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A First Amendment Objection to the Affordable Care Act's Individual Mandate

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A First Amendment Objection to the Affordable Care Act's Individual Mandate*

> "But, Mr. Clement . . . it would be different . . . if you were up here saying, I represent a class of Christian Scientists, then you might be able to say, look, you know, why are they bothering me?"[1]
>
> - Justice Elena Kagan

INTRODUCTION

Justice Kagan's remark to former Solicitor General Paul Clement on the second day of oral arguments in *National Federation of Independent Business v. Sebelius* (*NFIB*)[2] suggested that regardless of the Supreme Court's final ruling, the Patient Protection and Affordable Care Act[3] (Obamacare)[4] was not immune to further challenges. At the very least, Justice Kagan viewed challenges brought by Christian Scientists as particularly plausible.

Generally, Christian Scientists do not accept medical care: for example, they do not get vaccinations, go to doctors, have surgery, or accept blood transfusions.[5] Because they have taken themselves completely out of the group of individuals using modern medical care, it seems an unnecessary burden to subject them to certain provisions of Obamacare requiring

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1 Transcript of Oral Argument at 70, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf [hereinafter, NFIB Transcript].

2 132 S. Ct. 2566 (2012).

3 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

4 In an effort to maintain clarity in a mass of acronyms, the Patient Protection and Affordable Care Act is referred to as "Obamacare." This is not intended to disparage the PPACA in any way. *See* Peter Baker, *Democrats Embrace Once Pejorative 'Obamacare' Tag*, N.Y. TIMES, Aug. 4, 2012, at A11, *available at* http://nytimes.com/2012/08/04/health/policy/democrats-embrace-once-pejorative-obamacare-tag.html.

5 *See generally infra* notes 148-58 and accompanying text.

private action—either by purchasing health insurance coverage or paying a tax.

At the same time, what if a Christian Scientist is knocked unconscious in a car crash and taken to a hospital?[6] What if a Christian Scientist breaks her arm? What if a Christian Scientist comes down with pneumonia? In each of these scenarios, it is plausible that the Christian Scientist would end up in a hospital and would be given medical treatment. Thus, one might argue they should contribute to the health insurance pool. If there is a chance that a Christian Scientist would receive medical treatment, does the tax imposed by Obamacare infringe on Christian Scientists' right to freely exercise their religion, as guaranteed by the First Amendment?

Freedom of religion has been protected since the beginning of this country. In Virginia in 1779, Patrick Henry proposed a plan to require citizens to pay a general religious assessment, the proceeds of which would be diverted to the religious institution of their choice.[7] James Madison vigorously disagreed with this proposal and worked with Thomas Jefferson to create the Statute of Virginia for Religious Freedom.[8] The Statute provided:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to [his] particular pastor.[9]

The Founding Fathers sought to "build[] a wall of separation between Church & State."[10] In their attempt to preserve this separation between church and state, the Founding Fathers explicitly prevented religion from playing an official role

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[6] Cultural Awareness in Healthcare, *Christian Scientists*, ETHNICITY ONLINE, http://www.ethnicityonline.net/christian_scientists.htm (last visited Oct. 26, 2013) ("Christian Scientists do not believe in medical intervention and are likely to be in hospital only for childbirth, for the setting of broken bones or involuntarily as the result of an accident.").

[7] Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783 (2002), *reprinted in* IDEAS OF THE FIRST AMENDMENT 163 (Vincent Blasi ed., 2d ed. 2012).

[8] *See id.* at 164 (discussing that Madison devoted a year to defeating Henry's proposal).

[9] Thomas Jefferson, THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM (1777), *reprinted in* IDEAS OF THE FIRST AMENDMENT 170 (Vincent Blasi ed., 2d ed. 2012).

[10] Letter from Thomas Jefferson to Nehemiah Dodge, Ephriam Robbins, & Stephen S. Nelson, a Committee of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802) (on file with the Library of Congress) *available at* http://www.loc.gov/loc/lcib/9806/danpre.html.

in the public sphere. In the Constitution, Article VI, ¶ 3 disclaims the use of religious tests as a qualification to hold office and the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11]

The Court's recent majority opinion in *NFIB*, written by Chief Justice Roberts, discussed the extent to which Congress can "compel a man to furnish contributions of money"[12]—that is, the extent of Congress's taxing power. The Chief Justice highlighted that "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, *no more*."[13] However, he cautioned that the "imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."[14] Obamacare imposes a tax on individuals who fail to purchase and maintain health insurance coverage.[15] While attempting to make the tax imposed by Obamacare seem innocuous, Chief Justice Roberts opened the door to a religious objection. For example, because Christian Scientists abstain from using medical care, they frequently do not purchase health insurance. The Chief Justice's simple statement that each individual still has "a lawful choice . . . so long as he is willing to pay a tax levied on that choice"[16] shows that this tax is effectively levied on the Christian Scientists' religious choice not to use modern medical care. Is it constitutional for the federal government to levy a tax based on a choice an individual makes for religious reasons? Christian Scientists have not yet brought a challenge against the relevant provision of Obamacare (the Individual Mandate, as defined *infra* at Part II) but this note argues that one would be unsuccessful. The burden on Christian Scientists is primarily a financial one and the existing exemptions would no doubt satisfy even the most stringent constitutional test that the Supreme Court applies: the burden is the least restrictive and most narrowly tailored means to furthering the compelling governmental interest in nationwide health insurance coverage.

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[11] U.S. CONST. amend. I.

[12] Jefferson, *supra* note 9.

[13] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (emphasis added).

[14] *Id.*

[15] *See* discussion *infra* Part II.C.

[16] *NFIB*, 132 S. Ct. at 2600.

Part I of this note reviews the history of American religious freedom, including a discussion of the First Amendment and the Religious Freedom Restoration Act (RFRA).[17] Part II reviews the relevant provisions of Obamacare: the Employer Mandate, to which many organizations have already objected on religious grounds, and the Individual Mandate, to which Christian Scientists may object. Part III reviews challenges to the Employer Mandate that have already been advanced, with a particular emphasis on judicial proceedings subsequent to the decision in *NFIB*. Part IV predicts Christian Scientists' arguments against the Individual Mandate. Part V predicts the response to religious challenges to Obamacare. Part VI concludes that while the challenges are significant, they are not enough to limit the Individual Mandate or create a new exemption from it.

I. HISTORY OF AMERICAN FREEDOM OF RELIGION

Individual freedom of religion in America was founded in the First Amendment's free exercise and establishment clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[18] The Court has interpreted these two clauses to provide "absolute . . . protection against governmental regulation of religious beliefs" but only "qualified protection against the regulation of religiously motivated conduct."[19]

While the Founding Fathers protected religion in the United States through the First Amendment, Chief Justice Waite pointed out, in the first Supreme Court decision construing the free exercise clause, that: "[t]he word 'religion' is not defined in the Constitution . . . . The precise point of the inquiry is, what is the religious freedom which has been guaranteed."[20] Eighty-four years after Chief Justice Waite questioned which "religious freedom . . . has been guaranteed"[21] by the Constitution, Chief Justice Warren identified the point at which government involvement must cease: "[t]he freedom to hold religious beliefs and opinions is absolute."[22]

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[17] 42 U.S.C. § 2000bb (2011).

[18] U.S. CONST. amend. I.

[19] Emp't Div. v. Smith, 485 U.S. 660, 670 n.13 (1988).

[20] Reynolds v. United States, 98 U.S. 145, 162 (1878).

[21] *Id.*

[22] Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (citations omitted); *see also* Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." (emphasis omitted) (collecting cases)).

Rather than define a religious belief or opinion, the Supreme Court has found that an individual must prove that the belief is sincerely held. The Court articulated this standard in *United States v. Ballard*, in which the leaders of the "I Am" religion were indicted for mail fraud when they solicited mail donations in exchange for cures of various diseases.[23] The Court stated:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.[24]

The Court determined that the jury should not decide the truth of an individual's belief.[25] Rather, the jury can only determine whether the individual sincerely held those beliefs.[26] If the jurors do not find the belief plausible, they are more likely to doubt its sincerity. But because there is no objective gauge for sincerity, this question of fact must remain with the jury.

As the Court addressed religious freedom challenges, it found that while the freedom to believe is absolute, "in the nature of things, the [freedom to act] cannot be."[27] Consequently, free exercise challenges are always brought in the context of an individual action. These actions fall into three main categories: first, a government prohibition of an action or behavior that a person's religion requires (e.g., practicing polygamy);[28] second, a government requirement of an action that a person's religion prohibits (e.g., paying Social Security taxes);[29] and third, a government-imposed burden on a religious observance or a

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[23] *See* United States v. Ballard, 322 U.S. 78, 79-80 (1944).

[24] *Id.* at 86-87.

[25] *Id.*

[26] *Id.*

[27] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[28] *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (holding law criminalizing polygamy was valid even as applied to persons claiming that polygamy was required by their religion, Mormonism, and finding the law did not unconstitutionally infringe on the Mormons' free exercise of religion).

[29] *See generally* United States v. Lee, 455 U.S. 252 (1982) (holding payment of Social Security taxes infringed on Amish persons' right to free exercise of their religion, but government interest in supporting social security system and in uniformity of tax provisions required strict adherence to the limited exceptions Congress provided, and required payment of the social security taxes).

government action that impedes a religious observance (e.g., denying unemployment benefits).[30]

Almost two hundred years after the enactment of the First Amendment, the Court in *Sherbert v. Verner* articulated a standard for challenges brought under the free exercise clause.[31] The standard provided a two-part inquiry. First, the Court considered whether the appellant suffered any burden on the free exercise of her religion because of the government's conduct.[32] Second, the Court examined whether the government furthered a compelling interest through the legislation at issue.[33] With this decision, the Court heightened the standard for infringements to the free exercise of religion from rational basis review to strict scrutiny.

In *Sherbert*, the appellant was fired when she refused to work on Saturdays.[34] As a member of the Seventh-Day Adventist Church, the appellant observed the Sabbath on Saturday. Her state, South Carolina, denied her unemployment benefits and the Court found that as a result, she suffered a substantial burden on the free exercise of her religion, a violation of the first part of the Court's two-part inquiry.[35] The second part of the Court's inquiry was whether South Carolina had "some compelling state interest . . . [that] justifie[d] the substantial infringement of appellant's First Amendment right."[36] The Court found South Carolina's stated objection—that allowing Saturday Sabbath observers to collect unemployment would encourage fraudulent claims on their limited unemployment fund—unconvincing.[37] Furthermore, the Court noted that the vast majority of other states granted unemployment benefits to individuals unable to find suitable work due to their practice of observing the Sabbath on Saturday.[38] The Court found South Carolina did not have a compelling interest in denying the

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[30] *See* Thomas v. Review Board, 450 U.S. 707, 709 (1981) (denying "unemployment compensation benefits to . . . a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments[] constituted a violation of his First Amendment right to free exercise of religion" even though another member of the same religion did not find that job objectionable).

[31] *See generally* Sherbert v. Verner, 374 U.S. 398 (1963).

[32] *Id.* at 403.

[33] *Id.* at 406.

[34] *Id.* at 399.

[35] *Id.* at 403.

[36] *Id.* at 406.

[37] *Id.* at 406-07.

[38] *Id.* at 407 n.7.

appellant unemployment benefits, and that South Carolina violated the free exercise clause.[39]

While the Court purported to use a strict scrutiny standard to evaluate free exercise challenges after *Sherbert*, it generally upheld government actions affecting religion. For example, the Court did not find an infringement of a Jewish man's right of free exercise when the Air Force prohibited him from keeping his head covered in accordance with his religious beliefs.[40] On another occasion, the Court found that adherence to the Fair Labor Standards Act (FLSA) in contravention of certain religious tenets did not violate the First Amendment.[41] In *Tony and Susan Alamo Foundation v. Secretary of Labor*, the petitioner did not pay its employees wages because of the employer's religious belief against pay and the employees' religious objection to accepting payment. Instead, the employer provided employees with "food, clothing, shelter, and other benefits."[42] By requiring compliance with the provisions of the FLSA (and thereby requiring payment of wages), the Court held that the organization's free exercise and establishment rights were not infringed.[43] Additionally, in *Bob Jones University v. United States*, the Court held that a university's free exercise right was not infringed when the government revoked the university's § 501(c)(3) tax-exempt status because the school discriminated in its admissions process based on its "sincerely" held religious belief that interracial relationships are prohibited by the Bible.[44] Generally, the post-*Sherbert* Court found free exercise infringements in only two categories: denial of unemployment benefits to individuals whose religious observances prevented employment[45] and compulsory school attendance laws in opposition to religious beliefs.[46]

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[39] *Id.* at 406-07.

[40] *See generally* Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibiting Air Force member from wearing his yarmulke).

[41] *See generally* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985).

[42] *Id.* at 292.

[43] *Id.* at 306.

[44] 461 U.S. 574, 602-05, n.28 (1983).

[45] *See* Frazee v. Illinois Dept. of Emp't Sec., 489 U.S. 829 (1989); Thomas v. Review Board, 450 U.S. 707 (1981).

[46] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding compulsory school attendance laws, requiring children to attend public school through age sixteen, violated free exercise of the Amish religion because (i) the Amish sincerely believed that school after eighth grade would endanger their salvation, (ii) the Amish sincerely believed secondary education as provided at a secular school failed to provide education in accordance with Amish values, and (iii) the Amish children began vocational training within their community after eighth grade).

This period of reluctance to carve out religious liberties under the free exercise clause culminated in 1990 in *Employment Division v. Smith*.[47] There, the Court articulated a rational-basis test, which placed the burden of proof on the plaintiff and upheld the government's neutral law (denying unemployment benefits on the basis of religiously-motivated illegal drug usage). The Court found that it had only an incidental impact on religious practice and therefore could withstand a free exercise challenge.[48]

Americans—and, more significantly, Congress—were outraged by this decision. In response, Congress passed the Religious Freedom Restoration Act.[49] With RFRA, Congress intended:

> (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
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> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[50]

RFRA explicitly heightened the standard of review for free exercise challenges back to the strict scrutiny standard articulated in *Sherbert* and granted additional protections for the free exercise of religion.

The Court in *City of Boerne v. Flores* found that RFRA was unconstitutional as applied to the states.[51] Justice Kennedy explained that "Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut* . . . that the 'fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.'"[52] The Court explained that while Congressional action under section five of the Fourteenth Amendment may be remedial or preventative in nature, it may not create substantive rights.[53]

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[47] 494 U.S. 872 (1990).

[48] *See id.* While the Court held that the impact on religion was only incidental, that can be disputed.

[49] 42 U.S.C. § 2000bb (2011) (enacted in 1993).

[50] *Id.*

[51] 521 U.S. 507 (1997).

[52] *Id.* at 519 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

[53] *Id.* Experts have explained that "the remedial legislation must be both 'congruent' with the violations and 'proportional' to the injuries sought to be remedied." *See, e.g.*, Calvin R. Massey, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 1179 (3d ed. 2009).

The Court held that RFRA was unconstitutional as applied to state and local governments, because it created a substantive right as applied to the states.[54] RFRA remains applicable to the federal government.[55]

The most recent Supreme Court examination of a free exercise challenge came in 2006 in *Gonzales v. O Centro Espirita Beneficiente Unaio do Vegetal*.[56] In *Gonzales*, the plaintiffs sought a preliminary injunction to prohibit the government from barring their use of a certain hallucinogen in religious ceremonies.[57] The Drug Enforcement Administration had categorized this hallucinogen, *hoasca*, as a Schedule I controlled substance, meaning there is "no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse."[58] The Court applied RFRA and the strict scrutiny standard.[59] First, the Court deferred to the lower court's holding that prohibiting the use of *hoasca* was a substantial burden on the religion.[60] Then, the Court applied the compelling interest test.[61] The Court found that an exemption for this particular religious activity was permissible as well as constitutionally protected: there was no evidence that Congress considered this situation when approving the Schedule I categorization of *hoasca*; Congress had created exemptions within the statute in question; and the existing exemptions were fully functional and did not diminish the force of the statute.[62]

Provided that a free exercise challenge to a federal law is derived from a sincerely held religious belief, the law will be subjected to strict scrutiny under RFRA. Because Obamacare is a federal law and is challenged on the basis of sincerely held

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[54] *Flores*, 521 U.S. at 520, 532-34.

[55] Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal, 546 U.S. 418, 424 n.1 (2006) (applying RFRA and noting the invalidation of RFRA as applied to the states).

[56] *Id.*

[57] *Id.* at 425-26.

[58] U.S. Department of Justice Drug Enforcement Administration Office of Diversion Control, Controlled Substance Schedules, *available at* http://www.deadiversion.usdoj.gov/schedules/index.html#define.

[59] The strict scrutiny standard requires that if a person's exercise of religion is substantially burdened by the government, the government must "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.'" *Gonzales*, 546 U.S. at 424 (alteration in original) (quoting 42 U.S.C. § 2000bb-1(b)).

[60] *Id.* at 426-27.

[61] *Id.* at 432-34.

[62] *Id.* at 432-37.

religious beliefs, objections to the Individual Mandate and the Employer Mandate must be considered under RFRA.

II. OBAMACARE

Obamacare was intended to be a solution to a "broken" health care system.[63] The government expects that by encouraging all Americans to purchase health insurance coverage through or because of Obamacare, the federal deficit will decrease substantially over the next 10 years.[64] The two aspects of Obamacare relevant to this note are the "Employer Mandate" (26 U.S.C. § 4980H) and the "Individual Mandate" (26 U.S.C. § 5000A). Both of these mandates are vulnerable to religiously motivated challenges because both require private action, that a court could find infringes upon religion. In the event an employer or individual actor fails to act in accordance with Obamacare, the federal government will impose a tax against the private actor.

A. The Employer Mandate

The Employer Mandate requires an employer with 50 or more full-time employees to provide "minimum essential" health insurance coverage that is both comprehensive and affordable, or pay a penalty.[65] The penalty is either $2,000 or $3,000 per employee per year and can be imposed pro-rata for even a single month of deficient coverage.[66] Employers must

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[63] First Presidential Candidates' Debate, University of Mississippi, Oxford Mississippi (Sept. 26, 2008), *transcript available at* http://www.cnn.com/2008/POLITICS/09/26/debate.mississippi.transcript/ (then-Senator Barack Obama said, "a health care system that is broken").

[64] *See* Congressional Budget Office Statement of Douglas W. Elmendorf, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*, 3 (Mar. 30, 2011).

[65] 26 U.S.C. § 4980H(c)(2)(A) (2011) (defining an applicable employer as, "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year"); 26 U.S.C. § 4980H(c)(4)(A) (defining a full-time employee as, "with respect to any month, an employee who is employed on average at least 30 hours of service per week"); 26 U.S.C. § 5000A(f) (2011) (defining "minimum essential" health insurance coverage).

[66] § 4980H(a) (imposing an "assessable payment equal to the product of the applicable payment amount and the number of . . . full-time employees" on an employer who fails to provide "minimum essential coverage"); *see* § 4980H(c)(1) (defining "applicable payment amount" as $2000 per employee per year); *see also* § 4980H(c)(2)(D)(i) (stating that "[t]he number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating" the penalty). The slight loophole in the imposition of the penalty is found in § 4980H(a)(2), which states that the penalty will not be imposed unless and until "at least one full-time employee of the applicable large employer has . . . enrolled . . . in a qualified health plan." Theoretically, if none of the employees

"automatically enroll new full-time employees in one of the plans offered" within 90 days.[67]

The required "minimum essential" health insurance coverage incorporates the Preventive Coverage Mandate into the Employer Mandate's requirements to achieve its goal of comprehensive health insurance coverage.[68] The Preventive Coverage Mandate, codified at 42 U.S.C. § 300gg-13, requires that group health insurance providers (which includes employers that offer health insurance coverage) provide certain health care for free.[69] For example, the Preventive Coverage Mandate requires employers to provide coverage for women's health care in accordance with guidelines promulgated by the Health Resources and Services Administration, an agency of the U.S. Department of Health and Human Services.[70] These guidelines not only require coverage for annual doctor visits and mammograms for women of a certain age, but also "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods[] . . . [and] sterilization procedures."[71] The FDA has approved hormonal birth control, the morning-after pill, implantation devices, and sterilization[72]—and now, employers must provide health insurance coverage that makes these options free to all full-time employees.[73] The penalty for failure to provide comprehensive coverage is a tax of $2,000 per full-

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enrolled in health care (that is, they all paid the tax imposed by the Individual Mandate and did not enroll in health care plans of their own), the employer may not be required to pay the penalty imposed by the Employer Mandate.

[67] 29 U.S.C. § 218a (2011); *see also* 42 U.S.C. § 300gg-7 (2011) (prohibiting any waiting period from exceeding ninety days).

[68] 26 U.S.C. § 5000A(f) (2011).

[69] *See* 42 U.S.C. § 300gg-13 (2011) (prohibiting "cost sharing requirements" on certain types of medical care). "Cost sharing requirements" include the insured's annual deductible, annual out-of-pocket expense maximum, lifetime maximum, and coinsurance payments. *See, e.g.*, CATHY A. BAKER, U.S. BUREAU OF LABOR STATISTICS, COST SHARING IN MEDICAL INSURANCE PLANS (Mar. 31, 2004), http://www.bls.gov/opub/mlr/cwc/cost-sharing-in-medical-insurance-plans.pdf. All cost sharing requirements are prohibited under Obamacare for, among other things, contraceptives. *See* 42 U.S.C. § 300gg-13; *infra* note 71 and accompanying text.

[70] 42 U.S.C. § 300gg-13(a)(4).

[71] *Women's Preventative Services: Required Health Plan Coverage Guidelines*, HEALTH RES. & SERV. ADMIN. (last visited Oct. 26, 2013), *available at* http://www.hrsa.gov/womensguidelines/.

[72] *Birth Control: Medicines to Help You*, FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013).

[73] *See Women's Preventative Services: Required Health Plan Coverage Guidelines*, *supra* note 71.

time employee (after subtracting the first 30 employees) per year that can be imposed pro-rata (the coverage tax).[74]

To affect its goal of affordable health insurance coverage, Obamacare provides employees with a Premium Tax Credit if the employer's plan is too expensive.[75] If the available health insurance plan is too expensive, an employee earning between 133% and 400% of the federal poverty level (as of 2013, the poverty level is $11,450 for a single person[76]) may claim the Premium Tax Credit.[77] Health insurance coverage is considered too expensive if the health plan pays less than 60% of the total cost of covered benefits[78] *or* the employee share of the premium (i.e., the payment to the employer) is more than 9.5% of his or her total (gross) income.[79] The Premium Tax Credit is also available to an employee earning between 133% and 400% of the federal poverty level if his or her employer does not offer any health insurance coverage.[80] The employer is taxed $3,000 per year for every employee receiving the Premium Tax Credit, and the tax can be imposed pro-rata (the affordability tax).[81] An employer will not be charged both the coverage tax and the affordability tax. If an employer's health insurance coverage fails both the affordability and the comprehensive requirements, the tax imposed will be the lesser of the two tax penalties.[82]

While "religious employers"[83] are exempt from Obamacare entirely, many other employers oppose offering health insurance coverage that includes contraceptives, and

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[74] 26 U.S.C. § 4980H(a) (2011) (imposing an "assessable payment equal to the product of the applicable payment amount and the number of . . . full-time employees" on an employer who fails to provide "minimum essential coverage"); *see* 26 U.S.C. § 4980H(c)(1) (defining "applicable payment amount" as $2000 per employee per year); *see also* 26 U.S.C. § 4980H(c)(2)(D)(i) ("The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating [the penalty.]").

[75] 26 U.S.C. § 36B(c)(2)(C) (2012).

[76] 78 Fed. Reg. 16 (Jan. 24, 2013) 5115–5252, 5183. For a family of four, the poverty level is $23,550. *Id.*

[77] 26 U.S.C. § 36B(b)(3)(A)(i).

[78] *Id.* § 36B(c)(2)(C)(ii).

[79] *Id.* § 36B(c)(2)(C)(i)(II).

[80] *Id.* § 4980H(a)(2) (imposing a tax on employers that fail to offer health insurance coverage and that have at least one employee receiving the Premium Tax Credit).

[81] *See id.* § 4980H(a)(2) (imposing a tax on employers that fail to offer health insurance coverage and that have at least one employee receiving the Premium Tax Credit); § 4980H(b) (imposing a tax on employers that fail to offer affordable health insurance coverage, thereby having at least one employee receiving the Premium Tax Credit).

[82] *See, e.g.*, THE HENRY J. KAISER FAMILY FOUNDATION, SUMMARY OF THE AFFORDABLE CARE ACT: FOCUS ON HEALTH REFORM 1 (last modified Apr. 23, 2013) http://kaiserfamilyfoundation.files.wordpress.com/2011/04/8061-021.pdf.

[83] As defined by 45 C.F.R. § 147.130(a)(1)(iv)(B), discussed *infra*, Part II.B.

have already brought suit against the Employer Mandate.[84] The Employer Mandate of Obamacare offers non-exempt employers a choice: they can pay a tax of $2,000 per employee per year, or they can pay for health insurance that provides contraceptives at no cost to their employees.[85]

B. Exemptions from the Employer Mandate

There are four exemptions from the Employer Mandate. First, employers with fewer than 50 employees are not subject to the Employer Mandate.[86] Second, conscientious objectors are exempt.[87] Third, many employers may "grandfather" their health insurance coverage plan.[88] A health insurance coverage plan that has not undergone any significant change since 2010—regardless of the amount or type of health care it covers—can be granted grandfather status, thereby exempting the employer from the penalties imposed by the Employer Mandate.[89] A grandfathered plan will lose its status if it "significantly cut[s] benefits or increase[s] out-of-pocket

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[84] *See generally infra* Part III.

[85] The minimum tax for the minimum-size employer that would be affected by the Employer Mandate is $2,000 x (50 – 30) = $40,000 per year. While this seems like a hefty tax, it would be in lieu of providing health insurance for fifty employees, which is estimated to cost between $5,884 (for a single person) and $16,351 (for a family) per employee per year. *See, e.g.*, THE KAISER FAMILY FOUND. AND HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS 2013 ANNUAL SURVEY 12, http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf. To continue estimating lowest costs, $5,884 x 50 employees = $294,200 which is more than seven times larger than the tax imposed by Obamacare. The average employee contribution to employer-provided health insurance coverage is $999 annually for a single person and $4,565 annually for a family. *Id.* at 67. Even considering the employee contribution, the tax imposed by the Employer Mandate is far less than the cost of an employer providing health insurance coverage to all employees.

[86] § 4980H(c)(2). However, many small employers are losing their ability to offer health insurance. *See, e.g.*, National Federation of Independent Business Research Foundation, *PPACA One Year Later: Small Business Owners Expect Costs to Rise*, NAT'L FED'N INDEP. BUS., http://www.nfib.com/research-foundation/surveys/healthcare-year1 (last visited Apr. 29, 2013) ("Since enactment, one in eight (12%) small employers have either had their health insurance plans terminated or been told that their plan would not be available in the future. Plan elimination is the first major consequence of PPACA that small-business owners likely feel.").

[87] *See* 26 U.S.C. § 1402(g)(1) (incorporated into 26 U.S.C. § 5000A(d)(2)(A)(i) by reference).

[88] *See* 42 U.S.C. § 18011 (2011); *see also Glossary: Grandfathered Health Plan*, HEALTHCARE.GOV (last visited Oct. 27, 2013) https://www.healthcare.gov/glossary/grandfathered-health-plan/ (defining grandfathered health plan).

[89] *Id.* (allowing health insurance coverage plans that have not been substantially changed since March 23, 2010 to maintain their coverage without incurring penalties if that coverage would otherwise be considered insufficient under Obamacare); 45 C.F.R. § 147.140(a)(1)(ii) (stating that a group health plan ceases to be a grandfathered plan if it enters into a new policy); *see also infra* note 90.

spending for consumers."[90] A grandfathered health insurance coverage plan must also provide written notice to its subscribers that it has been grandfathered and thus does not provide some of the benefits that Obamacare requires of non-grandfathered plans.[91]

Finally, religious employers are exempted from the Employer Mandate.[92] The Health Resources and Services Administration is empowered by 45 C.F.R. § 147.130(a)(1)(iv)(A) to "establish exemptions from such guidelines [for women's health insurance coverage] with respect to group health plans established or maintained by *religious employers*."[93] A religious employer is defined as an organization that meets all of the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.[94]

Many organizations that are religiously motivated do not qualify as "religious employers" under Obamacare. For example, Catholic charities do not qualify for the exemption because they do not inculcate their religious values as their purpose or primarily serve Catholics. Additionally, Catholic colleges and universities fail to qualify for the religious

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[90] *Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans*, *available at* http://www.proskauer.com/files/uploads/Documents/GrandfatheredFactSheet.pdf (last visited Jan. 23, 2014) (explaining that grandfathered plans will lose their grandfathered status if they make any of the following changes: significantly cut or reduce benefits, raise co-insurance charges, significantly raise co-payment charges, significantly raise deductibles, significantly lower employer contributions, or add or tighten an annual limit on what the insurer pays; also noting that "[a]n employer with a group health plan can switch plan administrators as well as buy insurance from a different insurance company without losing grandfathered status—provided the plan does not make any of the above six changes to its cost or benefits structure."); *see also* 45 C.F.R. § 147.140(g).

[91] 42 U.S.C. § 300gg-15; 45 C.F.R. § 147.140(a).

[92] *See* 45 C.F.R. § 147.130(a)(1)(iv)(A) (empowering the HRSA to "establish exemptions from such guidelines [for women's health insurance coverage] with respect to group health plans established or maintained by *religious employers*" (emphasis added)).

[93] 45 C.F.R. § 147.130(a)(1)(iv)(A) (emphasis added).

[94] *Id.* § 147.130(a)(1)(iv)(B).

employer exemption.[95] Therefore, these employers must comply with the Employer Mandate—by providing contraceptives at no cost to their employees in direct contradiction with their religious beliefs[96]—or pay the tax.

Some news sources erroneously implied that exemptions were freely given out to non-religious employers, while Catholic institutions were denied exemptions and forced to choose between their religious beliefs and a substantial tax.[97] The U.S. Department for Health and Human Services publicized lists showing over 1,200 employers that have been exempted,[98] but noted that the exemptions apply only to the annual limits policy[99] and do not, in fact, alter the type of coverage that must be offered.[100] These "exempted" employers are still required to provide women's health coverage (which includes all contraceptive coverage).

The true exemptions to the Employer Mandate are narrow and it is now too late to qualify for a grandfathered health insurance coverage plan.[101] Thus, many successful family

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[95] *See infra* notes 145-46 and accompanying text.

[96] *See, e.g.*, Verified Complaint at ¶¶ 106-18, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012) (asserting that complying with the Employer Mandate "directly conflicts with [Plaintiffs'] religious beliefs and teachings" because of the requirements related to contraceptives); *Birth Control*, CATHOLIC ANSWERS, http://www.catholic.com/tracts/birth-control (last visited Dec. 24, 2012) ("The Church has always maintained the historic Christian teaching that deliberate acts of contraception are always gravely sinful, which means that it is mortally sinful if done with full knowledge and deliberate consent." (internal citation omitted)).

[97] *See, e.g.*, Tony Ondrusek, *McDonald's Trumps Catholic Church With Exemption From ObamaCare*, INS. & FIN. ADVISOR (Feb. 7, 2012, 3:11 PM), http://ifawebnews.com/2012/02/07/mcdonalds-trumps-catholic-church-with-exemption-from-obamacare/.

[98] Exempted employers include Jack in the Box, Cracker Barrel, Darden Restaurants, O'Reilly Auto Parts, Foot Locker, Western Growers Assurance Trust, REI, and Sargento Foods Inc. *See* Center for Consumer Info. & Ins. Oversight, *Self-Insured Employers: Approved Applications for Waiver of the Annual Limits Requirements*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Jan. 6, 2012), http://www.cms.gov/CCIIO/Resources/Files/Downloads/Employer_01062012.pdf.

[99] Another aspect of Obamacare is a ban on annual limits by 2014, but discussion of this aspect is outside the scope of this note. *See* 42 U.S.C. 300gg-11 ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish . . . annual limits on the dollar value of benefits for any participant or beneficiary."); *supra* note 98.

[100] *See* The Center for Consumer Info. & Ins. Oversight, *Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Jan. 6, 2012), http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html ("In order to protect coverage for workers . . . the law and regulations issued on annual limits allow the Department of Health and Human Services (HHS) to grant temporary waivers from this one provision of the law that phases out annual limits . . . . [T]hese waivers are temporary and after 2014, no waivers of the annual limit provision are allowed.").

[101] *See Glossary: Grandfathered Health Plan*, *supra* note 88.

businesses, charities, and religiously affiliated educational institutions must provide the full array of contraceptive coverage to all employees. However, the federal government recently argued in court that it "would *never* enforce [the Employer Mandate] . . . as regards contraceptive services."[102] The government seems ready and willing to expand the exemption to the Employer Mandate as it pertains to religiously motivated objections to the women's health coverage requirements but has not yet done so.

C. The Individual Mandate

The Individual Mandate of Obamacare is comparatively straightforward. Each person must maintain "minimum essential [health insurance] coverage" for him or herself and all of his or her dependents for each month beginning in 2013.[103] The "minimum essential coverage"—the Preventive Coverage Mandate—discussed above applies to both the Individual Mandate and the Employer Mandate.[104] It requires that an individual's health insurance coverage include many preventive care services (including contraceptives) for free.[105] If a person fails to comply with the Individual Mandate and obtain the required health insurance, he or she is subject to a monetary penalty, similar to the penalty imposed on employers that do not comply with the Employer Mandate.[106] The penalty will be imposed when the individual pays his or her annual taxes.[107] The penalty is a tax of $95 for the year 2014, $325 for the year 2015, and starting in 2016, the tax will not be less than $695 per uninsured individual.[108]

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[102] Wheaton College v. Sebelius, 703 F.3d 551, 552 (D.C. Cir. 2012).

[103] 26 U.S.C. § 5000A(a) (2011).

[104] *See* 42 U.S.C. § 300gg-13(a) (2011).

[105] *See id.*; *see also supra* notes 70-74 and accompanying text (explaining that 42 U.S.C. § 300gg-13(a)(4) provides for the Health Resources and Services Administration to determine what constitutes preventive care and screenings for women, and that the Health Resources and Services Administration has determined various types of contraceptives must be covered).

[106] *See* 26 U.S.C. § 5000A(b)-(c) (2011); *compare id.* § 5000A(b), *with id.* § 4980H(a) (2011).

[107] *See id.* § 5000A(b).

[108] *See id.* § 5000A(c)(3)(B), (D). While the tax imposed by the Employer Mandate is estimated to impose a lesser financial burden than providing health insurance coverage (*see supra* note 85), the math for the Individual Mandate is nowhere near as forgiving.

D. Exemptions from the Individual Mandate

There are a number of exemptions from the Individual Mandate.[109] Like the Employer Mandate, there is a religious exemption from the Individual Mandate.[110] The religious exemption has two aspects: a "religious conscience exemption"[111] and a "health care sharing ministry"[112] exemption. The religious conscience exemption applies only to individuals who are "conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care."[113] Very few individuals qualify for this exemption. It was originally designed to allow self-employed Amish people an exemption from paying Social Security taxes.[114] The exemption for health care sharing ministries applies to nonprofit organizations already exempt from taxation under section 501(a) of the federal tax code.[115]

The remaining exemptions from the individual mandate apply to: (i) individuals not legally present in the United States;[116] (ii) incarcerated individuals;[117] (iii) individuals with income below the filing threshold;[118] (iv) individuals who cannot afford coverage;[119] (v) Native Americans;[120] (vi) individuals with a short coverage gap;[121] and (vii) individuals who have suffered a hardship.[122]

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[109] *Id.* § 5000A(d)–(e).

[110] *Id.* § 5000A(d)(2).

[111] *Id.* § 5000A(d)(2)(A).

[112] *Id.* § 5000A(d)(2)(B). For an explanation of a health care sharing ministry, see ALLIANCE OF HEALTH CARE SHARING MINISTRIES, http://www.healthcaresharing.org/hcsm/ (last visited Nov. 9, 2012) ("A health care sharing ministry (HCSM) provides a health care cost sharing arrangement among persons of similar and sincerely held beliefs. HCSMs are not-for-profit religious organizations acting as a clearinghouse for those who have medical expenses and those who desire to share the burden of those medical expenses.").

[113] 26 U.S.C. § 1402(g)(1) (incorporated into 26 U.S.C. § 5000A(d)(2)(A)(i) by reference).

[114] *See* Peter J. Ferrara, *Social Security and Taxes*, in THE AMISH AND THE STATE 125, 137 (Donald B. Kraybill ed., Johns Hopkins Univ. Press 2d ed. 2003); *see also* United States v. Lee, 455 U.S. 252, 256-57 (1982); Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).

[115] 26 U.S.C. § 5000A(d)(2)(B)(ii)(I).

[116] *Id.* § 5000A(d)(3).

[117] *Id.* § 5000A(d)(4).

[118] *Id.* § 5000A(e)(2).

[119] *Id.* § 5000A(e)(1).

[120] *Id.* § 5000A(e)(3).

[121] *Id.* § 5000A(e)(4).

[122] *Id.* § 5000A(e)(5). Some of these exemptions are self-explanatory. For example, individuals not legally present in the United States do not file with the IRS

Of these remaining exemptions, the more complicated ones address coverage gaps and hardships. If an individual's health insurance coverage lapses "for a continuous period of less than three months," the penalty is not imposed for that calendar year.[123] However, once an individual has a short coverage gap during a single calendar year, the penalty will be imposed for any subsequent coverage lapses.[124] Additionally, if the coverage gap exceeds three months, the penalty will be imposed pro-rata for the offending months in each calendar year.[125] Finally, the hardship exemption enables the Secretary of Health and Human Services to exempt from the penalty an individual who has failed to obtain health insurance coverage "under a qualified health plan" because of a hardship.[126]

None of the exemptions from Obamacare apply to Christian Scientists as a group. Christian Scientists do not qualify for either of the two religious exemptions. First, Christian Scientists do not qualify for the religious conscience exemption because they have no objection to insurance generally—they purchase car insurance just as any other driver does and they accept social security benefits as they age.[127] Second, Christian Scientists are not exempt from taxation under section 501(a) and thus do not qualify for the health care sharing ministry exemption. Furthermore,

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and thus the Individual Mandate tax cannot be imposed on them; incarcerated individuals are not responsible for maintaining health insurance coverage during the months they are incarcerated; and individuals with income below the filing threshold will not be assessed the penalty because their income is so low they do not pay any taxes. *See id.* § 5000A(d)(3)-(4), (e)(2). An individual is considered unable to afford coverage if the individual's required contribution "exceeds 8 percent of such individual's household income for the taxable year." *Id.* § 5000A(e)(1)(A). Any individual who is a member of an Indian tribe is not responsible for maintaining health insurance coverage, either. *Id.* § 5000A(e)(3).

[123] *Id.* § 5000A(e)(4)(A).

[124] *Id.* § 5000A(e)(4)(B)(iii).

[125] *Id.* § 5000A(e)(4)(B)(ii).

[126] *Id.* § 5000A(e)(5).

[127] The updates on the Christian Science Member Resources website suggest their members receive Social Security benefits. *See, e.g.*, *Update: Petition for Rehearing En Banc Filed in Social Security-Medicare Case*, CHRISTIAN SCIENCE (Apr. 24, 2012), http://christianscience.com/member-resources/for-churches/committee-on-publication/federal-legislative-affairs/latest-updates/update-petition-for-rehearing-en-banc-filed-in-social-security-medicare-case; *see also Court rules that those enrolled in Social Security must enroll in Medicare*, CHRISTIAN SCIENCE (Feb. 13, 2012), http://christianscience.com/member-resources/for-churches/committee-on-publication/federal-legislative-affairs/latest-updates/court-rules-that-those-enrolled-in-social-security-must-enroll-in-medicare.
Christian Scientists demonstrably have no objection to insurance generally and do not qualify for the religious conscience exemption (for which Amish people qualify). *See* 26 U.S.C. § 5000A(d)(2)(A).

Christian Scientists do not qualify for any of the remaining exemptions, as those are tailored for individual circumstances.

III. CURRENT CHALLENGES TO OBAMACARE

A divided Supreme Court found the Individual Mandate of Obamacare constitutional in June 2012.[128] At that juncture, the inquiry was whether the Individual Mandate was a valid exercise of congressional power.[129] Chief Justice Roberts, writing for the majority, unexpectedly held that the Individual Mandate of Obamacare was a valid exercise of Congress's taxing power.[130] While the Constitution empowers Congress to tax the American people at large,[131] individuals and groups may have a constitutional basis for an exemption. The Individual Mandate has not been challenged as it applies to any particular subset of American taxpayers. As Justice Kagan's remark[132] suggested, a challenge on the basis of religious freedom could be valid.

Christians advance the primary arguments against the Employer Mandate, expressing a desire to operate businesses and schools in accordance with their faith. Many Christians believe abortion is a sin. Because some of the types of contraception required by Obamacare prevent a fertilized egg from implanting in a woman's uterus, some believe these types of contraception cause abortions.[133] Also, a central tenet of Catholicism is that the use of any contraception is "gravely sinful" because life is created by God, and thus birth control is direct contravention of God's natural law.[134]

The Supreme Court made short order of the first petition challenging the Employer Mandate.[135] Filed on behalf

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[128] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2575, 2594 (2012).

[129] *See id.* at 2593-94.

[130] *Id.*

[131] *See* U.S. CONST. art. I § 8 ("Congress shall have Power To lay and collect Taxes.").

[132] "But, Mr. Clement . . . it would be different . . . if you were up here saying, I represent a class of Christian Scientists. Then you might be able to say, look, you know, why are they bothering me?" *See* NFIB Transcript, *supra* note 1.

[133] *See, e.g.*, Verified Complaint at ¶¶ 109, 111-13, 118, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012) (asserting Plan B, Ella and "certain IUDs can prevent the implantation of a human embryo in the wall of the uterus," which "[p]laintiffs consider . . . to be an abortion" and thus "directly conflicts with their religious beliefs and teachings"); *see also* notes 70-73 and accompanying text (discussing Obamacare's requirement that group health insurance plans cover these types of contraceptives).

[134] *See Birth Control*, *supra* note 96.

[135] *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641 (2012). Hobby Lobby made an application directly to Supreme Court Justice Sotomayor for an injunction pending appellate review, through the procedural device of the All Writs Act, 28 U.S.C. § 1651. *Id.* at 2-4.

of Hobby Lobby Stores, Inc., Mardel, Inc., and their owners, the petition was denied on December 26, 2012.[136] However, the arguments advanced by Hobby Lobby before the Supreme Court are representative of the arguments advanced against the Employer Mandate generally.[137] Hobby Lobby began as a small, family-owned business and is maintained "in a way consistent with their Christian faith."[138] Hobby Lobby's owners believe offering health insurance coverage to Hobby Lobby's employees is a religious obligation[139] but offering all of the contraceptives[140] mandated by the Employer Mandate would violate their religious beliefs.[141] Hobby Lobby alleged the Employer Mandate unconstitutionally infringed many of its rights, including the right to freely exercise its religion as guaranteed by the First Amendment, the right to be free from religious discrimination as guaranteed by the First and Fifth Amendments, and the rights protected by RFRA.[142] The right of free exercise, together with RFRA, prevents the government from unnecessarily burdening an exercise of religion.[143]

Private employers and higher education institutions have filed cases against the Employer Mandate and the Preventive Coverage Mandate challenging its application to these various litigants nationwide.[144] So far, courts have come

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[136] *Id.*

[137] *Compare* Emergency Application for Injunction Pending Appellate Review, Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641 (2012) (No. 12A644), *with* Belmont Abbey College v. Sebelius, 878 F. Supp. 2d 25, 31-32 (D.D.C. 2012).

[138] Emergency Application for Injunction Pending Appellate Review at 5, Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641 (2012) (No. 12A644).

[139] Verified Complaint at ¶ 52, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012).

[140] Hobby Lobby considers Plan B, Ella, and certain IUDs to cause abortions, which "directly conflicts with their religious beliefs and teachings." Verified Complaint at ¶¶ 107-18, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012).

[141] Verified Complaint at ¶ 56, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012). Hobby Lobby does not dispute that its health insurance coverage plan is not eligible for grandfather status. *See* Verified Complaint at ¶ 59, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012).

[142] Verified Complaint at ¶¶ 145-86, Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012).

[143] *See* U.S. CONST. amend. I; 42 U.S.C. § 2000bb (2012); *see also* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); Emp't Div. v. Smith, 494 U.S. 872, 882-84 (1990).

[144] Discussion of these cases individually is beyond the scope of this note. The challenges to the Employer Mandate are supported (financially and otherwise) by The Becket Fund for Religious Liberty. The Becket Fund maintains information on challenges to the Employer Mandate on its website, *42 Cases, over 110 Plaintiffs, One Unconstitutional Mandate, and the Go-To Page for It All*, *HHS Mandate Information Central*, BECKET FUND, http://www.becketfund.org/hhsinformationcentral/ (last visited Dec. 23, 2012).

down on both sides of the objections to the Employer Mandate. Some have ruled to prevent enforcement of Obamacare's new requirements,[145] while others have denied motions for a preliminary injunction against the enforcement of the law, finding the Employer Mandate does not impose a substantial burden on the free exercise of religion.[146] The Supreme Court denied Hobby Lobby's motion for a preliminary injunction because it sought "extraordinary relief," which should only be granted "sparingly," and found that Hobby Lobby's entitlement to relief was not "indisputably clear."[147]

The religious objections to the Employer Mandate are similar to the potential objections by Christian Scientists to the Individual Mandate. Challengers to the Employer Mandate disagree with the requirement to provide and financially support access to a class of drugs that they oppose on religious grounds. The Christian Science objection to the Individual Mandate parallels this reasoning.

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[145] *See, e.g.*, Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) (granting injunction); Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (granting injunction); Korte v. Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting injunction); Monaghan v. Sebelius, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) (granting injunction); Geneva Coll. v. Sebelius, No. 2:12-CV-00207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013) (denying motion to dismiss); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (granting injunction); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012) (granting injunction); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (granting as to two plaintiffs and denying as to one plaintiff injunction); Am. Pulverizer Co. v. U.S. Dept. of Health & Human Services, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (granting injunction); Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order to prevent defendants from enforcing 42 U.S.C. § 300gg-13(a)(4) against plaintiffs).

[146] *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs., No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); Gilardi v. Sebelius, CIV.A. 13-104 EGS, 2013 WL 781150 (D.D.C. Mar. 3, 2013) (denying preliminary injunction); Briscoe v. Sebelius, No. 13-CV-00285-WYD-BNB, 2013 WL 755413 (D. Colo. Feb. 27, 2013); Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012).

[147] Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642-43 (2012). To obtain an injunction pending appeal, the petitioner must show that "it is necessary or appropriate in aid of [the Supreme Court's] jurisdiction and the legal rights at issue are indisputably clear." *Id.* (internal quotation and citation omitted). Justice Sotomayor found that Hobby Lobby did not "satisfy the demanding standard for the extraordinary relief they seek." *Id.* at 643. Hobby Lobby has since won a partial victory before the Tenth Circuit, which led to the lower court granting the preliminary injunction. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013); Hobby Lobby Stores, Inc. v. Sebelius, CIV-12-1000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013); Brianna Bailey, *Hobby Lobby Wins Partial Victory from Appeals Court in Health Care Challenge*, NEWSOK (June 27, 2013, 9:52pm), http://newsok.com/hobby-lobby-wins-partial-victory-from-appeals-court-in-health-care-challenge/article/3856764/?page=1.

IV. CHRISTIAN SCIENTISTS' CHALLENGES TO THE INDIVIDUAL MANDATE

Christian Science is based on the healing power of prayer.[148] Founded by Mary Baker Eddy in 1866, the church has grown to include members in 130 countries.[149] Its members believe in the teachings of Jesus and the King James Bible.[150] "Christian Scientists generally oppose all medical care because they feel disease reflects a spiritual problem that can be remedied by prayer[]."[151] While the Christian Science website states that medical care is not forbidden by the religion,[152] it is far from encouraged.[153]

Nearly all of the states in the United States allow Christian Scientists a religious exemption from the statewide immunization requirements[154] and Christian Scientists take advantage of the exemption, frequently choosing not to vaccinate their children.[155] Christian Scientists' objection to medical care does not stop at immunizations—Christian Scientists generally

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[148] *What Is Christian Science?: How Do Prayer and Healing Work?*, CHRISTIAN SCIENCE, http://christianscience.com/what-is-christian-science#how-do-prayer-and-healing-work (last visited Dec. 26, 2012).

[149] *What Is Christian Science?: History of Christian Science*, CHRISTIAN SCIENCE, http://christianscience.com/what-is-christian-science#history-of-cs (last visited Dec. 26, 2012). Some sources, however, claim that Christian Science membership is rapidly declining. *See, e.g.*, Jeffrey Shallit, *A Skeptic Looks At Christian Science: Does Christian Science Really Work?*, SKEPTICREPORT (Sept. 1, 2003), http://www.skepticreport.com/sr/?p=197 (citing Rodney Stark, *The Rise and Fall of Christian Science*, 13 J. CONTEMPORARY RELIGION 189, 189-214 (1998)).

[150] *What Is Christian Science?: Basic Teachings*, CHRISTIAN SCIENCE, http://christianscience.com/what-is-christian-science#basic-teachings (last visited Dec. 26, 2012).

[151] Thomas Novotny et al., *Measles Outbreak in Religious Groups Exempt from Immunization Laws*, 103 PUBLIC HEALTH REPORTS 49 (Jan.–Feb. 1988), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1477942/.

[152] *What Is Christian Science?: Relationship with Western Medicine*, CHRISTIAN SCIENCE, http://christianscience.com/what-is-christian-science#relationship-with-western-medicine (last visited Nov. 9, 2012) ("It's up to each person who practices Christian Science to choose the form of health care he or she wants . . . . Christian Scientists recognize and respect the interests of medical professionals and don't oppose them.").

[153] *See, e.g.*, Mary Baker Eddy, *Miscellaneous Writings 1883–1896*, *in* PROSE WORKS OTHER THAN SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 1, 88-89 (1925) [hereinafter PROSE WORKS] ("*Is it right for a [Christian] Scientist to treat with a doctor?* This depends upon what kind of a doctor it is. Mind-healing, and healing with drugs, are opposite modes of medicine. As a rule, drop one of these doctors when you employ the other. The Scripture saith, 'No man can serve two masters;' and, 'Every kingdom divided against itself is brought to desolation.'").

[154] Shaun P. McFall, *Vaccination and Religious Exemptions*, FIRST AMENDMENT CENTER, (Aug. 18, 2008 12:00AM), http://www.firstamendmentcenter.org/vaccination-religious-exemptions. The two states that do not provide an exemption from statewide immunization requirements are West Virginia and Mississippi.

[155] Novotny et al., *supra* note 151, at 52.

do not provide any sort of medical care for their children.[156] Infrequently, these children contract treatable illnesses that prove fatal when not treated with modern medicine, such as type 1 diabetes or pneumonia.[157] Most states have statutes protecting Christian Scientist parents, which provide that if a child falls ill and receives care through religious means, like prayer, the parents will not be held criminally liable for involuntary manslaughter if the child dies.[158]

Also, Christian Scientists do not keep official records of healings they have because they do not acknowledge any disease or illness as real.[159] The starting point for Christian Science prayer is to deny the reality of any ailment.[160] Christian Scientists believe any and all ailments can be cured through prayer.[161] Consequently, while the medical community is judged

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[156] *See, e.g.*, Seth M. Asser & Rita Swan, *Child Fatalities From Religion-motivated Medical Neglect*, 101 PEDIATRICS J. 4, 625, 628-29 (Apr. 1998), *available at* http://childrenshealthcare.org/wp-content/uploads/2010/07/Pediatricsarticle.pdf (reporting the results of a 172-child study in which 28 Christian Science children died due to failure to receive medical care, and noting that "Christian Science church leaders . . . have advised US members that the laws allow them to withhold medical care").

[157] *See, e.g.*, *id.* at 626-27 (reporting in Table 2 the results of a 172-child study in which 113 children died: 12 died from type 1 diabetes and 22 died from pneumonia).

[158] *See, e.g.*, Lundman v. McKown, 530 N.W.2d 807, 829 (Minn. Ct. App. 1995) (finding Christian Scientist parents guilty of manslaughter when their child died of juvenile diabetes); *see also* Donna K. LeClair, Comment, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79, 80-81 (1987) (discussing "the need for state legislatures to remove from child health and welfare statutes provisions providing immunity to parents who rely on prayer instead of medicine to treat their ill child."); Rebecca Williams, Note, *Faith Healing Exceptions Versus* Parens Patriae*: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 693 (2012) ("Many Americans would label the [parents'] refusal to seek medical treatment for a critically ill child as abhorrent.").

[159] MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 188 (2000) ("What is termed disease does not exist. It is neither mind nor matter."); *see also* Jeffrey Shallit, *A Skeptic Looks At Christian Science: Does Christian Science Really Work?*, SKEPTICREPORT (Sept. 1, 2003), http://www.skepticreport.com/sr/?p=197 ("On the one hand, the Christian Science church avidly collects testimonials about alleged incidents of healings through Christian Science. . . . Personal testimony of healings play a large part in organized Christian Science gatherings. On the other hand, the Church ardently resists any attempt to test Christian Science in a scientific manner . . . .").

[160] *Id.* at 14 ("Become conscious for a single moment that Life and intelligence are purely spiritual, – neither in nor of matter, – and the body will then utter no complaints. If suffering from a belief in sickness, you will find yourself suddenly well.").

[161] PROSE WORKS, *supra* note 153, at 41 ("*Can all classes of disease be healed by your method?* We answer, Yes. Mind is the architect that builds its own idea, and produces all harmony that appears. There is no other healer in the case."); *see also id.* at 53 ("*Do you sometimes find it advisable to use medicine to assist in producing a cure, when it is difficult to start the patient's recovery?* You only weaken your power to heal through Mind, by any compromise with matter; which is virtually acknowledging that under difficulties the former is not equal to the latter. He that resorts to physics, seeks

by its successes, the Christian Science method of healing is judged by its failures. Christian Scientists complain about this inequity,[162] but they have failed to remedy this discrepancy in the nearly 150 years since the religion began.

When a Christian Scientist child falls ill, the family faces a terrible choice: it can give the child medical care and risk feeling ostracized by their religious community[163] or it can rely on prayer thereby risking the child's death and, potentially, criminal prosecution. Obamacare would strongly encourage Christian Science families to obtain health insurance coverage, which may in turn encourage Christian Scientists to use modern medicine in lieu of paying for a service they will never use.

Christian Scientists' primary objection to the Individual Mandate of Obamacare is that it imposes a tax if they fail to obtain health insurance coverage that they do not believe they need. Asking a Christian Scientist to purchase health insurance coverage is comparable to asking an Amish person to purchase car insurance—the Amish do not own or drive cars and simply have no need for car insurance.[164] Christian Scientists similarly see no need for health insurance coverage and feel Obamacare imposes a tax on their religious belief.

V. ANALYSIS OF CHRISTIAN SCIENTISTS' CLAIM

As already discussed, Catholics and other Christians opposed to the Employer Mandate have brought their opposition

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what is below instead of above the standard of metaphysics; showing his ignorance of the meaning of the term and of Christian Science.").

[162] John Dwight Ingram, *State Interference with Religiously Motivated Decisions on Medical Treatment*, 93 DICK. L. REV. 41, 58 n.103 (1988) ("Christian Science practice is usually judged by its failures, whereas medicine is more often judged by its successes." (quoting Talbot, *Christian Science and the Care of Children: The Position of the Christian Science Church*, 309 NEW ENG. J. MED. 1641-44 (Dec. 29, 1983) (some internal citations omitted)).

[163] Paul Vitello, *Christian Science Church Seeks Truce With Modern Medicine*, N.Y. TIMES, Mar. 24, 2010 at A20, *available at* http://www.nytimes.com/2010/03/24/nyregion/24heal.html ("Publicly, the church has always said that its members were free to choose medical care. But some former Christian Scientists say those who consult doctors risk ostracism.").

[164] *See Amish FAQ*, AMISH RELIGIOUS FREEDOM, http://amishreligiousfreedom.org/amishfaq.htm#auto (last visited Dec. 26, 2012) (explaining that the Amish do not own or drive cars—but may ride in them—to keep equality within the Amish community); Carol Steffey, *Ten Myths About the Amish from Holmes County Ohio*, GARDEN GATE BLOG, http://blog.garden-gate.com/2011/02/10-myths-about-amish-from-holmes-county.html (Feb. 25, 2011) (explaining that the Amish do not own or drive cars to separate themselves from the rest of the world, as the Bible instructs).

before courts across the country.[165] But there has not yet been a Christian Science challenge to the Individual Mandate.[166] If Christian Scientists choose to oppose the Individual Mandate, they will likely parallel the arguments advanced against the Employer Mandate. Christian Scientists could allege that the Individual Mandate is an unconstitutional infringement of their right to freely exercise their religion and their rights protected by RFRA. This section works through the test for free exercise challenges to federal legislation that the Court has articulated. Then, problems with the test are discussed. Finally, potential solutions to the Christian Scientists' objection to the Individual Mandate are reviewed.

A. Free Exercise Analysis

Christian Scientists do not use modern medicine and would argue that they should not be taxed on that choice. They would also claim the government's action substantially burdens the free exercise of their religion, which would trigger a cause of action under RFRA. Here, if a court were to find a substantial burden, RFRA would require that the government's action is the most narrowly tailored means of furthering a compelling government interest. Contrary to popular conception, the Court has noted that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[167]

1. Substantial Burden

A court would begin by determining whether the government legislation "substantially burden[s] a sincere exercise of religion."[168] Christian Scientists would have to show their sincere belief that they rely exclusively on prayer for healing, that they do not use medical care, and therefore, they do not require health insurance coverage. Consequently, their

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[165] *Supra* Part III.

[166] Christian Science Committee on Publication, *September 2012 Newsletter* (copy on file with author) ("Has the Church considered filing a lawsuit to challenge the health care reform law? The Church has chosen for now to participate in the democratic process, working with the Administration and Congress to resolve the dilemma facing Christian Scientists under the ACA, rather than filing suit. We're encouraged by the good progress we're making.").

[167] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (citing Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[168] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423-24, 426 (2006).

argument would be that the Individual Mandate places a substantial burden on them.

The government would likely point to Christian Scientists' participation in Medicare, in opposition to the Christian Scientists' substantial burden argument. The Court of Appeals for the District of Columbia held that receipt of Social Security benefits mandates enrollment in Medicare.[169] Because Christian Scientists have not filed a lawsuit objecting to *that* health insurance coverage, the government may argue that participation in Obamacare is not substantially different than participation in Medicare. Because Christian Scientists would need to demonstrate that participation in modern health care would be a substantial burden, their participation in Medicare would partially undermine that argument.

The government would further argue that the Individual Mandate certainly does not infringe on the right of Christian Scientists to pray, to abstain from receiving medical care, or to seek medical care if the Christian Scientist desires it. Potentially, the Individual Mandate will protect Christian Scientists from any stigma within the religion that arises from having health insurance coverage in the first place. The Individual Mandate may also empower Christian Scientists to seek medical care instead of leaving the question of life or death to prayer.

Regardless, courts generally show deference to a group alleging a burden on the exercise of their religion.[170] A court would likely show deference to Christian Scientists' sincere belief that they do not require health insurance coverage.[171]

2. Compelling Interest

Assuming *arguendo* that a court finds the Individual Mandate imposes a substantial burden on Christian Scientists, the government will have to show the offending legislation is "the least restrictive means of advancing [a] compelling governmental interest[]."[172] To establish that the government's interest in applying the Individual Mandate to Christian Scientists is

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[169] *See* Hall v. Sebelius, 667 F.3d 1293, 1296-97 (D.C. Cir. 2012) *reh'g denied*, 11-5076, 2012 WL 1940654 (D.C. Cir. May 30, 2012).

[170] *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982) ("It is not within 'the judicial function and judicial competence' . . . to determine whether appellee or the Government has the proper interpretation of the . . . faith; '[c]ourts are not arbiters of scriptural interpretation.'" (internal citation omitted)).

[171] *See supra* notes 23-26 and accompanying text.

[172] *Gonzales*, 546 U.S. at 426.

compelling, the government would likely point to the extensive legislative history behind Obamacare and to the similarities with *United States v. Lee*.

This posture mimics the issue posed in *United States v. Lee*, in which the Amish opposed paying the Social Security tax. The Amish had removed themselves entirely from the group of individuals needing social security insurance, because they do not accept insurance at all and caring for the elderly within their community is considered a moral obligation.[173] However, the Court still found that government's compelling interest in the success of Social Security outweighed the Amish objection to participating in a federal insurance program by paying Social Security taxes.[174] Specifically, the Court found that "[n]ot all burdens on religion are unconstitutional,"[175] because "[t]he design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system."[176] The Court held that "the [g]overnment's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high."[177] The government ultimately only exempted *self-employed* Amish people from paying Social Security taxes.[178]

Obamacare is intended to alter the American landscape in the same magnitude as the Social Security system. A court would likely find nationwide health insurance coverage is a compelling government interest.

3. Least Restrictive Means

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court reiterated the strict scrutiny test applied in *Wisconsin v. Yoder*.[179] In both cases, the Court found that the

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[173] *See, e.g.*, United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J., concurring) ("In view of the fact that the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal."); *see also id.* at 255 (majority opinion) ("[T]he Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system."); *id.* at 257 ("The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.").

[174] 455 U.S. 252, 257-60 (1982).

[175] *Id.* at 257.

[176] *Id.* at 258.

[177] *Id.* at 258-59.

[178] *See id.*; 26 U.S.C. § 1402(g)(1) (2011).

[179] *Compare* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006), *with* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

government did not meet its burden, and held the legislation as applied to the religious group (the O Centro Espírita Beneficente Uniã do Vegetal[180] and the Amish, respectively) was unconstitutional.[181] To avoid creating an exemption from the Individual Mandate of Obamacare for Christian Scientists, the government must demonstrate with particularity "how its admittedly strong interest . . . would be adversely affected by granting an exemption" to Christian Scientists.[182] The government's compelling goal of nationwide health insurance coverage advanced by the Individual Mandate must be narrowly tailored.

The Christian Science request for an exemption must be considered within the framework of allowing an exemption only for Christian Scientists. The Court has noted that unless there is evidence Congress considered the particular issue at hand, the government must "shoulder its burden under RFRA."[183] Obamacare is projected to decrease the federal deficit, at least partially by collecting money from (or encouraging the purchase of health insurance coverage by) uninsured people using health care who otherwise fail to pay for the health care they receive.[184] Christian Scientists assert they are not part of that class.

Furthermore, the Individual Mandate already contains exemptions.[185] The Court has pointed to existing exemptions in legislation as evidence that the legislature is not concerned about discrete groups failing to conform to the conduct prescribed (or proscribed).[186] By exempting seven categories of individuals in addition to the two religious exemptions,[187] the law itself illustrates that exemptions do not frustrate the government's purpose. On the other hand, because Christian Scientists have been working with the legislature to create an exemption to the Individual Mandate to no avail, the Court may defer to the

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[180] *See Gonzales*, 546 U.S. at 425 ("O Centro Espírita Beneficente Uniã do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals.").

[181] *Yoder*, 406 U.S. at 234-35; *Gonzales*, 546 U.S. at 439.

[182] *See Gonzales*, 546 U.S. at 431 (quoting *Yoder*, 406 U.S. at 236) (alterations in original).

[183] *Gonzales*, 546 U.S. at 432. The Court also noted that, "[t]he Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too." *Id.* at 439.

[184] *See* Congressional Budget Office Statement of Douglas W. Elmendorf, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*, 3 (Mar. 30, 2011).

[185] *See supra* Part II.D.

[186] *See, e.g.*, *Gonzales*, 546 U.S. at 432-33.

[187] *See supra* Part II.B.

legislature's lack of an exemption as evidence that the inclusion of Christian Scientists in the Individual Mandate of Obamacare was intentional.[188]

Most likely, a court will use the strict scrutiny test articulated in *Gonzales*, *Lee*, and *Wisconsin v. Yoder*, and will find that the existing exemptions are the least restrictive means of advancing the compelling governmental interest.

B. Problems with the Existing Test

The biggest problem with the existing test for evaluating free exercise clause challenges is the inability of many courts and juries to appreciate the gravity of a sincerely held religious belief. Some argue that Christian Scientists' reliance on prayer for healing is not just unwise, but dangerous.[189] The legislature and judges of this country suggest time and again that religious beliefs are optional, that duties of conscience are secondary to legal obligations—this is known as a "voluntarist conception."[190] "What is lost in the voluntarist conception of religious practice is not an isolated and optional act but an integral part of a belief system."[191]

While legislators must respond to constituents' demands, judges must be neutral arbiters and the warning to defend against the tyranny of the majority should not be forgotten. For a Christian Scientist, there is nothing optional about relying on prayer for healing.[192] The Individual Mandate ignores the health care needs of Christian Scientists. The Court might not exempt Christian Scientists from compliance with the Individual Mandate, but it deserves careful consideration.

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[188] *See supra* note 166.

[189] *See generally, e.g.*, LeClair, *supra* note 158, at 81 (discussing "the need for state legislatures to remove from child health and welfare statutes provisions providing immunity to parents who rely on prayer instead of medicine to treat their ill child."); Rebecca Williams, *supra* note 158, at 693 ("Many Americans would label the [parents'] refusal to seek medical treatment for a critically ill child as abhorrent.").

[190] CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE 100 (2001).

[191] *Id.*

[192] *See* PROSE WORKS, *supra* note 153, at 53 ("*Do you sometimes find it advisable to use medicine to assist in producing a cure, when it is difficult to start the patient's recovery?* You only weaken your power to heal through Mind, by any compromise with matter; which is virtually acknowledging that under difficulties the former is not equal to the latter. He that resorts to physics, seeks what is below instead of above the standard of metaphysics; showing his ignorance of the meaning of the term and of Christian Science."); *see also* Asser & Swan, *supra* note 156 (noting that "Christian Science church leaders . . . have advised US members that the laws allow them to withhold medical care").

C. Potential Solutions

Prior to pursuing litigation against the government, Christian Scientists have proposed alternatives to the Individual Mandate in a Church-sponsored publication for members of Christian Science.[193] Two main alternatives were proposed by the Church:

> Requesting that the federal and state governments *include coverage of Christian Science practitioner and nursing services* in the benefits that will be offered by health insurance plans through the state insurance exchanges. Given the intent of [the Patient Protection and Affordable Care Act, ["PPACA"] to provide coverage for all, it seems fair that the law meet the "essential" health needs of all individuals regardless of faith. This would be consistent with the long history of government accommodations for Christian Science health services in Medicare, Medicaid, and other programs.
>
> Seeking a legislative solution with Congress that would allow anyone with a "sincerely held religious belief" against purchasing the mandated health insurance to be *exempted from the requirement*. The current religious exemption in PPACA gives preference to a few select faiths—allowing the Amish, the Mennonites, and Health Care Sharing Ministries to opt out—without respecting the rights of all faiths. We believe the rights of religious minorities should be respected when it comes to their health care decisions.[194]

The first option would enable health insurance companies to offer Christian Science healing coverage. In the Christian Science community, there are practitioners who pray with or for a person who has fallen ill. These practitioners charge fees for each consultation, which Christian Scientists pay. Treatment by prayer, with or without a practitioner's assistance, is the primary means of health care for Christian Scientists. It has been suggested that, "[g]iven [the] low cost [of Christian Science practitioners,] the insurance companies would have little to lose—it's kind of a no-brainer for them [to include Christian Science practitioners in their coverage]."[195]

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[193] *See* Christian Science Committee on Publication, *Health Care Reform*, CHRISTIAN SCIENCE, http://christianscience.com/member-resources/for-churches/committee-on-publication/federal-legislative-affairs/health-care-reform (last visited Sept. 9, 2013).

[194] *Id.*

[195] Paul Vitello, *Christian Science Church Seeks Truce With Modern Medicine*, N.Y. TIMES, Mar. 24, 2010 at A20, *available at* http://www.nytimes.com/2010/03/24/nyregion/24heal.html (internal quotation omitted). Christian Science practitioners typically charge $25-50 per consultation. *Id.* One health insurance company already provides Christian Scientists insurance coverage for prayer treatment, but it does not satisfy the requirements of the Individual Mandate of Obamacare. SERVING CHRISTIAN SCIENTISTS, http://www.scsinsurance.com/index.html (last visited Jan. 14, 2013).

The government could require insurance companies to include Christian Science healing coverage as one potential compromise between Obamacare and Christian Science.

The second option would extend the types of accommodations Christian Scientists have typically received from state governments. Many states provide exemptions that enable Christian Scientists to ignore medical requirements imposed by the state (e.g., immunization requirements) once they have demonstrated they are sincere believers. The federal government is not as quick to grant exemptions for Christian Scientists but a religious exemption from Obamacare was proposed soon after the decision in *NFIB*. On November 16, 2012, Representative Judy Biggert (R-IL) introduced a new bill to the House of Representatives that would add a religious exemption to Obamacare.[196] Any individual wishing to claim an exemption from Obamacare would be required to file a sworn statement with his or her tax filing that the individual failed to maintain minimum essential health insurance coverage[197] because of a sincerely held religious belief.[198] If the individual uses voluntary medical health care during the taxable year, he or she becomes ineligible for the exemption provided by this bill.[199] The bill was referred to the Committee on Ways and Means with 62 cosponsors but was not enacted during Congress's session.[200]

CONCLUSION

While the Christian Science free exercise challenge to the Individual Mandate is compelling, it is not enough to carve out a new exemption to Obamacare. The government will be able to carry its burden that public health insurance coverage is a compelling governmental interest, even though Christian Scientists will be able to establish the sincerity of their beliefs, thus showing a substantial burden. Christian Scientists are not prevented by Obamacare from practicing any aspect of their religion; the Individual Mandate is a lawful tax, just like Social Security. The best solution would be for insurance companies to

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[196] Equitable Access to Care and Health ("EACH") Act, H.R. 6597, 112th Cong. (2012).

[197] As defined in 26 U.S.C. § 5000A(f).

[198] EACH Act, H.R. 6597, 112th Cong. § 2(a)(C)(i).

[199] *Id.* § 2(a)(C)(ii).

[200] 158 Cong. Rec. H6428 (daily ed. Nov. 16, 2012). Consequently, this bill has "died in committee."

cover Christian Science practitioners, because then Christian Scientists would purchase health insurance coverage and comply with the Individual Mandate instead of paying the tax. The government is primarily interested in collecting the tax and Christian Scientists are unlikely to pursue litigation against the government. Consequently, Christian Scientists will not be exempted from the Affordable Care Act's Individual Mandate.

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