SUBSTANTIATING THE BURDENS OF COMPLIANCE

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As non-profit employers around the country seek exemption from compliance with the accommodation process under the contraceptive mandate, courts—and eventually the Supreme Court—confront the question of how plaintiffs establish a substantial burden on free exercise of religion under the Religious Freedom Restoration Act. In this and related litigation, courts should substantiate the burdens of complying with the law as RFRA's text and longstanding precedent demand. Deferring to religious objectors, as plaintiffs urge, would instead countermand the statutory text, reject prior case law, and authorize farfetched claims.

I. INTRODUCTION

Increasingly attenuated claims of complicity have been generated by the Affordable Care Act's mandate that large employers and insurers cover contraception. First, in *Burwell v. Hobby Lobby*, for-profit corporations sought exemption under the Religious Freedom Restoration Act (RFRA),[1] arguing that this mandate forced them to facilitate wrongdoing (that is, employees' contraceptive use).[2] The Supreme Court concluded that for-profit employers merited the same accommodation available to non-profit religious organizations.[3] Under this accommodation, employers must notify the government (or their insurer) of their objections.[4] Their insurance plans then exclude contraceptive coverage, but employees access coverage through separate payments from the insurers.[5]

Now, non-profit employers argue that even requesting this accommodation imposes a substantial burden on their free exercise.[6] They say that, although their insurance policies omit contraceptive coverage, they remain complicit if the insurers separately provide payments for contra-

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1. 42 U.S.C. § 2000bb(b) (1993).
2. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014).
3. *Id.* at 2759–60, 2785.
4. *Id.* at 2759, 2763.
5. *Id.* at 2782.
6. Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 557 (7th Cir. 2014) (describing claim as "paradoxical and virtually unprecedented").

ceptives to their employees. In other cases, employees object to their employer providing an insurance plan that other employees might use to purchase contraceptives. Small employers, exempt from any obligation to provide insurance, demand that insurers offer them contraceptive-free plans.

These claims capturing today's headlines are reducible to "my religion is substantially burdened if another person does X" (whether provide contraceptive coverage, use contraceptives, etc.). They go beyond what our legal system has previously accepted. In each case, for plaintiffs to be vindicated, the government must prevent third parties from acting.

These cases squarely present the courts with the question of how plaintiffs establish a substantial burden on free exercise of religion under RFRA. In deciding this and related litigation, they should not defer to religious objectors, but rather substantiate the burdens of compliance with the law as RFRA's text and longstanding precedent require. To do otherwise would open the door to farfetched complicity claims, absurd results, and serious third-party burdens.

II. DEFERENCE VERSUS EVIDENCE

When the Supreme Court ultimately revisits the substantial burden standard, it will have two divergent paths before it. The first demands deference to religious objectors.[7] On this view, the Court would have to accept religious adherents' say-so that their religious exercise is substantially burdened by compliance with law—the purported "religious costs."[8] It could, however, consider the severity of penalties for failure to comply—the "secular costs."[9]

Hobby Lobby opened the door to this deferential approach.[10] There, the government argued that the burden of the contraceptive mandate was insubstantial, because the connection between the employer's offering a comprehensive health plan covering contraceptives and an employee's ultimate use of contraceptives was too attenuated—a legal issue.[11] Writing for the majority, Justice Alito disagreed. Such analysis, he said, involved "a difficult and important question of religion and moral philosophy"—not law.[12] Because plaintiffs believed their connection to immorality was direct, the courts, Alito wrote, could only determine whether this belief was sincere: "It was not for us to say that their reli-

7. Steven D. Smith & Caroline Mala Corbin, *Debate: The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 263 (2013), https://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (Smith: "What matters . . . is whether a person—or in this case an employer—*sincerely believes* that compliance with the Mandate would violate religious duties.").

8. Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religions under RFRA*, Geo. Wash. L. Rev. (forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733, at *9–10. (explaining and critiquing this view).

9. *Id.*

10. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

11. *Id.* at 2777–78.

12. *Id.* at 2778.

gious beliefs are mistaken or insubstantial."[13] Besides, Justice Alito noted "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money. . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."[14]

Alternatively, the Court could take the second path—evaluating the substantiality of the burden that the law imposes as courts have historically done. In her *Hobby Lobby* dissent, Justice Ginsburg took this perspective.[15] Separating the religious question of what faith requires from the legal question of what burdens are substantial under RFRA, she concluded that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."[16] She noted three factors: first, the law imposed no direct requirement on employers to "purchase or provide the contraceptives they find objectionable;" second, the employer's connection to the use of contraceptives was indirect through contributions to insurance plans that finance a variety of medical care; and third, independent intervening acts and actors interrupted the linkage between employer and contraceptive use.[17]

In the non-profit cases, the Courts of Appeals—with one exception—similarly undertook to analyze the degree to which legal compliance burdened religious exercise.[18] Eight out of nine concluded that no substantial burden existed.[19] The accommodation, they decided, excused objecting employers from any involvement—that private insurance companies complied with their own legal obligations to offer contraceptive coverage could not substantially burden the plaintiffs.[20]

In its October 2015 term, the Supreme Court took up a number of the non-profit cases, consolidated under the name *Zubik v. Burwell*.[21] After oral argument, having taken the unusual step of proposing a possible alternative process for accommodation from the mandate and requesting

13. *Id.* at 2779.
14. *Id.*
15. *Id.* at 2787 (Ginsburg, J., dissenting).
16. *Id.* at 2799.
17. *Id.*
18. *See* Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 14-12696, 2016 WL 659222 (11th Cir. 2016); Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015); E. Texas Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 427 (3d Cir. 2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 252–53 (D.C. Cir. 2014); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 389 (6th Cir. 2014); Univ. of Notre Dame v. Burwell, 743 F.3d 547 (7th Cir. 2014). Only the Eighth Circuit decided a substantial burden exists. Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015).
19. *See Catholic Health Care Sys.*, 796 F.3d at 207; *Little Sisters of the Poor*, 794 F.3d at 1151; *E. Texas Baptist Univ.*, 793 F.3d at 449; *Geneva Coll.*, 778 F.3d at 427; *Priests for Life*,772 F.3d at 252–53; *Mich. Catholic Conference*, 755 F.3d at 389. Only the Eighth Circuit decided a substantial burden exists. *Sharpe Holdings, Inc.*, 801 F.3d at 927.
20. *See, e.g.*, Wheaton College v. Burwell, 791 F.3d 792, 795 (2015) (making this point).
21. Zubik v. Burwell, 136 S. Ct. 444 (Mem) (2015).

supplemental briefing, the Court remanded the cases to the appellate courts with the instruction to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[22] The cases—and the question of substantial burdens—will likely return to the Court shortly in the same, or similar, posture. The additional briefing goes only to the question of least-restrictive means under RFRA, a question irrelevant to the lower courts' analysis. These courts seem likely to reiterate their conclusions that no substantial burden exists without engaging in a least-restrictive means analysis. Nor is it likely that remand to the lower courts will bring the protracted litigation against the contraceptive mandate to an end. The parties' briefing on the Court's proposed alternative highlighted their lack of agreement. Even if the plaintiffs proved amenable to settlement, settlement of their suits would not preclude other plaintiffs from stepping forward to challenge the accommodation as a substantial burden under RFRA.

III. TEXTUAL AND DOCTRINAL SUPPORT FOR SUBSTANTIATING BURDENS

While *Hobby Lobby* has rendered the deferential approach to substantial burdens plausible,[23] substantiating burdens is textually, doctrinally, and practically superior. Consider RFRA's text: The federal government may "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[24] To defer entirely to plaintiffs reads "substantially" out of the statute altogether. To consider only the penalty gives some content to "substantially," but makes little sense of the statute as a whole. The question under RFRA is not whether the "application" of *a penalty* for noncompliance furthers a compelling interest or is a least restrictive means, but whether the "application" of *a law* satisfies these tests. Thus, in *Hobby Lobby*, the Court did not consider whether the tax penalty met the compelling interest and least-restrictive-means prongs of RFRA as this interpretation of the statute would seem to require. It instead asked whether the requirement to provide contraceptive coverage did so.

RFRA's drafting history also confirms the importance of substantiating the burdens of compliance. While "burden" went unmodified in initial drafts, the word "substantial" was added to RFRA to ensure that the government need not "justify every action that has some effect on reli-

22. Zubik v. Burwell, 578 U.S. ____ (2016).
23. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751.
24. 42 U.S.C. § 2000bb-1(b) (1993).

gious exercise."[25] As Frederick Gedicks explains, the addition addressed fears of litigation over policies affecting (and imposing significant punishment on) prison inmates and schoolchildren, claims where if the penalty sufficed, a "claim of burden is always a claim of 'substantial' burden."[26]

As is relevant to interpretation of a statute that restores precedent under the First Amendment, courts in past free exercise cases inquired into the substantiality of burdens and did not accept every assertion of religious burden based on an objector's say-so. For example, in *Bowen v. Roy* the Supreme Court ruled that the government's use of a Native American child's social security number to administer benefits did not substantially burden her or her parents' free exercise of religion.[27] While the religious believer might perceive the government to inflict substantial harms, the Court said, "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference."[28]

Indeed, courts historically have assessed the substantiality of burdens according to what the law requires of objectors.[29] RFRA specifically invokes *Wisconsin v. Yoder*, which looked to the burden of compulsory school attendance on the religious exercise of the Amish community, not the fine for truancy,[30] and *Sherbert v. Verner*, an unemployment case in which the Court examined both religious and secular burdens.[31] While *Sherbert* does not fit cleanly into the substantial burden framework, the cost of compliance with the requirements to qualify for unemployment insurance was hefty, because it would have required the plaintiff to abandon her religious precepts.[32] In cases involving employers in particular, the Supreme Court routinely evaluated the costs of compliance. In *Jimmy Swaggart Ministries v. Board of Equalization*, it inquired into "the economic cost . . . of *complying* with a generally applicable sales and use tax . . . no different from other generally applicable laws and regulations—such as health and safety regulations."[33] Similarly, *Tony and Susan Alamo Foundation v. Secretary of Labor* considered the effect of requirements under the Fair Labor Standards Act on a religious founda-

25. Gedicks, *supra* note 8, at *22, (quoting Senator Hatch).
26. *Id.* at *21 (reviewing legislative history of RFRA's substantial burden standard).
27. 476 U.S. 693 (1986).
28. *Id.* at 700-01 n.6.
29. Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretative Techniques and Standards of Application*, 115 COLUM. L. REV. SIDEBAR 153, 167 (2015). ("In past cases, the Court has assessed burdens in terms of the basic requirements, not the penalties."); Gedicks, *supra* note 8, at *22, (documenting Court's practice of adjudicating burdensome laws in terms of direct interference with a claimant's religious exercise rather than the sanction on the claimant for violating them).
30. 406 U.S. 205 (1972).
31. 374 U.S. 398 (1963).
32. *Id.* at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").
33. 493 U.S. 378, 391 (1990).

tion's activities and its employees.[34] In these cases, the consequences of failing to collect taxes or pay wages were not discussed.[35]

Nor have courts merely assessed the penalties for failure to comply with law under RFRA. Indeed, when individuals contested the ACA's individual mandate under RFRA several years ago, the existence of a tax penalty was proof, not of the existence of a substantial burden, but of its absence. The Fourth Circuit concluded, "[T]he option of paying a tax to avoid the mandates' requirements certainly imposes no substantial burden. On the contrary, this option underscores the 'lawful choice' Plaintiffs have to avoid any coverage they might consider objectionable."[36] As a D.C. District Court said in a related case, this choice meant plaintiffs bore only a de minimis burden and need not "modify their behavior and . . . violate their beliefs."[37]

Courts have similarly interpreted RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act.[38] The impact of not being able to expand a church, add a wing to a school, or build a parking lot may prove a substantial burden. The existence of fines for violating zoning ordinances does not suffice.[39]

With regard to complicity claims in particular, courts have evaluated burdens along a scale between directness and attenuation.[40] As in tort and criminal cases, courts consider the proximity and necessity of objectors to the purported wrongdoing and the existence of independent intervening acts (or actors) that dilute the connection between the objector and what the objector sees as wrongdoing.[41] They differentiate between direct and remote support.[42] They query whether objective observers might attribute a regulated act to the objector.[43]

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34. 471 U.S. 290 (1985).

35. *Id.*

36. Liberty University, Inc. v. Lew, 733 F.3d 72, 100 (4th Cir. 2013).

37. Mead v. Holder, 766 F. Supp. 2d 16, 20 (D.D.C. 2011), *aff'd by* Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).

38. 42 U.S.C. § 2000cc (2015).

39. *See, e.g.,* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) ("[W]here a school could easily rearrange existing classrooms to meet its religious needs in the face of a rejected application to renovate . . . [,] there would be no substantial burden, even though the school was refused the opportunity to expand its facilities."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004) (focusing on effect of permit denial and concluding that it imposed insubstantial burdens on synagogues and their members).

40. Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1938 (2015) ("When it comes to conscientious objection, the law distinguishes between direct participation and remote facilitation, treating the former as compelling and the latter as negligible.").

41. Gedicks, *supra* note 8, at *28–29, (drawing principles from tort law); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 82 (2015) (suggesting "accomplice liability in criminal law").

42. Bernstein v. Ocean Grove Camp Mtg. Ass'n, OAL DKT. NO. CRT 6145-09, 2012 WL 169302 at 4 (N.J. Adm. Jan. 12, 2012) (noting that a wedding venue objecting to renting to same-sex couples did not control or sponsor the weddings and "[t]he arm's length nature of the transactions gave respondent a comfortable distance from notions incompatible with its own beliefs"); *see also* Erzinger v. Regents of Univ. of Cal., 137 Cal. App. 3d 389, 392–93 (1983) (rejecting objection to student registration fee for health insurance because students were not forced "to use the student health service programs, receive pregnancy counseling, have abortions, perform abortions or endorse abor-

Despite claims to the contrary, the Court's decision in *Thomas v. Review Board of the Indiana Employment Security Division* in no way prevents substantiating the burdens of legal compliance.[44] *Thomas* involved denial of unemployment benefits to a Jehovah's Witness on the ground that his reasons for quitting his job were inconsistent with other Witnesses' beliefs and thus not truly religious. In rejecting this view, the Court said, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[45] That line referred to determinations of what a religion requires—barred to the courts by the religious question doctrine.[46] In the contraceptive cases, this basic rule means that judges cannot second-guess, for example, plaintiffs' conclusion that Catholic teachings prohibit taking advantage of the accommodation.

But analysis of substantial burdens need not lead courts into thickets of religious inquiry. Indeed, shortly after *Thomas*, the Supreme Court distinguished between inquiry into the centrality of belief—prohibited to the courts—and analysis of the substantiality of the burden—required of the courts.[47] Other courts did so as well under RFRA.[48] While courts lack expertise in religious studies, they regularly apply principles of proximity, causation, and attenuation in a variety of First Amendment contexts[49] and in tort and criminal cases. The fact that legal questions raised by the substantial burden standard can be tricky does not require judges to throw up their hands.[50]

IV. ABSURD EFFECTS OF DEFERENCE

If the Supreme Court ultimately were to adopt a deferential standard toward substantial burdens in the contraceptive mandate cases, it would remove the primary limiting mechanism for RFRA claims.[51] The

tions"). As with tax objection, "the fact plaintiffs may object on religious grounds to some of the services the University provides is not a basis upon which plaintiffs can claim a constitutional right not to pay a part of the fees." *Id.* at 393.

43. *See, e.g.*, Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77, 95 (D. Me. 2004).

44. *Hobby Lobby*, 134 S. Ct. at 2778 (referring to Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) as "nearly identical").

45. 450 U.S. at 715.

46. Greenawalt, *supra* note 29, at 170 (critiquing Justice Alito's reliance on *Thomas*).

47. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

48. *See, e.g.*, Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008).

49. Smith & Corbin, *supra* note 7, at 271 (Corbin arguing that free exercise exemptions should be analyzed like government endorsement of religion in school voucher cases, separated by intervening individual decisions); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 185 (2015) (demonstrating that indirectness and generality "are of critical importance in at least three areas of First Amendment law").

50. Chad Flanders, *Insubstantial Burdens* 7–8 (Working Paper) (June 2015), *available at* http://ssrn.com/abstract=2727423 (asserting that, because doctrine requires line-drawing, it is "[b]etter that courts stay out of it").

51. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 594 n.86 (1998) (concluding that, in RFRA's first years, substantial burden "accounted for over 70% of the RFRA defeats"); Lupu, *supra* note 41, at n.118 (compiling decisions rejecting RFRA claims for insubstantial burdens).

mere existence of high penalties would substantially burden a religious objector who had to do little to comply with the law.[52] Consider the Little Sisters of the Poor, one of the non-profit plaintiffs. Its insurer is a church plan, itself exempt from the mandate and unwilling to offer the Little Sisters' employees separate coverage.[53] Thus, if Little Sisters submit paperwork for the accommodation, they bear no risk of involvement in contraceptive coverage. If they fail to do so, however, significant taxes attach.

Dwelling on penalties for noncompliance obscures the vanishingly small "secular" burden of regulatory compliance. Non-profit challengers across the board bear a "secular" compliance cost of forty-nine cents,[54] the cost of a stamp. To take another example, to exempt itself from paying taxes, a hospital must file an application for tax-exempt status with the IRS. If one considers penalties, the burden of IRS regulation is the substantial taxes that the hospital would pay if it failed to avail itself of the tax exemption—rather than the cost of submitting an application for exemption.

Under a deferential standard, religious burdens long considered insubstantial would become entitled to relief. As Gedicks notes, "[i]t is the rare law whose violation triggers only trivial sanctions."[55] Take tax objections. Courts historically turned away tax objectors, not because the amount of taxes was small, but because "there are too many steps in the causal chain between the taxpayer's payment of taxes and the pursuit of the activity he deplores."[56] Insurance contributions and wage regulations also would become substantial burdens. As Caroline Corbin says, "if an institution considers it 'cooperation with evil' to allow its employees to use their salary to purchase contraception, buy alcohol, or see a movie celebrating same-sex marriage," deference means allowing them to limit employees' use of wages unless the laws pass strict scrutiny.[57]

The Eighth Circuit's docket offers a window into the future effects of no longer substantiating burdens. Based on *Hobby Lobby*, Missouri state representative Paul Wieland filed suit, arguing that his state employer's compliance with the contraceptive mandate substantially burdens the family's religious exercise contrary to RFRA.[58] The Wielands object to regulations that apply to employers and insurers and require nothing from them.[59] Nonetheless, they claim that the mandate "coerces Plaintiffs into violating their sincerely-held religious beliefs," because the only available insurance plan might allow other employees or their

52. Greenawalt, *supra* note 29, at 167.
53. *See* Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 1232 (D. Colo. 2013).
54. 26 C.F.R. § 54.9815-2713 (2016) (noting the cost of mailing the self-certification form).
55. Gedicks, *supra* note 8, at *5.
56. Sepinwall, *supra* note 40, at 1940-41.
57. Smith & Corbin, *supra* note 9, at 271.
58. Wieland v. U.S. Dep't of Health & Hum. Serv., 793 F.3d 949, 950 (8th Cir. 2015).
59. *Id.* at 951–52.

daughters to access contraception.[60] In the absence of the contraceptive mandate, they argue, the state might prove willing to offer a contraceptive-free plan to some employees.[61] In another case, a small for-profit corporation with no obligation to offer any insurance to employees (much less a plan that includes contraception) is challenging the mandate as a substantial burden.[62] In effect, the plaintiff seeks to free third-party insurers from regulatory compliance based on its own religious beliefs.[63] These claims of complicity stretch the concept of a substantial burden on free exercise to encompass any perceived religious slight.

V. CONCLUSION

Substantiating burdens admittedly proves difficult in some cases, but the non-profit challenges to the contraceptive mandate's accommodation process are not among them. The objectors are remote from, and bear little or no responsibility for, the purported wrongdoing. They ultimately seek a "private veto" over regulatory compliance by others.[64]

If the Court concludes that a religious accommodation itself is a substantial burden on religion, every regulation (or exemption therefrom) is as well. All federal law could have to survive strict scrutiny in order to apply to religious objectors—whether they are individuals of disfavored faiths or craft stores aligned with Evangelicals. The burdens of any exemptions will fall on the employees stripped of statutory rights and the insurers or employers constrained to resist regulatory compliance in order to protect the beliefs of others.

60. Wieland v. United States Dep't of Health & Human Servs., No. 4:13-CV-01577-JCH, 2016 WL 98170, at *2 (E.D. Mo. 2016); *see also* March for Life v. Burwell, No. 14-cv-1149, 2015 WL 5139099, at *7 (D.D.C. 2015) (concluding that "[e]ven though employee plaintiffs are not the direct objects of the Mandate, they are very much burdened by it").

61. Wieland, 2016 WL 98170 at *2.

62. Annex Med., Inc. v. Burwell, 769 F.3d 578, 581 (8th Cir. 2014).

63. *Id.* at 582.

64. Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. 2012) (noting that deference regarding substantial burdens "subject[s] virtually every government action to a potential private veto").