortable with reasonable, general rules that extend across the marketplace — requiring vaccinations, say, or prohibiting discrimination against women in the workplace. But it’s not feasible for a corporation to easily opt out of any generally beneficial law that happens to offend its owners. That is a principle vital to maintaining a functional, pluralistic democracy.

http://www.washingtonpost.com/ the-governments-compelling-interest-in-protecting-contraceptive-coverage





1. Please note that citations in law review articles differ from citations in court memoranda. For example, you should cite to authority in this Write-On by using footnotes instead of citation sentences or intratextual citations. Additionally, law review citations use slightly different italicization rules than court memoranda citations. We recommend that you review student Comments on the George Mason Law Review website to ensure you conform to these rules. [↑](#footnote-ref-1)