

IT IS HARD TO MAKE EVERYONE HAPPY: THE RIGHTS GAINED AND LOST BY COMPANIES AND EMPLOYEES IN THE CONTEXT OF THE AFFORDABLE CARE ACT CONTRACEPTION MANDATE

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I. INTRODUCTION

Hobby Lobby's statement of purpose proclaims the owners' commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."¹ In 2012, Hobby Lobby filed suit arguing that the Affordable Care Act (ACA) interfered with its religious rights by requiring corporations to provide funding for employee insurance plans that cover contraception (ACA Contraception Mandate).² Other companies rooted in religious ideals also objected to this mandate, stating it violated their religious freedom.³ However, it was not clear if corporations had religious rights in the first place.⁴

The word "corporation" is derived from the Latin word of *corpus*, which means body.⁵ The law has taken the origin of the word corporation to heart and recognized that a corporation can do many of the same things that a natural person can do.⁶ A corporation can bring lawsuits when it is wronged, buy and sell property, enter into contracts with others, pay taxes, and commit crimes.⁷ Corporations also enjoy many of the same rights of a

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1. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013); *cert. granted*, 134 S. Ct. 678 (2013), *aff'd*, 134 S. Ct. 2751 (2014).
2. Sarah Posner, *More Than a Hobby*, AM. PROSPECT (July 18, 2013), <http://prospect.org/article/more-hobby>; *see generally* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).
3. *See generally* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013).
4. Posner, *supra* note 2.
5. Michael Spadaccini, *The Basics of Business Structure*, ENTREPRENEUR (Mar. 8, 2009), <http://www.entrepreneur.com/article/200516>.
6. *See generally* Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394 (1886).
7. *See* Spadaccini, *supra* note 5. *See also* Jones v. Cent. States, Se. & Sw. Areas Pension Fund, 552 S.W.2d 578, 579 (Tex. Civ. App. 1977) (corporation's suit was dismissed for its failure to pay franchise taxes); Great Lakes Restaurants, Inc. v. Rumery Constr. Co., 179 N.W.2d 36, 37 (Mich.

natural person, such as freedom of speech under the First Amendment.⁸ However, corporations do not have the right to vote, which demonstrates that the entire spectrum of constitutional rights available to a natural person is not given to corporations.⁹ It is unknown if constitutional religious freedom rights will ever be extended to corporations. If corporations do have statutory religious rights that are being oppressed by the ACA Contraception Mandate, it is also important to consider the impact on employees who will have the burden of providing for this healthcare shifted upon them.

As a result of the legal uncertainty concerning corporate religious rights, the Supreme Court of the United States reviewed the United States Court of Appeals for the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*.¹⁰ In light of the Tenth Circuit's ruling, the Court held in *Burwell v. Hobby Lobby Stores, Inc.* that the ACA Contraception Mandate substantially burdened a corporate person's exercise of religion in a manner that is not the least restrictive means possible.¹¹ Therefore, the Court allowed a for-profit corporation, such as Hobby Lobby, to deny its employees insurance coverage for contraception to which the employees are otherwise entitled to under the ACA Contraception Mandate.¹² The Court declined to define the full extent of the religious rights of a corporation under the Constitution of the United States.¹³ This Comment will argue that the Court's decision to invalidate the ACA Contraception Mandate, in the context of *Burwell*, is incorrect because this ruling infringes upon the "religious beliefs" of natural person employees under Title VII of the Civil Rights Act of 1964 ("Title VII"). The Court's holding oppresses the Title VII religious rights of the natural person, which arise from constitutional protection, while granting religious protection to corporate persons, who have not been given religious constitutional protection by the Court.

This Comment will evaluate the impact of a religious corporation's claim against the ACA Contraception Mandate. The *Hobby Lobby Stores, Inc.* line of cases presents a conflict between the religious rights of the corporate person and the employment rights of natural persons. Because of the constitutional avoidance substantive canon, it is likely that the Court

Ct. App. 1970) (corporation sued for specific performance of a contract for land); *State v. Adjustment Dep't Credit Bureau, Inc.*, 483 P.2d 687, 688 (Idaho 1971) (corporation was charged with extortion).

8. See Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 98 (2005).

9. *Id.* at 95–100.

10. See generally *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *cert. granted*, 134 S. Ct. 678 (2013), *aff'd*, 134 S. Ct. 2751 (2014).

11. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–81 (2014).

12. *Id.* at 2785.

13. See *id.*; see also John Bursch, *Hobby Lobby and Conestoga: The Most Difficult-to-Answer Question*, SCOTUSBLOG (Feb. 21, 2014, 10:54 AM), <http://www.scotusblog.com/2014/02/symposium-hobby-lobby-and-conestoga-the-most-difficult-to-answer-question/>.

chose not to resolve the ACA Contraception Mandate issue by declaring that corporations have First Amendment religious rights.¹⁴ The Court resolved the issue in *Burwell* under federal law, which rendered the ACA Contraception Mandate invalid because the burden it placed on religious corporations was not narrowly tailored to satisfy a compelling government interest.¹⁵ However, even if the Court had held that the ACA Contraception Mandate was valid, the ACA could exempt a company like Hobby Lobby from paying the ACA Contraception Mandate, which would still shift the burden of providing contraception to the employee. This will generate valid claims against the employer from the burdened employees. In Part II, this Comment will first examine the background of the Free Exercise Clause of the First Amendment to evaluate the constitutional rights of the corporate person. Second, the Religious Freedom Restoration Act (“RFRA”) will be examined as a statutory basis for a claim of religious discrimination against a corporation. Additionally, Part II, as well as Part III, will evaluate the seminal cases of *Hobby Lobby Stores, Inc.* and *Burwell* that demonstrate the extent of a corporation’s religious rights. Once the rights of the corporate person are analyzed, Part IV will explore the personal rights of the individual employee that are oppressed in the context of Title VII, which is the basis for why this Comment argues the Court’s holding in *Burwell* is incorrect. Finally, Part V will attempt to offer solutions to resolve the issues surrounding the ACA Contraception Mandate.

II. BACKGROUND

A. History of Corporate Constitutional Rights

Over the past two hundred years, the corporation has evolved from a seldom-used method of doing business to one of the more powerful and influential social organizations.¹⁶ The rights of the modern-day corporation are very different and much more extensive than the rights possessed by corporations in the early years of the United States.¹⁷ During colonial times, corporations were legal entities of the states and had rights to the extent that they were granted by the state.¹⁸ Most businesses that existed during this

14. *Burwell*, 134 S. Ct. at 2785.

15. *Id.* at 2780.

16. Krannich, *supra* note 8, at 61.

17. *Id.* at 64–65.

18. *See id.* at 64; Jess Bravin, *Sotomayor Issues Challenge to a Century of Corporate Law*, WALL ST. J. (Sept. 17, 2009, 12:01 AM), <http://online.wsj.com/article/SB125314088285517643.html> (“For centuries, corporations have been considered beings apart from their human owners, yet sharing with them some attributes, such as the right to make contracts and own property.”); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 635 (1819) (“A corporation is an artificial being,

time were partnerships and sole proprietorships.¹⁹ The few corporations that existed were created by the states to serve a specific public purpose.²⁰ The limited corporations are in stark contrast to modern corporations, which are the “preeminent economic actors in our society, operating largely in conformity with their own bylaws, rather than at the whim of the state.”²¹ “Many commentators believe that the modern business corporation is such a powerful, pervasive entity that it should be viewed as a quasi-governmental body.”²²

New rights enjoyed by today’s corporations arose suddenly out of *Santa Clara County v. Southern Pacific Railroad* and *Pembina Consolidated Mining & Milling Co. v. Pennsylvania*.²³ The Court in *Santa Clara County* casually declared, “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”²⁴ This simple statement that lacked further justification or analysis gave birth to the legal fiction that a corporation is a “person” who is entitled to constitutional rights and protection.²⁵ Additionally, decisions that stem from the *Santa Clara County* holding also lack a definitive explanation for why a corporation is a “person” entitled to Fourteenth Amendment protection.²⁶

However, the first legally recognized corporate constitutional rights did not originate from the First Amendment, but rather the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.²⁷ Interestingly, the Court in *Pembina Consolidated Mining & Milling Co.* declined to acknowledge a corporation as a “citizen” entitled to Privileges and Immunities Clause protection under the Fourteenth Amendment.²⁸

The Court also extended the constitutional protection of the Fourth Amendment to corporations.²⁹ In *Hale v. Henkel*, the Court held that corporations should be protected from unreasonable search and seizure under

invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”)

19. Krannich, *supra* note 8, at 61; Spadaccini, *supra* note 5 (“The sole proprietorship is not a legal entity. It simply refers to a natural person who owns the business and is personally responsible for its debts A partnership is a business form created automatically when two or more persons engage in a business enterprise for profit.”).
20. Krannich, *supra* note 8, at 64.
21. *Id.*
22. *Id.* at 65.
23. Bravin, *supra* note 18.
24. *Id.*; see *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 394 (1886).
25. Bravin, *supra* note 18.
26. Krannich, *supra* note 8, at 95.
27. *Id.* at 94.
28. *Pembina Consol. Mining and Milling v. Pennsylvania*, 125 U.S. 181, 187 (1888).
29. Krannich, *supra* note 8, at 96–97.

the Fourth Amendment.³⁰ However, in *Hale*, the Court also decided that corporations did not have a right of protection against self-incrimination under the Fifth Amendment.³¹ The extent of corporate rights under the Fifth Amendment are muddled by the fact that the Court has consistently held that corporations are entitled to Fifth Amendment double jeopardy protection, but corporations are not granted self-incrimination protection.³² Despite the fact that the use of the term “persons” appears in the same context in both clauses, the Court has not explained why a corporation is a “person” for purposes of double jeopardy, but not for purposes of self-incrimination.³³ Again, the discrepancy regarding Fifth Amendment protection demonstrates that the corporate “person” is not entitled to all constitutional rights that a natural United States citizen possesses.³⁴

Recently, the Court has also extended First Amendment protection to corporations.³⁵ In *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, the Court held that commercial speech, which is recognized as a general form of communication, is protected by the First Amendment.³⁶ Since the decision in *Virginia State Board of Pharmacy*, the Court has limited the scope of constitutional protection for corporate speech.³⁷ The fear of the Court is that protecting the free speech of powerful corporations may “dilute the marketplace of ideas.”³⁸ This fear is particularly relevant in the political arena.³⁹ In *Federal Election Commission v. Massachusetts Citizens for Life*, the Court struck down a federal law prohibiting for-profit and non-profit corporate spending linked to federal elections.⁴⁰ However, the Court noted that the law might have been constitutional if designed to combat the “corrosive influence of concentrated corporate wealth,” but the law was invalid because non-profit corporations did not pose the same threat to political speech.⁴¹ Complete freedom of speech rights have not been granted to corporations because the Court wants to create a balance between freedom of speech, and not allowing powerful corporations to drown out all other points of view.⁴²

30. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

31. *Id.* at 67.

32. Krannich, *supra* note 8, at 96–97.

33. *Id.*

34. *Id.*

35. *Id.* at 98.

36. *Va. State Bd. of Pharm v. Va. Citizen's Consumer Council*, 425 U.S. 748, 770 (1976).

37. Krannich, *supra* note 8, at 98–99.

38. *Id.* at 98.

39. *Id.* at 98–99.

40. *See Fed. Election Com'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–65 (1986).

41. *Id.* at 257.

42. Krannich, *supra* note 8, at 100.

The history of constitutional protection for corporations is dynamic and continuing to evolve.⁴³ Corporations are not entitled to all of the constitutional rights that a natural “person” is entitled to, specifically in the context of the First Amendment.⁴⁴ It remains to be seen if First Amendment religious protection will ever be granted to the corporate “person.” Corporate religious protection would come from the Free Exercise Clause within the First Amendment, which states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁴⁵ It is established law that associations, and not just individuals, have Free Exercise religious rights.⁴⁶ To explain why associations are also protected by the Free Exercise Clause, the Court has stated, “[a]n individual’s freedom . . . to worship . . . 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.”⁴⁷ For this reason, the Tenth Circuit extended Free Exercise rights to associations in *Hobby Lobby Stores, Inc.*, and, more specifically, to corporations.⁴⁸

B. Explanation of the Religious Freedom Restoration Act

The RFRA was enacted to bolster the commitment that the Framers of the Constitution had to the free exercise of religion.⁴⁹ Religion is an “unalienable right” that is guaranteed to all people and should be free from government interference.⁵⁰ The RFRA recognizes the fact that religious laws that are either intentionally suppressive, or neutral, may impede on the free exercise of religion.⁵¹ The Court’s ruling in *Employment Division Department of Human Resources of Oregon v. Smith* is an example of a

43. *See generally id.*

44. *Id.* at 95–100.

45. U.S. CONST. amend. I (“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.”).

46. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1133.

47. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

48. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1133. (“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.”).

49. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012).

50. *Id.* Congress found 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.

Id.

51. *Id.*

neutral law hindering the free exercise of religion.⁵² In that case, petitioners sought review of an employment law ruling that classified the petitioners' religious use of peyote as "misconduct."⁵³ The penalty for such "misconduct" disqualified the petitioners from receiving Oregon unemployment compensation benefits.⁵⁴ The Court held that sacramental peyote use violated state drug laws, so prohibiting the use of the peyote was not in conflict with the First Amendment Free Exercise Clause.⁵⁵ Oregon was permitted to regulate ceremonial peyote use and deny petitioners their unemployment benefits based on the "misconduct" of testing positive for peyote.⁵⁶ The ruling in *Smith* allowed for neutral state laws to interfere with the free exercise of religion, which prompted Congress to enact the RFRA.⁵⁷ "[G]overnments should not substantially burden religious exercise without compelling justification."⁵⁸ The RFRA provides an additional cause of action or affirmative defense, besides the First Amendment, for individuals who have had their religious rights substantially burdened by a state or federal law.⁵⁹

C. ACA Contraception Mandate Litigation

Hobby Lobby Stores, Inc. and *Burwell* are paramount cases when analyzing the balance of corporate religious rights within the context of the ACA Contraception Mandate.⁶⁰ There were other ACA Contraception Mandate cases before the Court, but the facts and arguments of *Hobby Lobby Stores, Inc.* encompass these other cases.⁶¹ The basic argument was that religious for-profit companies felt that they should not have to provide for employee insurance under the ACA Contraception Mandate because it was a violation of their religious freedom.⁶²

The plaintiffs in *Hobby Lobby Stores, Inc.* were David and Barbra Green, who, along with their three children, are the owners and operators of

52. See generally *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

53. *Id.* at 874.

54. *Id.*

55. *Id.* at 890.

56. *Id.*

57. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012).

58. *Id.* § 2000bb(a)(3) ("[T]he 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.").

59. *Id.* § 2000bb(a)(2).

60. See generally *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013), *aff'd*, 134 S. Ct. 2751 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

61. See generally *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Serv.*, 724 F.3d 377 (3d Cir. 2013).

62. Marty Lederman, *Symposium: How to Understand Hobby Lobby*, SCOTUSBLOG (Feb. 23, 2014, 7:20 PM), <http://www.scotusblog.com/2014/02/symposium-how-to-understand-hobby-lobby/>.

Hobby Lobby Stores, Inc. and Mardel, Inc.⁶³ The Green family founded Hobby Lobby, which is an arts and crafts chain.⁶⁴ Hobby Lobby is an S-corporation⁶⁵ and is comprised of over five hundred stores and approximately thirteen thousand full-time employees.⁶⁶ The Greens also founded Mardel, an affiliated chain of thirty-five Christian bookstores with approximately four hundred full-time employees.⁶⁷ Both companies are family run on a for-profit basis.⁶⁸ Furthermore, the Greens make business decisions for both Hobby Lobby and Mardel with religious faith as an important consideration.⁶⁹

Hobby Lobby is organized within a religious framework.⁷⁰ Hobby Lobby's statement of purpose proclaims that one of the company's objectives is to maintain a commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."⁷¹ Mardel shares a similar commitment to religious principles in its own business statement of purpose.⁷² Examples of corporate decisions based on faith include closing Hobby Lobby and Mardel stores on Sundays and not allowing business activities that advertise alcohol.⁷³

Additionally, the Greens finance the operation of Hobby Lobby and Mardel through the use of a management trust, which mandates that trust funds for business activities be used in a way that promotes the corporations' commitment to faith.⁷⁴ One such religious ideal that Hobby Lobby and Mardel seek to promote is the belief that human life begins when sperm

63. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

64. *Id.*

65. *S Corporations*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/S-Corporations> (last updated Jan. 15, 2015)

S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income at the entity level.

Id.

66. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* ("Similarly, Mardel, 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.'").

73. *Id.* ("Hobby Lobby buys hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'").

74. *Id.* ("The trustees must sign 'a Trust Commitment,' which among other things requires them to affirm the Green family statement of faith and to 'regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer.'").

fertilizes an egg and that it is immoral to cause the death of a human embryo.⁷⁵

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

The Tenth Circuit underwent a highly subjective analysis of the business structure and company philosophy of Hobby Lobby and Mardel to determine that the plaintiffs' businesses had legitimate religious convictions that could potentially be violated.⁷⁶ The court acknowledged that not every company would qualify as a religious company in order to bring a claim against the ACA Contraception Mandate.⁷⁷ The following analysis was done by the Tenth Circuit in the context that the plaintiff was a religious business.⁷⁸

In order to maintain their corporate religious convictions, the plaintiffs sought relief from required employer compliance with sections of the ACA that obligated companies to provide insurance that pays for "preventive care and screenings" for women.⁷⁹ The ACA does not specifically state what "preventive care and screening" healthcare services women are entitled to under the ACA.⁸⁰ However, the Health Resources and Services Administration (HRSA), which is a Health and Human Services Agency (HHS) authorized by the ACA to promulgate regulations, has declared that contraception for women is within the intended scope of "preventive care and screenings."⁸¹ To comply with the ACA, employers must provide insurance that pays for contraception methods approved by the Food and Drug Administration.⁸² The approved contraception methods include intrauterine

75. *Id.*

76. *Id.*

77. *Id.* at 1120.

78. *Id.* at 1128.

79. *Id.* at 1122 (quoting 42 U.S.C. § 300gg-13(a)(4)).

80. *Id.* at 1123 (quoting 42 U.S.C. § 300gg-13(a)(4)).

81. *Id.*; see also The Public Health and Welfare Act, 42 U.S.C. § 300gg-13(a)(4) (2012) ("[W]ith respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

82. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1123; Group Health Plans and Health Issuers Relating to Coverage of Preventative Services, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147). The regulation provides,

These preventive health services include, with respect to women, preventive care and screening provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) that were issued on August 1, 2011 (HRSA Guidelines). As relevant here, the HRSA Guidelines require coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraception methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'

Id.

devices and emergency contraception that is referred to as Plan B and Ella.⁸³ These methods prevent pregnancy by interfering with the implantation of a fertilized egg.⁸⁴ The plaintiffs asserted that funding any activity that interferes with a fertilized egg is a violation of their corporate religious beliefs.⁸⁵ HRSA has allowed exemptions for certain employers, mostly religious non-profit organizations, from the requirement that they must provide insurance that pays for contraception.⁸⁶ However, the plaintiffs were not covered by any HRSA regulations that would exempt them from the ACA Contraception Mandate.⁸⁷

The plaintiffs' cause of action arose under the Free Exercise Clause of the First Amendment and the RFRA.⁸⁸ "A plaintiff makes a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise."⁸⁹ If this is accomplished, the burden of proof shifts to the government to show that a "compelling" government interest is accomplished through the application of the scrutinized law to the individual "person."⁹⁰ The RFRA states that the "Government shall not substantially burden a *person's* exercise of religion."⁹¹

The Tenth Circuit held that, for the purposes of the RFRA, the plaintiffs' corporations were defined as "persons."⁹² The court looked to the text of the RFRA to support its decision.⁹³ While the text of the RFRA does not define "person," the Dictionary Act does offer a definition of "person."⁹⁴ The Dictionary Act states "[T]he meaning of any Act of Congress, unless the context indicates otherwise . . . 'person' . . . include[s] 'corporations', companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."⁹⁵ The Court has also agreed with this interpretation of the word "person" in the context of the RFRA.⁹⁶ However, the Tenth Circuit felt that there was a possibility that the Dictionary Act did not address the distinction between for-profit and non-profit corporations.⁹⁷ To ensure that the RFRA applies to for-profit corporations, such as the

83. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1123.

84. *Id.*

85. *Id.* at 1125.

86. *Id.* at 1123–24.

87. *Id.* at 1124.

88. *Id.* at 1125.

89. *Id.* at 1125–26.

90. *Id.* at 1126.

91. *Id.* at 1128 (emphasis added).

92. *Id.*

93. *Id.* at 1128–29.

94. *Id.* at 1129.

95. *Id.* (emphasis added).

96. *Id.*

97. *Id.*

plaintiffs, the court turned to existing corporate statutes to assist in their construction of “person.”⁹⁸

The court looked at other corporate statutes because, if the “context” offers a different construction of “person” than the Dictionary Act, then the context definition of “person” would be applied.⁹⁹ Statutes that are in “context” contain exemptions for religious employers, which include Title VII, the Americans with Disabilities Act, and the National Labor Relations Act.¹⁰⁰ The court reasoned that the text of these statutes did not provide support for the exclusion of a for-profit corporation from the RFRA, but instead showed that Congress knew how to draft a corporate religious exclusion.¹⁰¹ The court reasoned that Congress intentionally chose not to include a corporate religious exclusion into the RFRA.¹⁰² For example, in Title VII, “the prohibition on discrimination on the basis of religion does not apply to an employer that is ‘a religious corporation, association, educational institution, or society.’”¹⁰³ The court concluded that in this “context,” if a corporate religious exclusion for a for-profit company was not present, then it did not apply.¹⁰⁴ The court also evaluated case law that did not exclude for-profit companies from the scope of the definition of “person” in the RFRA.¹⁰⁵ The court concluded that there was no persuasive authority that indicated that Congress meant “person” in the RFRA to have a different definition than the default definition found in the Dictionary Act, which includes all corporations within the scope of the meaning of “person.”¹⁰⁶

Once the court determined that a “person” under the RFRA could be a for-profit corporation, it still had to decide if the ACA Contraception Mandate constituted a substantial burden upon the corporation because of its religious convictions.¹⁰⁷ The court examined whether a substantial burden was present by weighing three factors, which are if the government legal obligation “(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 . . . to engage in conduct contrary to a sincerely held religious belief.’”¹⁰⁸

98. *Id.* at 1130.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1131–32.

106. *Id.* at 1132.

107. *Id.* at 1137.

108. *Id.* at 1138; *see generally* Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) (applying the RFRA balancing test when Madyun Abdulhaseeb, a Muslim prisoner, raised a religious objection to the lack of halal dietary options available in his prison).

The court first identified the religious beliefs of the plaintiffs.¹⁰⁹ The plaintiffs argued that under the ACA Contraception Mandate they must provide insurance coverage that provides for contraception that interferes with a fertilized egg, which is against their religious beliefs.¹¹⁰ Second, the court determined if this corporate belief was sincere. In this case, a subjective analysis of the plaintiffs' corporations convinced the court that the belief was sincere.¹¹¹ Third, the court determined if the burden placed on the plaintiff by the government was substantial.¹¹² The court reasoned that the non-compliance fines that the plaintiffs would be subjected to if they did not provide the contraception insurance to their employees would constitute a substantial burden.¹¹³ The court held that there was a substantial burden upon the plaintiffs because of the ACA Contraception Mandate.¹¹⁴

The final issue the court addressed was whether the government had a compelling interest that was exercised in the least restrictive manner possible.¹¹⁵ The government interests asserted by the ACA Contraception Mandate are public health and gender equality.¹¹⁶ The court reasoned that the interests were not compelling for two reasons.¹¹⁷ The first reason was that the interests were too broad.¹¹⁸ Second, the interests were not compelling because the contraception insurance requirement did not apply to the population as a whole, so portraying the ACA Contraception Mandate as widespread societal aid was not convincing to the court.¹¹⁹ Even if the

109. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1140 (“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.’”).

110. *Id.* (“The government does not dispute the corporations’ sincerity, and we see no reason to question it either.”).

111. *Id.*

112. *Id.* at 1140–41.

113. *Id.* (“Here, it is difficult to characterize the pressure as anything but substantial. To the extent Hobby Lobby and Mardel provide a health plan, they would be fined \$100 per employee, per day . . . With over 13,000 employees, that comes to more than \$1.3 million per day, or close to \$475 million per year. And if Hobby Lobby and Mardel 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 also* Internal Revenue Code, 26 U.S.C. § 4980D(b)(1) (2012) (“The amount of the tax imposed by subsection (a) on any failure shall be \$100 for each day in the noncompliance period with respect to each individual to whom such failure relates.”).

114. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1142.

115. *Id.*

116. *Id.* at 1143.

117. *Id.*

118. *Id.*

119. *Id.* at 1143–44.

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

government had presented compelling interests, these interests were not narrowly tailored in the court's opinion.¹²⁰ There are other contraception methods that the plaintiffs must provide insurance for under the ACA Contraception Mandate that do not involve interference with a fertilized egg.¹²¹ The plaintiffs did not oppose providing insurance for these methods.¹²² Rather, the plaintiffs did not want to provide insurance coverage for the methods that interfere with a fertilized egg.¹²³ The court felt that allowing for this exemption would not frustrate the goal of providing preventative care for women under the ACA.¹²⁴ As it was written, the court felt the ACA Contraception Mandate was too broad.¹²⁵

III. RECENT DEVELOPMENTS

Hobby Lobby Stores, Inc. was granted certiorari by the Supreme Court.¹²⁶ Oral argument before the Court was made in the combined cases of *Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp.* on March 25, 2014.¹²⁷ During oral argument, the Justices voiced concern over the fact that either the healthcare rights of female employees or the religious rights of companies would be oppressed by the decision.¹²⁸ However, Justice Antonin Scalia pointed out that the RFRA does not provide for third party rights, such as those of the female workers.¹²⁹ Justices Elena Kagan and Sonia Sotomayor also pointed out that finding in favor of *Hobby Lobby Stores, Inc.* could create a "slippery slope" that could provide the framework for companies to continually challenge and unravel the entirety of the ACA.¹³⁰ A final important question came from Justice Anthony M. Kennedy, who inquired as to how the Court could avoid the First Amendment issue of

colleges and universities run by religious institutions . . . they would leave unprotected all women who work for exempted business entities.

Id.

120. *Id.* at 1144.

121. *Id.* ("Hobby Lobby and Mardel 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.").

122. *Id.* at 1125.

123. *Id.* at 1143–44.

124. *Id.*

125. *Id.*

126. See generally *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *cert. granted*, 134 S. Ct. 678 (2013), *aff'd*, 134 S. Ct. 2751 (2014).

127. Lyle Denniston, *Argument Recap: One Hearing, Two Dramas*, SCOTUSBLOG (Mar. 25, 2014, 4:50 PM), <http://www.scotusblog.com/2014/03/argument-recap-one-hearing-two-dramas/>.

128. *Id.*

129. *Id.*

130. *Id.*

the ACA Contraception Mandate's impact on the right of a corporation to exercise religion.¹³¹ The Court issued its opinion on June 30, 2014.¹³²

The Court's opinion in *Burwell* has a profound impact on the rights of religious corporations, like Hobby Lobby, and their employees. Following much of the same analysis as the Tenth Circuit, the Court held that the plaintiffs prevailed under their RFRA claim and that the ACA Contraception Mandate was invalid.¹³³ However, to reach this conclusion, the Court did not extend the right of constitutional religious protection to the corporate person under the Free Exercise Clause.¹³⁴ This opinion does not overrule the Tenth Circuit's holding that religious corporations are entitled to constitutional religious protection because the Court likely used the substantive canon of constitutional avoidance to not rule on the issue.¹³⁵ The constitutional avoidance canon provides that "The Court will not pass [rule] upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."¹³⁶ In *Hobby Lobby Stores, Inc.*, there was both a constitutional question, which was whether corporations have protectable First Amendment religious rights, and also the "other ground" of the RFRA upon which to resolve the case.

The Court agreed with the extensive statutory construction done by the Tenth Circuit and concluded that a for-profit corporation is a "person" who may bring a claim for religious discrimination under the RFRA.¹³⁷ However, the Court stated that the applicability of this decision to for-profit corporations is narrow because it only applies to for-profit corporations with "sincere religious beliefs."¹³⁸ Despite providing important means of contraception to female employees, the Court felt the ACA Contraception Mandate imposed a substantial burden upon the religious corporation, because it forced employers to pay for methods of contraception that were contrary to the religious beliefs of the plaintiffs.¹³⁹ Additionally, the Court chose not to preserve the ACA Contraception Mandate on the grounds that it was narrowly tailored towards serving a compelling government interest.¹⁴⁰

131. *Id.*

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

133. *Id.* at 2785.

134. *Id.*

135. *Id.*

136. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 269 (Robert C. Clark et al. eds., 2010).

137. *Burwell*, 134 S. Ct. at 2768–69; *see also* *Hobby Lobby Stores, Inc.*, 723 F.3d at 1132.

138. *Burwell*, 134 S. Ct. at 2775; *see also* *Hobby Lobby Stores, Inc.*, 723 F.3d 1122 (detailed subjective analysis by the Tenth Circuit in *Hobby Lobby Stores, Inc.* shows that a limited number of companies can bring a religious claim against the ACA Contraception Mandate. It seems that the Tenth Circuit was looking for written statements and company practices to determine if there was a legitimate corporate religious interest).

139. *Burwell*, 132 S. Ct. at 2775–79.

140. *Id.* at 2780.

The Court felt that the government has other means of providing the lost benefit to female employees under the ACA Contraception Mandate without burdening their religious employers by violating their religious rights under the RFRA.¹⁴¹ This reasoning shifts the cost of contraception to an undefined third party and forces female employees to seek contraception coverage outside of their employer provided group health plan.¹⁴²

Besides the corporations that may be exempt from the ACA Contraception Mandate under the rules articulated by the Court in *Burwell*, the HSRA may establish exemptions for “religious employers” who do not have to provide the disputed contraception insurance.¹⁴³ Therefore, the scope of the term “religious employers” is in flux, and could eventually encompass more employers than the narrow ruling in *Burwell*. The Dissent of *Burwell* recognized that this trend imposes a substantial burden upon women because “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁴⁴ The invalidation of the ACA Contraception Mandate in *Burwell* overrides significant interests of the corporations’ employees and denies access to contraception coverage otherwise provided by the ACA to women who do not hold their employers’ beliefs.¹⁴⁵

IV. ANALYSIS

The Court’s holding in *Burwell* will likely have a negative downstream impact on female employees. Not only is an important method of contraception now unavailable to female employees of corporations like Hobby Lobby, but the Court has also allowed these corporations to impose their own moral choice upon their employees. The Court’s decision to invalidate the ACA Contraception Mandate, in the context of *Burwell*, is incorrect because this ruling infringes upon the “religious beliefs” of natural person employees under Title VII. The Court’s holding oppresses the Title VII religious rights of the natural person, which arise from constitutional protections, while granting religious protection to corporate persons, who have not been given religious constitutional protection by the Court.

A. Employee Religious Rights Under Title VII

Hobby Lobby Stores, Inc. and *Burwell* bring up an interesting employee rights issue that was not explored in-depth by the Tenth Circuit or the

141. *Id.* at 2780–82.

142. *Id.*

143. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1123-24.

144. *Burwell*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

145. *Id.* at 2790.

Supreme Court but was addressed in oral arguments before the Court.¹⁴⁶ The issue is that religious corporations suppress employees' religious rights when the company decides for the employees that certain forms of contraception are immoral and should not be provided in a group health plan. The Tenth Circuit stated, "Finally, we note a concern raised both at oral argument and in the government's briefing that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs."¹⁴⁷ This is an issue that has widespread relevance in ACA cases where the employer opposes a mandate under the ACA or when a company is granted an exemption by the HSRA. The burden of cost is then shifted to the employees, who have had their own rights oppressed. This issue will be explored in the context of Title VII.

Title VII is a paramount statute that must be considered when evaluating possible oppression of employee rights.¹⁴⁸ The overall purpose of Title VII is to forbid an employer from discriminating against an employee on the basis of race, color, religion, national origin, or sex.¹⁴⁹ Title VII also requires that employers reasonably accommodate employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.¹⁵⁰ The overall theme of Title VII is that employees have certain rights that cannot be denied to them by their employers.¹⁵¹

The exercise of corporate religious rights has the potential to deny employee rights under Title VII. Enforcement of employee rights falls to the Equal Employment Opportunity Commission (EEOC), which is the agency that is delegated authority to enforce Title VII against non-compliant employers.¹⁵² EEOC Guidance materials indicate that Title VII's prohibition against disparate treatment of employees based on religion is broad and can be applied to a variety of circumstances.¹⁵³ EEOC Regulations also set a broad scope for what may constitute a religious belief, practice, or observance.¹⁵⁴ This broad scope is consistently applied in EEOC Regulation violation suits by courts that need to determine if a religious interest is at

146. Denniston, *supra* note 127.

147. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1144–45 ("Accommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere.").

148. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1-17) (2012).

149. *Title VII of the Civil Rights Act of 1964*, EEOC (2014), <http://www.eeoc.gov>.

150. *Id.*

151. *Id.*

152. 42 U.S.C. § 2000e-5 ("Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].").

153. See *Title VII of the Civil Rights Act of 1964*, *supra* note 149.

154. Guidelines and Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2001).

stake.¹⁵⁵ EEOC Regulations state, “[i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs”¹⁵⁶ Title VII protects the religious beliefs, or lack thereof, of employees when employers are exercising control over their employees.¹⁵⁷

This is relevant to the *Hobby Lobby Stores, Inc.* and *Burwell* litigation because the plaintiffs sought to deny employees their right to contraception coverage under the ADA.¹⁵⁸ While wanting contraception healthcare is obviously not a traditional “religious belief,” it is likely that the scope of Title VII is broad enough to cover this encroachment upon employee rights.¹⁵⁹ If an employee decides that birth control is a preventative measure that the woman would like to take, this entails a moral decision by the woman.¹⁶⁰ As stated in the EEOC Regulations, moral beliefs are protected from employer infringement under Title VII.¹⁶¹ In *Hobby Lobby Stores, Inc.* and *Burwell*, the employer decided that providing contraception coverage for employees was morally wrong, even though some female employees do not have a moral objection to the contraception.¹⁶² This is a violation of Title VII because an employer has denied employees a right that is entitled to employees under the ACA because of corporate religious beliefs.¹⁶³ Specifically, Title VII Prohibited Practices outlines several benefits that cannot be denied by employers on the basis of religion.¹⁶⁴ Among the benefits that cannot be denied are insurance benefits.¹⁶⁵ The plaintiffs in *Hobby Lobby Stores, Inc.* and *Burwell* showed no regard for the contrary moral or religious beliefs of their employees.

155. *Id.*

156. *Id.*; see also *United States v. Seeger*, 380 U.S. 163, 185–86 (1965).

[T]he statutory definition excepts those registrants whose beliefs are based on a ‘merely personal moral code’ We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words ‘merely personal’ seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant’s belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a ‘merely personal’ moral code.

Id. See generally *Welsh v. United States*, 398 U.S. 333 (1970).

157. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1-17) (2012).

158. See generally *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013), *aff’d*, 134 S. Ct. 2751 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

159. 42 U.S.C. § 2000e (1-17).

160. *Id.*

161. 29 C.F.R. § 1605.1.

162. See *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122; *Burwell*, 134 S. Ct. at 2755.

163. 42 U.S.C. § 2000e (1-17).

164. *Id.*

165. *Id.*

B. Title VII Case Law Supports an Employee's Claim in the Context of *Hobby Lobby Stores*

The issue of whether an employer needs to provide insurance for contraception is not a new issue and has been litigated in the past. In *Willett v. Emory and Henry College*, the court evaluated whether an employee could recover under Title VII if the employee was discriminatorily denied benefits under the employer's group health plan.¹⁶⁶ Pursuant to the terms of the female employee's employment contract with her employer, "the plaintiff was eligible to participate in a group health insurance plan, which provided dependent benefits to the spouses and children of employees."¹⁶⁷ The policy included benefit payments for surgical treatment for pregnancy and related disabilities.¹⁶⁸ The plaintiff enrolled in the group health plan and was denied coverage after a surgery that required pregnancy insurance benefits.¹⁶⁹ The court found the benefits had not been denied to the employee based on her pregnancy and gender, but rather because the plaintiff was not in full compliance with the terms of the group health plan.¹⁷⁰ For this reason, the court held that the plaintiff was not entitled to Title VII relief.¹⁷¹ The opinion seems to indicate that the case may have been more favorable to the plaintiff under Title VII if the plaintiff had been in compliance with her health plan, similar to employees in *Hobby Lobby Stores, Inc.*, and the benefits were still denied.¹⁷²

A similar issue was considered under Title VII in *EEOC v. United Parcel Service, Inc.*, the plaintiff was a United Parcel Service (UPS) employee.¹⁷³ He was denied coverage for his wife's prescription for an oral contraception.¹⁷⁴ The plaintiff's wife was prescribed the oral contraception to treat an incapacitating female hormonal disorder.¹⁷⁵ The health plan benefits of UPS excluded coverage of oral contraception for all purposes, including treatment of female hormonal disorders.¹⁷⁶

As a result, the EEOC brought suit and alleged that UPS engaged in unlawful employment practices in violation of Title VII by providing a health

166. See *Willett v. Emory & Henry Coll.*, 427 F. Supp. 631, 633 (W.D. Vir. 1977).

167. *Id.* at 632 ("The applicable provision is set forth below: Pregnancy Expense Benefits . . . are available to you if you are a female Employee, or to your wife if you are a male Employee, and if you are insured with respect to your Dependents.").

168. *Id.*

169. *Id.*

170. *Id.* at 636.

171. *Id.*

172. *Id.*

173. *EEOC v. United Parcel Serv., Inc.*, 141 F. Supp. 2d 1216, 1217 (D. Minn. 2001).

174. *Id.*

175. *Id.*

176. *Id.*

benefit plan that discriminated against its employees because of their sex.¹⁷⁷ According to the EEOC, UPS discriminated against female employees by refusing to provide them with coverage for hormonal treatment while male employees were eligible to receive coverage for hormonal treatment.¹⁷⁸ Additionally, the EEOC argued that UPS discriminated against male employees because UPS failed to provide the spouses of male employees with the same coverage that it provided to spouses of female employees who were entitled to the hormonal coverage.¹⁷⁹ UPS asserted that the exclusion was gender neutral, because neither female employees nor spouses of male employees were covered for oral contraception.¹⁸⁰ The EEOC also argued that UPS's exclusion of coverage for prescription contraception had a disparate impact on females because of their sex.¹⁸¹ The court held that Title VII prohibits employers from engaging in employment practices that are facially neutral but are discriminatory in operation.¹⁸² The court determined that even if UPS's plan was unlawful, it had a disparate impact on women because only women could benefit from the treatment.¹⁸³ The court considered UPS's argument that its benefits coverage negated the claim because both female employees and spouses of male employees were not covered under the insurance exclusion of oral contraception.¹⁸⁴ The court considered the argument that because only females can be prescribed the oral contraception, the facially neutral exclusion was harsher on female employees.¹⁸⁵ The court held that the EEOC sufficiently pled a disparate impact claim based on the above arguments and allegations.¹⁸⁶

The court addressed a similar issue in *In re Union Pacific Railroad Employment Practices*. The defendant, Union Pacific, provided healthcare benefits to its employees who were covered by collective bargaining agreements.¹⁸⁷ The plans excluded all types of both male and female contraception methods when the contraception was used for the sole purpose of contraception.¹⁸⁸ Union Pacific only covered contraception when medically necessary for a non-contraception purpose, such as regulating

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1219–20 (“To establish a prima facie case of disparate impact, a plaintiff must show that an employer uses ‘employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another without justification.’”).

183. *Id.* at 1220.

184. *Id.*

185. *Id.*

186. *Id.*

187. *In re Union Pac. R.R. Emp't Practices*, 479 F.3d 936, 938 (8th Cir. 2007).

188. *Id.*

menstrual cycles.¹⁸⁹ The plaintiff female employees brought suit against Union Pacific alleging that the defendants discriminated against its female employees by not providing coverage of prescription contraception in violation of Title VII.¹⁹⁰ Union Pacific argued that a requirement to cover prescription contraception would have a large financial impact; that the denial of all contraception results in equal treatment of men and women; that contraception deals with fertility and is not a medical condition “related to” pregnancy; that Union Pacific’s covered benefits are treatment-related, not preventive; and that there was no medical need for contraception regarding fertility because pregnancy is a normal human condition.¹⁹¹ The court compared the scope of the applicable health benefit to men and women in the context of denying contraception coverage.¹⁹² The court held that there was no violation of Title VII because both men and women were denied contraception.¹⁹³ In the court’s Title VII analysis, the question of disparate costs to men and women during pregnancy was not addressed.¹⁹⁴ The common theme of the above Title VII cases is that when a company denies specific treatment insurance coverage to a particular class of employees, such as females, a valid Title VII claim may arise.

C. Employee Recourse Under Title VII

Overall, the Title VII caselaw shows that a legitimate claim can be made against an employer when contraception is denied to the employees as part of a health insurance benefits plan. It seems likely that invalidating the ACA Contraception Mandate could constitute a Title VII violation. Title VII was enacted to protect the rights of the individual employee in the face of various forms of discrimination. The denial of contraception coverage is an infringement upon an employee’s protected Title VII religious belief. Since EEOC Regulations set a broad scope for what a “religious belief” actually means in a practical sense, it is likely that choosing to use contraception constitutes a moral decision. EEOC caselaw has held that the employee may regard a religious right as any moral choice. Lack of religious conviction also constitutes a “religious belief.” Therefore, the choice to take contraception comes down to a moral choice. The woman can either decide that it is not a conflict with her personal religious beliefs to use contraception; the woman could believe in a religion that is not at odds with contraception in the first place; or the woman could actively not believe in religion at all,

189. *Id.*

190. *Id.*

191. *Id.* at 939.

192. *Id.* at 944–45.

193. *Id.*

194. *See generally id.*

which would make any religious conflict regarding contraception moot. Regardless, using contraception involves a moral choice of some kind. This is not unlike using any other sort of medicine. For example, some groups of people believe that manmade medicine should not be used.¹⁹⁵ This is a religious or moral choice. A person who chooses to use medicine is making a decision not to comply with the beliefs of the non-medicine using group. The belief still prompted the person to act in a certain way, which constitutes a moral choice. The Court's holding in *Burwell* infringes upon the Title VII religious rights of the natural person, which arise from established First Amendment religious protection, in order to protect the religious rights of a corporation. This is an incorrect application of law because the Court has never held that a corporation has constitutional religious rights. As it stands now, the Court is left with a conflict between the laws of Title VII and the RFRA.

Invalidating the ACA Contraception Mandate also imposes a disparate negative impact on female employees. Only women will be denied the benefit of emergency contraception that their fellow female employees at different corporations will be entitled to under the ACA Contraception Mandate. Invalidating the ACA Contraception Mandate places a burden upon the natural person, as opposed to the abstract corporate person.

In *Hobby Lobby Stores, Inc.* and *Burwell* the plaintiffs interfered with employees' statutory right to contraception healthcare insurance. The RFRA acknowledges that this kind of litigation usually has the end result of shifting the burden from one group to another. The problem is never totally resolved. Here, the burden is shifted to the employees, but it seems likely that Title VII provides the employees with a possible recourse to recover their lost and oppressed rights.

V. RESOLUTION AND POSSIBLE SOLUTION TO THE ISSUE

The *Hobby Lobby Stores, Inc.* and *Burwell* cases present a conflict between the religious rights of the corporation and the employment rights of natural persons. The most direct way to resolve this issue is for the Court to rule that corporations have religious rights that are protected under the Free Exercise Clause of the First Amendment. This ruling would provide a legitimate basis for oppressing the Title VII rights of natural persons. Both employees and employers would then know the full scope of their rights under the ACA Contraception Mandate because both parties would have religious rights protected under the Free Exercise Clause. The current

195. *Cultural Perspectives on Vaccination*, HISTORY VACCINES (Jan. 16, 2014), <http://www.historyofvaccines.org/content/articles/cultural-perspectives-vaccination>.

religious rights of a corporation, assuming it is deemed a religious corporation by a court, are merely statutory.

Now that the ACA Contraception Mandate has been invalidated by the Court, it is imperative that employers who are exempt from providing contraception disclose to current and prospective employees that the burden of providing for contraception falls to the employees. Employees will then be able to make an informed decision as to whether the lack of ACA Contraception Coverage changes their decision to work for the particular company.

One possible solution that may protect the rights of all parties is the creation of a trust designed to provide for the contraception coverage indirectly.¹⁹⁶ The corporations in *Hobby Lobby Stores, Inc.* and *Burwell* are genuinely concerned with preserving their religious beliefs because they are not challenging all of the contraception methods, only the ones that interfere with a fertilized egg. The solution must have the overall goal of preserving the religious freedom of the corporation and the employment and moral rights of the individual. To do this, the HRSA can create a federal ACA trust to administer the contraception benefits, instead of the company directly. Companies that want to be exempt from the ACA Contraception Mandate acknowledge that they want to be exempt for a religious reason. The company then pays the equivalent amount of money that they would have paid the employee, or an adjusted yearly average, into a trust. Employees then file their ACA Contraception Mandate needs directly with the trust, which pays out the coverage. The remainder of the funds are distributed back to the companies who paid into the trust, or used to support charities specified by the paying corporate directors. With this model, the employees get the needed contraception under the ACA Contraception Mandate through the trust, and the companies do not directly pay for contraception to which they are religiously opposed.

VI. CONCLUSION

The *Hobby Lobby Stores, Inc.* and *Burwell* cases present a conflict between the religious rights of the corporate person and the employment and religious rights of natural persons. The Court likely did not resolve the ACA Contraception Mandate issue by declaring that corporations have First Amendment religious rights because of the constitutional avoidance substantive canon. *Burwell* was decided under the RFRA. The Court ruled that the ACA Contraception Mandate substantially burdened a corporate person's exercise of religion in a manner that is not the least restrictive means

196. *Burwell*, 134 S. Ct. at 2782 (ACA regulations provide for a similar compromise, but the employee is still excluded from the company's group health plan).

possible. Therefore, the Court allowed a for-profit corporation, such as Hobby Lobby, to deny its employees the insurance coverage for contraception to which the employees are otherwise entitled to under the ACA Contraception Mandate. The *Burwell* decision is incorrect because this ruling infringes upon the “religious beliefs” of natural persons under Title VII. The Court’s holding oppresses the Title VII religious rights of the natural person, which arise from constitutional protections, while granting religious protection to corporate persons, who have not been given religious constitutional protection by the Court. Invalidating the ACA Contraception Mandate shifts the burden of providing for contraception to the employees, which will generate valid Title VII claims against the employer from the burdened employees.