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## NOTES

### A FEW FOR-PROFIT BUSINESSES' BATTLE OVER THE AFFORDABLE CARE ACT'S PREVENTATIVE SERVICES MANDATE

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# NOTES

## A FEW FOR-PROFIT BUSINESSES' BATTLE OVER THE AFFORDABLE CARE ACT'S PREVENTATIVE SERVICES MANDATE

*Leigh Argentieri Coogan\**

### ABSTRACT

Under the Patient Protection and Affordable Care Act (ACA), employers are required to provide employees with health plans, which must include FDA-approved contraceptives with no cost sharing. While Health and Humans Services (HHS) revised the regulation to allow for a compromise among religious organizations and non-profits run by religious organizations, private for-profit businesses must comply with the ACA even if the business asserts to be founded on religious principles. Several for-profit business have sued in district court for an injunction against the requirements. However, a circuit split exists among courts granting preliminary injunctions against the ACA pending a granting of appeal. This note will focus on whether the federal government can compel secular, for-profit organizations to provide employee health plans that include contraceptives, the morning after pill, and sterilization under the Religious Freedom Restoration Act. On November 26, 2013, the United States Supreme Court granted *certiorari* to decide this issue.

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## I. INTRODUCTION

The health care world changed when in *National Federation of Independent Business v. Sebelius*,<sup>1</sup> the United States Supreme Court held that all of the Patient Protection and Affordable Care Act (ACA) is constitutional, except for the Medicaid Expansion requirement.<sup>2</sup> Opposition to many of the ACA requirements pervade the media, but the most prominent resistance comes from the Catholic Church over employers required to provide health insurance that includes contraceptives, the morning after pill and sterilization.<sup>3</sup> Although the ACA exempted religious institutions, such as churches, mosques and temples, the ACA did not exempt organizations run by a religious institution, such as a soup kitchen or a college or hospital run by a religious organization, but these non-profits were allowed a safe harbor period.<sup>4</sup> HHS issued an Advanced Notice of Proposed Rule Making as an attempt to alleviate certain religious non-profits' concerns.<sup>5</sup> Private, for-profit businesses, however, were not included in this safe harbor, and thus, several suits for injunctions against the ACA's requirement ensued.<sup>6</sup>

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<sup>1</sup> 132 S. Ct. 2566 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> Michelle Boorstein, *Affordable Care Act Ruling Promises Religious Fights for the Foreseeable Future*, WASH. POST, June 28, 2012, available at [http://www.washingtonpost.com/blogs/under-god/post/health-care-decision-religious-reaction-swift-catholic-groups-lawsuits-will-continue/2012/06/28/gJQAk15D9V\\_blog.html](http://www.washingtonpost.com/blogs/under-god/post/health-care-decision-religious-reaction-swift-catholic-groups-lawsuits-will-continue/2012/06/28/gJQAk15D9V_blog.html); see also *Cardinal Dolan Applauds Church Agencies As They Challenge HHS For Violating Religious Freedom*, United States Conference for Catholic Bishops (May 21, 2012), available at <http://www.usccb.org/news/2012/12-088.cfm>.

<sup>4</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-30 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54) [hereinafter Group Health Plans].

<sup>5</sup> Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012).

<sup>6</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Newland v. Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 3212597 (E.D. Mich. June 26, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

President Obama's administration through Health and Human Services modified the regulations allowing for small, religious non-profits, such as soup kitchens running out of a church, to be exempt, and providing a model for religious run colleges and hospitals to not have to contribute to an employee's contraceptive.<sup>7</sup> These changes, however, deliberately did not include secular, for-profit businesses, even if the employer establishes that the business has a strong religious foundation.<sup>8</sup> Therefore, these lawsuits will not disappear with the changing of the ACA's regulations.<sup>9</sup>

Part II of this note will provide an overview of the Affordable Care Act and coverage of preventative services. Part III will review the Religious Freedom and Restoration Act. Part IV will identify current litigation by for-profit businesses against the ACA and argue that the U.S. Supreme Court will likely decide that RFRA does not apply to private, for-profit businesses. Part V will argue that even if Supreme Court rules that RFRA does apply, the ACA's preventative services requirement does not create a substantial burden to secular, for-profit businesses, and thus, the Federal Government may require private, for-profit organizations to provide employee health plans that include contraceptives, emergency contraceptives and sterilization under the Religious Freedom Restoration Act (RFRA).

## II. AFFORDABLE CARE ACT AND COVERAGE OF PREVENTATIVE SERVICES

Under the ACA, private employers with fifty or more employees must provide women with "such additional preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."<sup>10</sup> The Health Resources and Services Administration promulgated regulations providing that the health plan must include any FDA approved

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<sup>7</sup> Coverage of Certain Services under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 147, 148, 156).

<sup>8</sup> *Id.*

<sup>9</sup> Additionally, like with others, the Catholic Church and self-insured, religious non-profits will continue to pursue litigation. *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. 2013); *Univ. of Notre Dame v. Sebelius*, 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. 2012).

<sup>10</sup> 42 U.S.C. § 300gg-13 (2012).

contraceptives without any cost sharing for the employee.<sup>11</sup> This includes various forms of birth control, including the Pill and Intrauterine Devices (IUD), emergency contraceptives including Plan B and ELLA, and sterilization.<sup>12</sup> Most women have used contraceptives at some point in her life.<sup>13</sup> Employers who do not comply with the ACA requirement will face a \$100 per day penalty per each employer.<sup>14</sup>

While many religions do not approve of contraception, the Catholic Church took the lead to fight against the ACA. The Catholic Church disapproves artificial contraceptives, such as the pill and analogizes the morning after pill to abortions.<sup>15</sup> The ACA, however, does not require that a religious organization, such as a church, provide health insurance to employees that include contraceptives. The ACA does require non-grandfathered and nonexempt group health insurance plans to cover certain preventive health services without cost sharing.<sup>16</sup>

#### *A. Definition of a Religious Employer*

The ACA originally carved out an exception for a religious organization if the employer meets the following requirements:

- (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.<sup>17</sup>

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<sup>11</sup> *Insurance Coverage for Contraception Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://m.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx> (last updated Nov. 15, 2013).

<sup>12</sup> *Birth Control Guide*, FDA OFFICE OF WOMEN'S HEALTH, <http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/UCM356451.pdf> (last updated July 16, 2013).

<sup>13</sup> "99% of women who have ever had sexual intercourse have used at least one method." *Contraceptives*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/Contraception.htm> (last visited Feb. 15, 2014).

<sup>14</sup> 26 U.S.C. § 4980(D) (2012).

<sup>15</sup> *Contraception, Abortion, and Sterilization*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, available at <http://old.usccb.org/prolife/issues/nfp/Contraception.pdf>.

<sup>16</sup> 42 U.S.C. § 300gg-13(a)(4) (2012).

<sup>17</sup> Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (2012).

This definition failed to exclude organizations that might be run out of a religious institution, such as a soup kitchen organized inside of a church. Additionally, the Catholic Church runs many hospitals and schools, none of which were exempt from providing employees with a health plan that covers contraceptives. The ACA, however, provided a safe harbor for these religious organizations until August 2013, allowing President Obama's administration and HHS time to reach a compromise with religious nonprofits.<sup>18</sup>

Secular, for-profit businesses, however, were required to comply with the ACA starting August 1, 2011.<sup>19</sup> Many private for-profit businesses filed lawsuits also arguing that the ACA violates RFRA.<sup>20</sup> Across the United States, courts have inconsistently granted preliminary injunctions to private businesses from complying with the ACA requirements.<sup>21</sup>

### *B. Changes to the Definition of Religious Employer*

On February 6, 2013, the Obama administration released proposed rule changes as a compromise to the original legislation's definition of "religious organization."<sup>22</sup> The proposed rule change eliminates the first three prongs of the "religious organization," definition and thus, would include organizations, such as soup kitchens, from being exempt from the ACA requirements. Health and Human Services agreed "that the exemption should not exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school."<sup>23</sup> An

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<sup>18</sup> Group Health Plans, *supra* note 4.

<sup>19</sup> Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) [hereinafter Interim Final Rules].

<sup>20</sup> *See supra* note 6. Many of the lawsuits also challenge the ACA's requirement under the Free Exercise Clause of the Constitution, but the primary focus is the challenging the requirement under RFRA, 42 U.S.C.S. § 2000bb-1(b).

<sup>21</sup> *Id.*

<sup>22</sup> *See supra* note 7.

<sup>23</sup> *Id.*

objective for the changes, however, includes not expanding the amount of employers that would qualify for the exemption.<sup>24</sup>

Additionally, religious run, nonprofit health care providers, educational institutions, and charities with religious objections will qualify for an accommodation under the ACA.<sup>25</sup> The federal government will pay the part of the employee health plan that covers contraceptives.<sup>26</sup> Therefore, none of the religious organizations owe money that will be used towards providing contraceptives, but employees and their families will still have access to preventative services without cost sharing.<sup>27</sup> However, an organization will not be considered a nonprofit entity “if its assets or income accrue to the benefit of private individuals or shareholders.”<sup>28</sup> Therefore, private, for-profit business will not qualify for an exemption or an accommodation, regardless of their religious foundation for their business. Most businesses, however, have accepted contraceptives coverage with 90 percent believing it to be a “typical benefit” offered in an employee plan.<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> Cardinal Timothy M. Dolan criticizes the word “accommodation” and argues it undermines the importance of these institutions. Robert Pear, *Bishops Reject Birth Control Compromises*, N.Y. TIMES, Feb. 7, 2013, available at <http://www.nytimes.com/2013/02/08/health/bishops-reject-white-house-proposal-on-contraceptive-coverage.html>.

<sup>26</sup> See *supra* note 7.

<sup>27</sup> A *New York Times* article wrote that private insurers would recoup their fees through fewer births. Robert Pear, *Birth Control Rule Altered to Allay Religious Objections*, N.Y. TIMES, Feb. 1, 2013, available at <http://www.nytimes.com/2013/02/02/us/politics/white-house-proposes-compromise-on-contraception-coverage.html?pagewanted=all>. However, CMS said the cost would be “offset by adjustments in Federally-facilitated Exchange user fees that insurers pay.” *Women’s Preventive Services Coverage and Non-Profit Religious Organizations*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Feb. 15, 2014). Additionally, these small, religiously-affiliated nonprofits argue that filling out the paperwork to exempt the organization from providing contraception via the employer health plan, but still allowing for their employees to have access to contraceptive, etc., violates their religious freedom. The Supreme Court granted the injunction in favor of Little Sisters of the Poor Home for the Aged, exempting them from filling out this paperwork for the time being. *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 893 (Dec. 31, 2013) (order granting preliminary injunction). This paper, however, focuses on for-profit businesses seeking an exception from the ACA’s requirements.

<sup>28</sup> See *supra* note 7.

<sup>29</sup> Bruce Jaspén, *While Controversy Boils Over Obamacare Contraceptive Proposal, Employers Provide Coverage*, FORBES (Feb. 4, 2013, 11:03 AM), available at <http://www.forbes.com/sites/brucejapsen/2013/02/04/while-controversy-still-boils-over-obamacare-contraceptive-mandate-most-employers-provide-coverage-2/>.

The Obama administration made a conscious decision to exclude private businesses from their compromise.<sup>30</sup> Thus, private business will likely continue to pursue injunctions against the ACA until the United States Supreme Court decides whether the federal government can compel private businesses to provide contraceptives, emergency contraceptives, and sterilization via an employee health insurance plan.

### III. RELIGIOUS FREEDOM AND REFORMATION ACT

The Religious Freedom Restoration Act states that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”<sup>31</sup> The Public Health and Welfare statute defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>32</sup> This rather circular definition does not offer much insight to clarify what constitutes exercise of religion and who or what, such as a corporation, can exercise religion. An exception, however, to the requirement set forth in RFRA allows the government to “substantially burden a person’s exercise of religion only if” the law survives strict scrutiny.<sup>33</sup>

The legislative history does not clarify the definition of “exercise of religion,” but does provide a helpful background to the statute and suggests that only a person, rather than a corporation, may exercise religion. While *Citizens United* held that the First Amendment applies to corporations, likely the Court will distinguish a corporation’s ability to exercise its freedom of speech from its ability to exercise its freedom of religion.<sup>34</sup>

According to the Senate Report, RFRA “is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a

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<sup>30</sup> See *supra* note 7.

<sup>31</sup> Religious Freedom Restoration Act of 1993 (RFRA) § 2, 42 U.S.C. § 2000bb-1(a) (2012).

<sup>32</sup> Religious Land Use and Institutionalized Persons Act of 2000 § (8), 42 U.S.C. § 2000cc-5 (2012).

<sup>33</sup> 42 U.S.C. § 2000bb-1(b)(1)–(2) (2012) (“Is in furtherance of a compelling government interest; and is the least restrictive means.”).

<sup>34</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371–73 (2010).



compelling governmental interest.”<sup>35</sup> For example, in *Sherbert v. Verner*, the Court held that strict scrutiny must be applied to whether the federal government can deny unemployment to a woman who was fired from her job, because her religion prohibited her from working on Saturdays.<sup>36</sup> The Court held that the law did not survive strict scrutiny.<sup>37</sup>

The RFRA “test applies whenever a law or an action taken by the government to implement a law burdens a person’s exercise of religion.”<sup>38</sup> A law does not have to specifically target religious practices, and thus, a neutral law, such as the ACA may be determined to substantially burden a person’s exercise of religious.<sup>39</sup>

The questions that must be answered for secular, for-profit businesses are whether requiring to provide employees with a health plan that includes contraceptives burdens the employer’s exercise of religion at all, and if it does, whether it is substantially burdened.<sup>40</sup>

#### IV. RFRA DOES NOT APPLY TO PRIVATE, FOR-PROFIT BUSINESSES

HHS will not revise its regulations to exempt private, for-profit businesses that claim to have foundations of religious values from

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<sup>35</sup> S. REP. NO. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

<sup>36</sup> 374 U.S. 398, 406–11 (1963).

<sup>37</sup> *Id.*

<sup>38</sup> H.R. REP. NO. 103-88, at 8 (1993).

<sup>39</sup> *Id.*

<sup>40</sup> DiMungo argues that the following questions are before the Court:

- (1) Do corporations have either religious rights of its own or standing to assert the religious rights of their owners?
- (2) Does requiring an employer who objects to contraceptives on religious grounds to pay for employees’ contraceptives violate the employer’s free exercise of religion?
- (3) Does the contraception mandate regulation’s exemption of some religious employers but not others violate the Establishment Clause of the First Amendment of the United States Constitution?
- (4) Does the requirement that health plan’s cover counseling and education about contraceptives compel employer’s to speak in violation of the First Amendment’s Free Speech Clause?
- (5) Can the contraception mandate violate a business’s owners right of associational expression under the First Amendment’s Free Speech Clause?

The first question, however, will be most determinative for the Court to decide. John K. DiMungo, *The Affordable Care Act’s Contraceptive Coverage Mandate*, 25 No. 1 CAL. INS. L. & REG. REP. 1 (2013).

providing coverage of preventative services, and thus, the Supreme Court will need to decide the issue.<sup>41</sup>

#### *A. The Courts Are Split in Current Litigation*

While there are many businesses suing for an injunction against the ACA's requirement, the courts are split on their rulings. The party seeking a preliminary injunction bears the burden of proving four factors.<sup>42</sup> The following are the four factors the court will consider: "(1) The likelihood of the movant's ultimate success on the merits, (2) the threat of irreparable harm to the movant in the absence of relief, (3) the balance between that harm and the harm that the relief may cause the non-moving party, and (4) the public interest."<sup>43</sup> The Seventh, Eighth, D.C. and Tenth Circuits granted an injunction against the ACA's requirement.<sup>44</sup> The Third Circuit, Sixth Circuit, and Eastern District of Missouri denied an injunction against the ACA's requirement.<sup>45</sup> The Supreme Court granted *certiorari* and, on March 25, 2014, heard oral arguments.<sup>46</sup>

Justice Sotomayor denied an application for an injunction pending appellate review filed with her as Circuit Justice for the Tenth Circuit.<sup>47</sup> Hobby Lobby, an arts and crafts retail chain store with more than 13,000 employees in over 500 stores nationwide, and Mardel, a chain of Christian-themed bookstores with 372 full-time employees in 35 stores, sought relief under RFRA and the Free Exercise clause claiming that the ACA

<sup>41</sup> Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

<sup>42</sup> Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003).

<sup>43</sup> Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

<sup>44</sup> Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d at 1147; Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025, at \*8 (8th Cir. Feb. 1, 2013); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1224 (D.C. Cir. 2013); Grote v. Sebelius, 708 F.3d 850, 855 (7th Cir. 2013); Korte v. Sebelius, 735 F.3d 654, 687 (7th Cir. 2013); Newland v. Sebelius, No. 12-1380, 2013 WL 5481997, at \*13 (10th Cir. Oct. 3, 2013).

<sup>45</sup> Autocam Corp. v. Sebelius, 730 F.3d 618, 628 (6th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 389 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1169 (E.D. Mo. 2012) (denying preliminary injunction and granting motion to dismiss all claims).

<sup>46</sup> Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *see also* Sebelius v. Hobby Lobby Stores, Inc., SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last updated Feb. 10, 2014).

<sup>47</sup> Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012).

requirement to purchase devices that cause abortions and contraceptives violates their rights.<sup>48</sup> Justice Sotomayor decided that Hobby Lobby and Mardel did not meet the requirements for the “extraordinary relief they” sought, and denied the preliminary injunction pending appeal.<sup>49</sup>

In *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit originally agreed with the District Court’s ruling and denied the injunction pending appeal.<sup>50</sup> The Hobby Lobby and Mardel owners, the Greens, claimed that the ACA affects their ability to exercise religion, and asked the court to disregard the fact that a group health plan is a legally separate entity from the corporation that sponsors it, which is also distinct from the people who run the corporation.<sup>51</sup> Additionally, Hobby Lobby’s health plan previously covered contraceptives, but now, they wished to exclude them, and thus, the exclusion of contraceptives with the granting of an injunction would harm their 13,000 full-time employees and their families.<sup>52</sup> The employees working for employers such as Hobby Lobby may not share the same religious persuasions and should not be prevented from benefiting for the ACA’s preventative coverage requirement. Even in cases where the employer is refusing to provide for contraceptives rather than taking it away, harm still exists by preventing women from receiving necessary preventative health measures.<sup>53</sup>

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<sup>48</sup> *Id.* at 642.

<sup>49</sup> *Id.* at 643.

<sup>50</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at \*3 (10th Cir. Dec. 20, 2012).

<sup>51</sup> *Id.* at \*1.

<sup>52</sup> *Id.* Annex presents a similar case, because it has less than 16 employees, but traditionally provided a health plan. It did not realize that the health plan covered contraceptives, and thus terminated health plans for its employees when it could not provide a health plan that did not cover contraceptives. Subsequently, Annex sued under RFRA. The Court denied the preliminary injunction. *Annex Med., Inc. v. Sebelius*, No. CIV. 12-2804 DSD/SER, 2013 WL 203526, at \*2 (D. Minn. Jan. 17, 2013).

<sup>53</sup> *Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 284 (D.D.C. 2013), *aff’d in part, rev’d in part sub nom.* *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Annex Med., Inc. v. Sebelius*, No. CIV. 12-2804 DSD/SER, at \*2; *Annex Med., Inc. v. Sebelius*, CIV. 12-2804 DSD/SER, 2013 WL 203526, at \*19 (D. Minn. Jan. 17, 2013), *rev’d*, *Annex Med., Inc. v. Sebelius*, 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414–15 (E.D. Pa. 2013), *aff’d sub nom.* *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d at 1161; *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012), *rev’d and remanded*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

*Hobby Lobby* presented a strong argument for not granting secular, for-profit businesses a preliminary injunction against the ACA by showing that they will likely not win on their merits and the harm will be greater for the employees than the corporation, which is a distinct entity from the Greens, the individual owners of Hobby Lobby.<sup>54</sup> However, in June 2013, the Tenth Circuit reversed and remanded holding that corporations were “persons,” within the meaning of RFRA, corporations showed substantial likelihood of success on the merits, as to substantial-burden element of RFRA claim, government’s claimed interests in public health and gender equality did not constitute compelling interests, corporations satisfied irreparable injury prong of test for preliminary injunctive.<sup>55</sup> Thus, the stage was set for determining whether for-profit business will need to comply with the preventative services mandate, and the stakes are high. If the Supreme Court were to decide that for-profit business employers did not have to comply, then thousands of employees, mainly women, will go without coverage for birth control and other contraceptives the government deems crucial for women’s health care equality. However, if the Supreme Court decides that for-profit business employers must comply with the contraceptive mandate, an employer, such as Hobby Lobby with 13,000 employees would face a penalty of \$100 per day for each employee, which amounts to \$1.3 million per day, or almost \$475 million per year.<sup>56</sup>

*B. Distinguishing Between an Individual and a Corporation’s Right to Exercise Religion*

The Constitution and RFRA protect people’s right to exercise their religious beliefs, and curtailing that right by the federal government must undergo strict scrutiny.<sup>57</sup> However, a corporation’s ability to exercise its religious belief is more attenuated, if existing at all. The Courts denying the injunction or denying an injunction pending an appeal demonstrates the

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<sup>54</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. at 642.

<sup>55</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d at 1132.

<sup>56</sup> *Id.* at 1125 (“If the corporations instead drop employee health insurance altogether, they will face penalties of \$26 million per year.”).

<sup>57</sup> U.S. CONST. amend. 1; 42 U.S.C. § 2000bb-1(b) (2012).

unlikelihood of success the for-profit, secular business would have against invalidating the preventative coverage requirement of the ACA.

*Citizens United* held that the First Amendment applies to corporations.<sup>58</sup> Likely, however, the Court will differentiate a corporation's right to free speech and a corporation's right to exercise religion.<sup>59</sup> *Citizens United*'s holding was integral to political speech. Conceptually, it is easy to understand that a corporation as a separate legal entity will have distinct political interests that can be distinguished from Board Members and Employees' political interests, and it is important for the corporation to be able to participate in political speech for its own interest. However, a corporation does not practice religion like an individual does. It does not go to a church, temple or mosque. It does not have an interest in practicing religion that can be distinguished from those who run the corporation. Thus, a corporation's right to exercise religion is different from its right to free speech.

Additionally, and more importantly, a legal distinction exists between a corporation's freedom of speech right and a corporation's right to exercise religion, whether applying the First Amendment or RFRA. The court in *Conestoga Wood Specialties Corp. v. Sebelius* held that it "find(s) no such historical support for the proposition that a secular, for-profit corporation possesses the right to free exercise of religion."<sup>60</sup>

RFRA does not protect a secular, for-profit business from providing preventative services through a health plan. There are no cases in which the Court decided that the individual's right to exercise religion is identical to corporation's right. In *United States v. Lee*, the Court held that an Amish farmer must pay social security tax for his employees even though the employer claimed that it violated his free exercise of religion.<sup>61</sup> The Court explained that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>62</sup> Similarly, in the

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<sup>58</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 365 (2010).

<sup>59</sup> *Id.*

<sup>60</sup> *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 407 (E.D. Pa. 2013).

<sup>61</sup> *United States v. Lee*, 455 U.S. 252 (1982).

<sup>62</sup> *Id.* at 261.

current cases, secular, for-profit businesses may not impose their own religious beliefs onto their employees' statutory rights, especially when it is to the employees' detriment.

Furthermore, the corporation and people who run the corporation are legally separate. The ACA requires that the business provide health insurance that covers preventative services, which is several steps removed from those running the business. The business's liabilities are not the liabilities of the people who run the business, "which is the primary and 'invaluable privilege' conferred by the corporate form."<sup>63</sup> Therefore, the business expenditures of the secular, for-profit business are distinct from the expenditures of the individuals, including paying for the health plan than covers contraceptives.<sup>64</sup> Thus, RFRA does not apply to a corporation like it would an individual, because a corporation cannot exercise religion. Moreover, because the corporation is distinct from the individuals running it, RFRA's protection of the individual does not extend to the business.

#### V. IF RFRA DOES APPLY, THE FEDERAL GOVERNMENT MAY STILL REQUIRE BUSINESSES TO MEET THE ACA COVERAGE OF PREVENTATIVE SERVICES REQUIREMENT

The Court may decide that under *Citizens United*, the First Amendment's application to a corporation extends to the exercise of religion.<sup>65</sup> The Court in *Citizens United* differentiated an outright ban of speech from a statutory requirement limiting speech as applied to a corporation's right to free speech. The Court held that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."<sup>66</sup> Similarly, the ACA does not ban corporations from practicing religion. Owners may still decide not to be closed on Sundays or have other religious practices integrated into running their business. Other courts have granted preliminary injunctions against the ACA, and thus, it is important to

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<sup>63</sup> *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation).

<sup>64</sup> *Id.*

<sup>65</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010).

<sup>66</sup> *Id.* at 319.

explore those arguments.<sup>67</sup> The Supreme Court will need to decide whether the ACA requirement creates a substantial burden to the secular, for-profit businesses, and if it does, whether it survives strict scrutiny.

*Korte v. Sebelius* provides an example of the argument for granting a preliminary injunction for a secular, for-profit business against the ACA.<sup>68</sup> The Seventh Circuit granted an injunction against “enforcing the contraception mandate against the Kortes and K&L Contractors” pending appeal.<sup>69</sup>

K&L Contractors is run by the Kortes family who “are Roman Catholic, and they seek to manage their company in a manner consistent with their Catholic faith, including its teachings regarding the sanctity of human life, abortion, contraception, and sterilization.”<sup>70</sup> The court briefly explains why it believes that RFRA applies to a secular, for-profit business.<sup>71</sup> The court argues that there is not a distinction between the corporation and Cyril and Jane Korte who own about 88% of K&L Contractors and who run the business with Catholic beliefs.<sup>72</sup> The court, however, states that “the Kortes would have to violate their religious beliefs to operate their company in compliance with” the ACA, not that K&L Contractors would be violating their religious beliefs.<sup>73</sup> Therefore, the court does not distinguish between the corporation and the people who run it.

The Kortes also argue that ACA creates a substantial burden for K&L Contractors, because “the penalties could be as much as \$730,000 per year, an amount that would be financially ruinous for their company and for them personally.”<sup>74</sup> The court provided that because there are exemptions for

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<sup>67</sup> *Korte v. Sebelius*, 735 F.3d at 687; *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012), *aff’d*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); *Monaghan v. Sebelius*, 916 F. Supp. 2d 802 (E.D. Mich. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 999 (E.D. Mich. 2012) (motions granted in part and denied without prejudice in part).

<sup>68</sup> *Korte v. Sebelius*, 528 F. App’x 583 (7th Cir. 2012).

<sup>69</sup> *Id.* Labeling it as a “contraception mandate” creates a subtext that simplifies an important issue for women’s health, because it affects woman substantially more than men, since the controversial FDA-approved contraception are meant for women, except for sterilization.

<sup>70</sup> *Id.* at 585.

<sup>71</sup> *Id.* at 588.

<sup>72</sup> *Id.* at 586.

<sup>73</sup> *Id.* at 587.

<sup>74</sup> *Id.* at 585.

certain employers, there must not be a compelling government interest, and thus, the requirements will likely fail strict scrutiny, essentially minimizing preventative services as a compelling government interest.<sup>75</sup>

Even though the proposed regulation changes abolish the first three prongs of what qualifies as a religious organization, those prongs are telling in that they distinguish religious nonprofits that are run by people with similar beliefs and serve people with similar beliefs.<sup>76</sup> People who do not adhere to their employer's beliefs will suffer and the ACA regulations aim to protect those people.<sup>77</sup> Also, the entire reason for the accommodation for hospitals and schools run by religious organizations is because the interest is so compelling, the Federal government does not want women to go without preventative services, and thus, they will still be able to receive them.<sup>78</sup>

However, the Court concluded in *Korte* that, the balance of harms tips strongly in Kortes's favor.<sup>79</sup> "An injunction pending appeal temporarily interferes with the government's goal of increasing cost-free access to contraception and sterilization. That interest, while not insignificant, is outweighed by the harm to the substantial religious-liberty interests on the other side."<sup>80</sup> Again, the court minimized the government's interest in providing women with preventative services that do not only benefit individuals, but also benefit the public health of other Americans. Therefore, like the Supreme Court will disagree with the holding in *Korte* even if it decides that RFRA applies to businesses, because the ACA requirement does not impose a substantial burden on the corporation.<sup>81</sup>

#### *A. The ACA Requirement Does Not Impose a "Substantial Burden" on Secular, For-Profit Businesses*

Before applying the strict scrutiny test to the ACA's requirement, the Court must decide, under RFRA, if it imposes a substantial burden on the

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<sup>75</sup> *Id.* at 588.

<sup>76</sup> Interim Final Rules, *supra* note 19.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Korte v. Sebelius*, 528 F. App'x 583 (7th Cir. 2012).

<sup>80</sup> *Id.* at 588.

<sup>81</sup> *Id.*



corporation's exercise of religion.<sup>82</sup> In, *O'Brien v. U.S. Dept. of Health & Human Services*,<sup>83</sup> the District Court denied O'Brien Industrial Holdings, LLC (OIH), a secular for-profit business, an injunction against the ACA. The District Court held that the ACA regulations did not substantially burden plaintiffs' exercise of religion, under the RFRA, and did not offend the Free Exercise Clause.<sup>84</sup> The Court did not discuss whether a secular, private, for-profit company could exercise religion, because the court held that the ACA regulations do not impose a "substantial burden" on either Frank O'Brien or OIH. "Substantial Burden" is not defined in either RFRA or Religious Land Use and Institutionalized Persons Act (RLUIPA), which adopted RFRA's same "substantial burden" test. Therefore, the court adopted the following definition: "the plain meaning of 'substantial' suggests that the burden on religious exercise must be more than insignificant or remote, and case law confirms this common-sense conclusion."<sup>85</sup>

The Court does not consider the \$100 per day per employee penalty to be a substantial burden, but rather, looked at the behavior that the statute was either curtailing or compelling when it held that

[T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. Frank O'Brien is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives.<sup>86</sup>

The court recognized that providing a health plan for employees is a series of separated events.<sup>87</sup> The court stated, "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding

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<sup>82</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>83</sup> 4:12-CV-476 CEJ, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012).

<sup>84</sup> *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

<sup>85</sup> *Id.* (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a substantial burden must place more than an inconvenience on religious exercise; a substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly")).

<sup>86</sup> *Id.* at 1159.

<sup>87</sup> *Id.*

individuals who hold religious beliefs that differ from one's own."<sup>88</sup> Also, the court said that under the plaintiff's argument, if a private company objected to medical care because of their religion it would not be required to comply to the ACA at all.<sup>89</sup> In *Mead v. Holder*, a Court already dismissed this claim.<sup>90</sup>

The court in *Conestoga* also found that any burden imposed by the regulations is separated by too many events to be a substantial burden.<sup>91</sup> Before the employee would even be able to use one of the controversial preventative services, several events must occur, which would distance the act from the employer.<sup>92</sup> The *Conestoga* court held that

[t]hese events include: the payment for insurance to a group health insurance plan that will cover contraceptive services (and a wide range of other health care services); the abortifacients must be made available to *Conestoga* employees through a pharmacy or other healthcare facility; and a decision must be made by a *Conestoga* employee and her doctor, who may or may not choose to avail themselves to these services.<sup>93</sup>

Therefore, the inability for the employer to practice his or her own religion is so indirect, there is no burden imposed on either the employer or the business, even if the Supreme Court decides not to distinguish between the two.

Another important distinction includes the fact that many employers consider providing health insurance to compliment the employee's wage.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011), *hearing en banc denied*, No. 11-5047, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011), *and aff'd sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012), *and abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

When pressed at oral argument to name a less restrictive means of lowering health insurance premiums or otherwise improving access to health care, Plaintiffs could not do so. Consequently, the Court concludes that (1) § 1501 does not place a substantial burden on the exercise of Plaintiffs' Christian faith, and (2) even assuming that it does, it is the least restrictive means of serving a compelling governmental interest. Defendants' Motion to Dismiss Plaintiffs' RFRA claim is therefore granted.

*Id.* at 43.

<sup>91</sup> *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013).

<sup>92</sup> *Id.* at 414.

<sup>93</sup> *Id.* at 415.

Just like an employee may purchase contraceptives with her wage, she should be able to choose to have her health insurance provide contraceptives.<sup>94</sup> This does not burden the business's exercise of religion.

However, the penalties for not complying with the ACA's preventative services requirement is substantial by requiring the employer to pay \$100 each day per employee<sup>95</sup> and allowing the Department of Labor and employees to sue the employer for failing to comply with the regulations.<sup>96</sup> To alleviate this burden, however substantial it may be, HHS could consider reducing the penalty. Employers with 50 or more fulltime employees who do not provide any health insurance for their employees will face a penalty of \$2,000 per employee per year.<sup>97</sup>

The penalty emphasizes the compelling interest of providing preventative services for women, but the compelling reason allows for the requirement itself, not for such a large penalty. While these services are critical, it is certainly better to have health insurance and not have preventative services than not to have health insurance at all. While that is not the solution, the relative penalty needs to better reflect the consequence.

Also, as less desirable compromise would include altering the ACA requirement for businesses' employee health insurance plans to not have to provide for all FDA approved contraceptives, such as the morning after pill, sterilization and Ella. While this is definitely not ideal, these seemed to be more controversial and similar to abortions than contraception.

Even if HHS were to amend the regulations, most likely, these secular, for-profit businesses would not be satisfied unless completely exempt from the requirement. Thus, HHS may just want to wait until Supreme Court hears the case.

*B. The ACA's Preventative Services Requirement Serves a Compelling Government Interest and Is the Least Restrictive Means Necessary*

The Supreme Court will likely not have to apply the strict scrutiny test to the ACA's preventative services requirement, because it does not create a

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<sup>94</sup> *Id.* at 414.

<sup>95</sup> 26 U.S.C. § 4980D(b)(1) (2012).

<sup>96</sup> 29 U.S.C. § 1132 (2012).

<sup>97</sup> 26 U.S.C. § 4980H (2012).

substantial burden on a business, but if it does, it will likely find that the ACA serves a compelling government interest in the least restrictive means necessary.<sup>98</sup>

The compelling government interest includes both women's rights and important public health safety.<sup>99</sup> Women have a right to decide when to procreate. Women "spend 68 percent more in out-of-pocket health care costs than men."<sup>100</sup> Besides costs, just allowing women to have autonomy over whether to have a child is compelling.<sup>101</sup> Additionally, delaying preventative care has significantly higher health risks for the mother and child than for them during planned pregnancies, and "harms to the woman and fetus that can occur when pregnancies are unintended. . . . For example, short intervals between pregnancies are associated with low birth weight and prematurity."<sup>102</sup>

While there is certainly a compelling government interest, the high penalty might not make it the least restrictive means necessary. An adjustment to the fine, however, would not thwart the purpose of the requirement and make it less restrictive.

## VI. CONCLUSION

The Supreme Court will need to decide whether the federal government may compel secular, for-profit businesses to provide contraceptives, emergency contraceptives and sterilization for its employees through a health insurance plan. The Supreme Court should decide that RFRA does not apply to corporations, and thus, secular, for-profit businesses must comply with the ACA. However, if the Supreme Court were to decide that RFRA does apply, then like the Court will determine that secular, for-profit businesses still need to comply with the ACA, because it does not create a substantial burden to the business. Ensuring

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<sup>98</sup> See 42 U.S.C. § 2000bb-1(b) (2012).

<sup>99</sup> Brief for the Appellees at 34–35, *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (No. 12-3841).

<sup>100</sup> 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

<sup>101</sup> Cyril B. Korte, Jane E. Korte, and Korte & Luitjohan Contractors, Inc., Plaintiffs-Appellants, v. Katherine Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services et al., Defendants-Appellees, 2013 WL 874983 (C.A.7).

<sup>102</sup> *Id.* at 34.

women's access to necessary preventative services allows for both gender equality and important public health safety measures.