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## Burwell v. Hobby Lobby Stores, Inc. - The U.S. Supreme Court Holds that the Religious Freedom Restoration Act Trumps the Affordable Care Act

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**BURWELL V. HOBBY LOBBY STORES, INC. – THE  
U.S. SUPREME COURT HOLDS THAT THE  
RELIGIOUS FREEDOM RESTORATION ACT  
TRUMPS THE AFFORDABLE CARE ACT**

*Sue Ganske*\*

INTRODUCTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>1</sup>

As noted by the Tenth Circuit, the issue presented in *Burwell v. Hobby Lobby Stores, Inc.*<sup>2</sup> involves a “tale of two statutes.”<sup>3</sup> The first statute is the Religious Restoration Act of 1993 (“RFRA”).<sup>4</sup> The RFRA prohibits government action that substantially burdens a person’s exercise of religion.<sup>5</sup> The second statute is the recently enacted Patient Protection and Affordable Care Act (“ACA”), which made numerous changes to the health care system.<sup>6</sup> The ACA requires health insurers to provide coverage for

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1. U.S. CONST. amend. I. When the *Hobby Lobby* case reached the Supreme Court, the Court found it unnecessary to reach the First Amendment claims raised by Conestoga Wood Specialties and the Hahns. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

2. *Burwell*, 134 S. Ct. 2751.

3. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, J. concurring), *aff’d sub nom. Burwell*, 134 S. Ct. 2751 (2014).

4. Religious Freedom and Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*); *see infra* note 79 and accompanying text.

5. 42 U.S.C. § 2000bb(a)(3) (2012).

6. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered titles and sections of the U.S.C.).

additional preventive care and screenings as provided by general guidelines endorsed by the Health Resources and Services Administration (“HRSA”).<sup>7</sup>

Under the ACA, the HRSA commissioned the Institute of Medicine to develop recommendations for the HSRA guidelines.<sup>8</sup> These included recommendations that all insurance plans cover all Food and Drug Administration (“FDA”) approved methods of contraception, sterilization, patient education, and counseling for all women.<sup>9</sup> The approved methods of contraception included, but are not limited to: diaphragms, oral contraceptives, emergency contraceptives, and intrauterine devices.<sup>10</sup> HRSA adopted these recommendations in full,<sup>11</sup> and used these guidelines when publishing their final rules.<sup>12</sup>

According to the ACA, large employers with fifty or more full-time employees<sup>13</sup> may provide employees with health insurance,<sup>14</sup> or pay a penalty.<sup>15</sup> Employers with fewer than fifty employees are not required to provide health insurance coverage under the ACA.<sup>16</sup> As of August 1, 2012, unless exempted or grandfathered, all employers’ group health plans were required to conform to the published rules.<sup>17</sup> Grandfathered health insurance

7. 42 U.S.C. § 300gg-13(a) (2012). Other issues of the ACA have previously been litigated. In 2012, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2608 (2012), the Court held five to four that the individual mandate, 26 U.S.C. § 5000A(a) (2012), was constitutional as a tax, but not under the Commerce Clause. See Nicole Huberfeld, Elizabeth Weeks Leonard, & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 34-40 (2013) (discussing the government’s tax argument and the plurality opinion in *Sebelius*); see generally Comment, *National Federation of Independent Business v. Sebelius: The Patient Protection and Affordable Care Act*, 126 HARV. L. REV. 72 (2012).

8. The Institute of Medicine is an independent non-profit “health arm of the National Academy of Sciences.” *About the IOM*, INST. OF MED., <http://www.iom.edu/About-IOM.aspx> (last updated Nov. 04, 2013, 10:09 PM).

9. INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, 165 (2011), available at [http://www.nap.edu/openbook.php?record\\_id=13181](http://www.nap.edu/openbook.php?record_id=13181).

10. OFFICE OF WOMEN’S HEALTH, U.S. FOOD. & DRUG ADMIN., *Birth Control Guide*, <http://www.fda.gov/downloads/ForConsumers/ByAudience/For%20A8Women/FreePublications/UCM356451.pdf> (last visited Dec. 02, 2014).

11. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,870 (July 02, 2013) (codified at 45 C.F.R. pts. 147, 156).

12. *Id.*; see 45 C.F.R. § 147.130 (codifying the final rule).

13. 26 U.S.C. § 4980H(c)(2)(A) (2012) (defining “applicable large employer”).

14. *Id.* § 4980H(a), (c)(2)(A); see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762-64 (2014) (discussing the ACA requirements).

15. 26 U.S.C. §§ 4980D(a)-(b), 4980H(a) (2012).

16. See *id.* § 4980H(a), (c)(2)(A).

17. Coverage for Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39,870; U.S. DEP’T OF HEALTH & HUMAN SERVS., *Women’s Preventive Services: Required Health Plan Coverage Guidelines: Affordable Care Act Expands*

plans are not subject to the preventative services provision.<sup>18</sup> Additionally, certain religious organizations and religious non-profits are exempt from the requirement to provide contraceptive services.<sup>19</sup>

Three for-profit closely held corporations filed two separate suits claiming that the requirement to cover four of the mandatory twenty contraceptive methods violated the RFRA.<sup>20</sup> These three for-profit corporations objected, for religious reasons, to the requirement stating the corporations had to cover four of the currently required twenty contraceptive methods.<sup>21</sup> The corporations objected because the four methods could prevent the implantation of a fertilized egg.<sup>22</sup> These for-profit closely held corporations employ more than fifty people, are not grandfathered, and are not religious non-profits, so they did not qualify for any exemption from coverage.<sup>23</sup> In light of an appellate court split,<sup>24</sup> the U.S. Supreme Court granted certiorari to decide whether or not the regulations<sup>25</sup> regarding contraception violated the RFRA.<sup>26</sup> On June 30, 2014, in a five to four decision<sup>27</sup> the Supreme

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*Prevention Coverage for Women's Health and Well-Being*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Dec. 02, 2014).

18. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 44,621, 46,623 (Aug. 03, 2011) (codified at 45 C.F.R. pt. 147). A grandfathered plan is defined as a plan that was in existence on March 23, 2010, and has not undergone any enumerated changes that would disqualify the plan, such as "elimination of all or substantially all benefits to diagnose or treat a particular condition." 29 C.F.R. § 2590.715-1251T(a)(1)(i) (2013); 26 C.F.R. § 54.9815-1211T (2013); 45 C.F.R. § 147.140(a).

19. 145 C.F.R. § 147.130(a)(1)(iv)(A)-(B) (2013); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623-24.

20. Hobby Lobby Stores and Mardel Christian bookstores were among the plaintiffs in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev'd and remanded* 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014). Conestoga Wood Specialties Corporation was the plaintiff in *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec. of United States Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

21. *Burwell*, 134 S. Ct. at 2765-66.

22. *Hobby Lobby*, 723 F.3d at 1124-25; *Conestoga*, 724 F.3d at 390.

23. *Supra* notes 13-17 and accompanying text.

24. In *Hobby Lobby*, the Court of Appeals for the Tenth Circuit reversed a denial of a preliminary injunction. 723 F.3d at 1147. In *Conestoga Wood Specialties Corp.*, the Court of Appeals for the Third Circuit affirmed the denial of the plaintiffs' request for a preliminary injunction. 724 F.3d 377 at 417; *see* Petition for Writ of Certiorari at 15-16, *Burwell*, 134 S. Ct. 2751 (No. 13-354) (2014) (discussing circuit split).

25. 45 C.F.R. § 147.130 (2013).

26. 42 U.S.C. § 2000bb-1(a) (2012).

27. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2758 (2014).

Court held that indeed the requirement to cover the four disputed methods violated the RFRA.<sup>28</sup>

This article examines the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*<sup>29</sup> and discusses its implications. The Supreme Court's ruling is limited, and confined only to closely-held non-profit corporations that object to the contraceptive mandate, or part of the mandate, for religious reasons.<sup>30</sup> However, it is possible or even probable that the decision has opened the door to further litigation on this issue for other employers to request exemptions under the ACA to follow. Further litigation under the ACA is pending<sup>31</sup>, and is also discussed.

The ACA was a controversial piece of legislation from the very start. Politicians and commentators alike challenged the individual mandate,<sup>32</sup> contraception coverage,<sup>33</sup> and the establishment of administrative bodies to administer the law,<sup>34</sup> among other provisions. On June 28, 2012, the Supreme Court weighed in on the constitutionality of one piece of the ACA in *National Federation of Independent Business v. Sebelius*.<sup>35</sup>

## I. NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS AND THE INDIVIDUAL MANDATE

### A. ACA Provision

Under the individual mandate, most Americans were required to purchase “minimum essential” health insurance or pay a tax penalty.<sup>36</sup> Specifically, the law required that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum

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28. *Id.* at 2785.

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

30. *Id.* at 2785.

31. *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, No. 14-114, 2014 WL 3817533 (U.S. Nov. 07, 2014).

32. *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1263 (N.D. Fla.), *aff'd in part, rev'd in part sub nom.* *Florida v. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

33. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev'd and remanded* 723 F.3d 1114 (10th Cir.), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014).

34. *Coons v. Geithner*, No. CV-10-1714-PHX-GMS, 2012 WL 6674394 (Dec. 20, 2012), *aff'd in part, rev'd in part sub nom.* *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014).

35. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

36. 26 U.S.C. § 5000A(a) (2012).

essential coverage for such month.”<sup>37</sup> Individuals would be in compliance with the individual mandate if they were part of a qualifying federal health care program, had an “employer-sponsored plan,” were participants in a plan that was “grandfathered” in or, most notably, purchased a “plan offered in the individual market.”<sup>38</sup>

### *B. The Decisions Below*

On March 23, 2010, the day President Obama signed the ACA into law, the National Federation of Independent Business, twenty-six states, and two private individuals challenging the ACA’s individual mandate.<sup>39</sup> The plaintiffs alleged that the ACA attempted to regulate individuals who were not active in the health care marketplace and, therefore, outside the reach of the Commerce Clause.<sup>40</sup>

The District Court held that enacting the individual mandate was not a constitutional exercise of Congress’ power under the Commerce Clause.<sup>41</sup> The District Court reasoned that “activity” was an essential element to any legislation enacted under the Commerce Clause and Congress’ attempt to compel participation in the marketplace was outside the scope of that Clause.<sup>42</sup> The District Court further rejected the government’s claim that a failure to purchase insurance was itself “activity” because of the unique nature of the health care marketplace and the profound effect uninsured individuals have on that marketplace.<sup>43</sup> Thus, the District Court concluded that the individual mandate was unconstitutional.<sup>44</sup>

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37. *Id.*; see *id.* § 5000A(d)(1) (defining “applicable individual” as anyone who was not incarcerated, present unlawfully, covered under a “health care sharing ministry.”).

38. *Id.* § 5000A(f). Under the ACA, individuals who (a) could not afford coverage, (b) were experiencing hardship, or (c) were members of an Indian tribe were exempt from the individual mandate. *Id.* § 5000A (e).

39. Complaint at 1, *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla.) (No. 3:10-cv-91-RV/EMT), *aff’d in part, rev’d in part sub nom. Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

40. *Florida*, 780 F. Supp. 2d 1256 at 1270; see *United States v. Lopez*, 514 U.S. 549, 559 (1995) (“Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”).

41. *Florida*, 780 F. Supp. 2d at 1295.

42. *Id.* at 1286 (rejecting the “power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* ‘commercial and economic in nature, and substantially affects interstate commerce.’”) (emphasis in original).

43. See *generally id.* at 1288-95.

44. *Id.* at 1305-06. The District Court also addressed the plaintiffs’ other claim that the Medicaid expansion was compulsory and, therefore, unconstitutional because the

On appeal, the Court of Appeals for the Eleventh Circuit agreed with the District Court that Congress exceeded its power under the Commerce Clause when it enacted the individual mandate.<sup>45</sup> Notably, the Eleventh Circuit declined to base its Commerce Clause discussion on whether individuals were active or inactive in the marketplace.<sup>46</sup> Instead, the Eleventh Circuit conducted a multifactor analysis in deference to the unique nature of the individual mandate question.<sup>47</sup> In the end, the Eleventh Circuit concluded that upholding the mandate under the Commerce Clause would unconstitutionally expand Congress' power because doing so would mean that "the mere fact of an individual's existence substantially affects interstate commerce" and, thus, brings that individual under the power of the Commerce Clause.<sup>48</sup>

The Eleventh Circuit also "remain[ed] unpersuaded" by the government's alternative argument that the individual mandate was properly enacted under Congress' power to tax because the individual mandate to be a mandate with a penalty rather than a tax.<sup>49</sup> Rejecting the government's argument that the mandates revenue-producing element should qualify it as a tax, the Eleventh Circuit noted that the requirement is repeatedly described as a "mandate" in the legislation itself and that Congress did not intend for the mandate to function as a tax.<sup>50</sup>

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states would either be required to accept the "transformed Medicaid program with its new costs and obligations" or withdraw from the program and lose all federal funds. *Id.* at 1267. The District Court noted that participation in the program was entirely voluntary and, as the states' claim that they would have to accept changes to a voluntary program did not prove the ACA's unconstitutionality, the District Court granted the government's motion for summary judgment on that count. *Id.* at 1270 (noting that several states appeared *amici* to defend the ACA's program).

45. *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1282 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *id.* at 1244-48 (reviewing congressional findings related to the size and cost of the health care marketplace).

46. *Id.* at 1286; *id.* at 1286-87 (also rejecting an economic/noneconomic distinction).

47. *Id.* at 1295 (describing the scope of the individual mandate as "breathhtaking").

48. *Id.*; *see id.* at 1295-97 (dismissing the government's argument that the unique nature of the individual mandate serves to limit the Eleventh Circuit's ruling and, therefore, the reach of the Commerce Clause), 1305 (noting that health insurance has traditionally been an area of state concern); *see also id.* at 1267 (agreeing with the District Court that the Medicaid expansion was "not unduly coercive").

49. *Florida*, 648 F.3d at 1314-15 (noting that lower courts overwhelmingly reject the government's tax-based argument), 1317-18 (rejecting the government's argument that the mandate qualifies a tax because the penalty would be collected by the Internal Revenue Service).

50. *Id.* at 1314-15; *see, e.g.*, 26 U.S.C. § 5000A(b)(1) (2012) ("If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months

C. *The Supreme Court Upholds the Individual Mandate*<sup>51</sup>

The Supreme Court also rejected the government’s argument that Congress had the right to enforce the individual mandate under the Commerce Clause but ultimately held that the mandate was constitutional as a tax.<sup>52</sup> In dismissing the Commerce Clause claim, the Court noted that many individuals do not currently own or plan on purchasing health insurance and that enforcing the mandate under that clause would effectively force inactive consumers into the marketplace in order to regulate them.<sup>53</sup> The Court also worried that recognizing Congress’ power to enact the mandate under the Commerce Clause would lead to an unlimited Commerce Clause power.<sup>54</sup>

After rejecting the government’s Commerce Clause argument, the Court carefully evaluated the government’s alternative tax argument. “Granting the Act the full measure of deference owed to federal statutes,”<sup>55</sup> the Court held that the federal government could enact the mandate under the Taxing and Spending Clause because reading the statute as imposing a tax was “reasonable.”<sup>56</sup> The Court specifically noted that a tax is the only penalty for declining to buy health insurance.<sup>57</sup> The Court further noted that the mandate was “plainly designed to expand health insurance coverage” but reasoned that the government was well within its rights to enact a tax that influenced the conduct of individual consumers.<sup>58</sup>

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. . . there is hereby imposed on the taxpayer a *penalty* with respect to such failures . . . ) (emphasis added).

51. The Court also addressed the Medicaid expansion, striking down that portion of the ACA because it unconstitutionally coerced states into expanding their Medicaid programs. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012); *see id.* at 2602 (noting that Congress can “create incentives for States to act in accordance with federal policies” but may not compel their cooperation). *But see id.* at 2634 (Ginsburg, J., dissenting) (asserting that the Medicaid expansion was constitutional and not coercive where the federal government agreed to provide funds and would not withhold other federal funds for states that declined to participate).

52. *Id.* at 2591, 2600.

53. *Id.* at 2587.

54. *Id.* at 2589. The Court also rejected the government’s argument that the Mandate was constitutional under the Necessary and Proper Clause. *Id.* at 2592-93. While the Court deferred to Congress’ use of “convenient” or “useful” measures to further its enumerated powers, it rejected the government’s invocation of that Clause as it related to the individual mandate because it would otherwise grant Congress the right to “reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.” *Id.* at 2592.

55. *Id.* at 2594.

56. *Sebelius*, 132 S. Ct. at 2593.

57. *Id.* at 2593-94.

58. *Id.* at 2596; *see id.* at 2600 (noting that the mandate qualifies as a tax under the Court’s “narrowest interpretations of the taxing power”).



Joined by Justice Sotomayor, Justice Ginsburg penned a concurring opinion that would have upheld the individual mandate under the Commerce Clause.<sup>59</sup> Analogizing Congress' health care overall to the Social Security System, Justice Ginsburg asserted that the states were unable to control the rising costs of insurance and only Congress could act at a national level to address the burden health care placed on the economy.<sup>60</sup> Justice Ginsburg also reasoned that "Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce" and, thus, the power to act under the Commerce Clause.<sup>61</sup> Justice Ginsburg also rejected the majority's suggestion that the mandate encompasses non-consumers that would ordinarily be outside Congress' regulation under the Commerce Clause because everyone will, at some time, purchase insurance or otherwise participate in the health care marketplace.<sup>62</sup>

Justices Scalia, Alito, Breyer, and Thomas dissented and asserted that Congress overreached its enumerated powers when it passed the ACA.<sup>63</sup> The dissenting justices explained that Congress' effort to compel individuals to buy health insurance or pay a penalty went beyond regulating commerce to actually create commerce by forcing inactive individuals to join the marketplace.<sup>64</sup> In the justices' opinion, that mandate stretched far beyond Congress' powers under the Commerce Clause.<sup>65</sup> The dissenting justices further rejected the Court's decision to uphold the individual mandate as a tax and noted that, even if Congress may have had the power to impose a tax, it did not enact the mandate under that power.<sup>66</sup> Instead, Congress imposed a mandate with a "penalty" under the Commerce Clause, a penalty that could not later be reframed as a "tax" to survive judicial scrutiny.<sup>67</sup>

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59. *Id.* at 2615 (Ginsburg, J., dissenting).

60. *Id.* at 2612; *id.* at 2609-11 (discussing the size and complexity of the health care marketplace)

61. *Sebelius*, 132 S. Ct. at 2617 (noting that the "inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability").

62. *Id.* at 2618; *id.* at 2621 (rejecting the requirement that an individual be active in the marketplace in order to fall under the Commerce Clause) (quoting *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)).

63. *Id.* at 2642 (Scalia, J., dissenting)

64. *Id.* at 2644 ("[W]hen Congress provides that (nearly) all citizens must buy an insurance contract . . . it directs the creation of commerce.").

65. *Id.* at 2648 ("[Young people] are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.").

66. *Sebelius*, 132 S. Ct. at 2651.

67. *Id.* at 2653; *id.* at 2662 (further rejecting the Medicaid expansion because it requires full participation from the states and uses federal funds to compel that participation). Justice Thomas filed a separate dissent to criticize the court's use of the

*D. Reaction to NFIB v. Sebelius*

The Court's decision to uphold the individual mandate was largely heralded by those who consider the mandate as the cornerstone of the ACA,<sup>68</sup> though the Court's Commerce Clause and tax discussions drew sharp responses.<sup>69</sup> Some noted with approval that the active/inactive distinction was "novel,"<sup>70</sup> although observers who considered the new test "ultimately successful" were matched by those who rejected the Court's categories.<sup>71</sup> Legal observers declared outright that there "is little doubt that [*Sebelius*] marks a doctrinal turn that can restrain congressional power" and future efforts by Congress to regulate the marketplace may be stymied by the Court's new analytical framework.<sup>72</sup> Others complained that Court did not appreciate the breadth and pervasiveness of the health care market in rejecting Congress' attempts to regulate insurance.<sup>73</sup>

Commentators quickly seized on the Court's tax discussion as a departure from traditional jurisprudence and others suggested that "Congress's Taxing Power has been extended to historical new bounds."<sup>74</sup> While some embraced the expansive view of the Taxing Clause, other commentators questioned the wisdom of "taxing inactivity" and worried that the Court had

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"substantial effects" test to consider arguments related to the Commerce Clause. *Id.* at 2677 (Thomas, J., dissenting)

68. There was some suggestion at the time that Chief Justice Roberts decided to uphold the mandate under the Taxing and Spending Clause to rehabilitate the Court's image after it was repeatedly characterized as partisan and political. Stephen M. Feldman, *Chief Justice Roberts's Marbury Moment: The Affordable Care Act Case (NFIB v Sebelius)*, 13 WYO. L. REV. 335, 348 (2013) ("By unexpectedly reaching this ostensibly liberal result-upholding the ACA-Roberts will likely shield the Court from intense political scrutiny and criticism for the near future.").

69. Though it will not be discussed here, the Court's rejection of the Medicare expansion created similarly powerful reactions. *See, e.g.*, Michael S. Greve, *Coercion, Conditions, and Commandeering: A Brief Note on the Medicaid Holding of NFIB v. Sebelius*, 37 HARV. J. L. & PUB. POL'Y 83, 84 (2014) (describing the Court's Medicaid decision as "incoherent").

70. Matthew J. Lindsay, *Federalism and Phantom Economic Rights in NFIB v. Sebelius*, 82 U. CIN. L. REV. 687, 702 (2014).

71. Lindsay, *supra* note 70, at 702.

72. Feldman, *supra* note 68, at 343.

73. Lindsay, *supra* note 70, at 701 ("Whether one defines the relevant market broadly, as the consumption of health care; somewhat more narrowly, as the financing of health care; or still more discretely, as health care insurance, each affects interstate commerce in a proximate and palpable way.").

74. Christopher L. Richard, *Balancing Liberty and Healthcare Access: Sebelius on Taxing Inactivity*; 5 ALA. C.R. & C.L. L. REV. 141, 152 (2013); *see also id.* at 151 (describing the ACA as "guttled to some extent" by the Court's decision); Lindsay, *supra* note 70, at 689 (noting that "few predicted" that the Court's decision would turn on Congress' power to tax).

granted Congress unlimited taxing power.<sup>75</sup> Specifically, scholars described the Court's decision as helping Congress circumvent its enumerated powers and "resort[ing] to the taxing power to achieve what it could not achieve by other means."<sup>76</sup> Still others challenged the wisdom of approving legislation under the Taxing Clause when that was not how Congress originally characterized the mandate.<sup>77</sup> While the Court distinguished the mandate as a tax rather than a penalty, commentators worried that the decision gave little guidance on where the line should be drawn.<sup>78</sup>

## II. BURWELL V. HOBBY LOBBY STORES, INC. AND CONTRACEPTION COVERAGE

### A. *The Religious Freedom Restoration Act and the ACA*

"Government shall not substantially burden a person's exercise of religion."<sup>79</sup>

In *Employment Division v. Smith*,<sup>80</sup> the Supreme Court held that facially neutral laws that in effect incidentally burdened free religious practice do not contravene the Free Exercise Clause.<sup>81</sup> In response, Congress enacted the RFRA "[i]n order to ensure broad protection for religious liberty."<sup>82</sup> The government cannot substantially burden a person's exercise of religion, even when the burden is caused by a generally applicable rule.<sup>83</sup> If the government does substantially burden a person's exercise of religion, that person is exempt from the law unless the government can demonstrate that

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75. Richard, *supra* note 74, at 153; Matthew A. Melone, *The Pundits Doth Protest Too Much: National Federation of Independent Business v. Sebelius and the Future of the Taxing Power*, 4 MICH. ST. L. REV. 1189, 1208 (2012) (describing the individual mandate as a tax "imposed for merely existing").

76. Melone, *supra* note 75, at 1210 (suggesting, however, that there remain some meaningful limitations on the taxing power).

77. Brett W. Hastings, *Taxation Without Limitation: The Prohibited Pretext Doctrine v. the Sebelius Theory*, 15 MARQ. ELDER'S ADVISOR 229, 240 (2013) (arguing that *Sebelius* "grants Congress the ability to simply ignore violations of constitutional provisions so long as the associated law can reasonably be interpreted as a tax").

78. Melone, *supra* note 75, at 1205.

79. 42 U.S.C. § 2000bb-1(a) (2012); *see also id.* at § 2000bb-1(b); Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 605-06 (2014); Jeremy M. Christiansen, Note, *The Word "Person" Includes Corporations: Why the Religious Freedom Restoration Act Protects both For and Nonprofit Corporations*, 2013 UTAH L. REV. 623, 623 (2013).

80. 494 U.S. 872, 874-76 (1990) (altering the test for free exercise of religion claims used in prior Supreme Court precedent).

81. *Id.* at 882-90.

82. *Burwell*, 134 S. Ct. at 2761.

83. 42 U.S.C. § 2000bb-1(a).

the application of the burden to that person is in furtherance of a compelling governmental interest, and that it is the least restrictive means of furthering that compelling governmental interest.<sup>84</sup>

Under the ACA, “[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for<sup>85</sup> . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.”<sup>86</sup> Any employer with 50 or more full-time employees must offer a health insurance plan that provides minimum essential coverage or be fined \$100 per day for each employee who qualifies as an affected “individual.”<sup>87</sup>

#### *B. Hobby Lobby Stores, Inc. v. Sebelius*

David Green, founder of Hobby Lobby, Inc. and his wife Barbara, and their three children, Steve Green, President of Hobby Lobby, Inc. Mart Green, founder and CEO of Mardel, and Darsee (Green) Lett filed suit on behalf of the corporations and in their individual capacity.<sup>88</sup> The Greens run both businesses through a management trust which requires trustees to sign a statement of faith and to maintain a walk with the Lord Jesus Christ.<sup>89</sup> Each Green is a trustee.<sup>90</sup> Hobby Lobby Stores, Inc., an S Corporation,<sup>91</sup> has over 500 arts and crafts stores with about 13,000 full-time employees.<sup>92</sup> Mardel, Inc. is a Christian bookstore and educational supply store with thirty-five stores in seven states with about 400 employees.<sup>93</sup>

The Greens are Christian, and operate their companies in accordance with their faith.<sup>94</sup> Both companies are not open on Sunday in accordance with their Christian faith.<sup>95</sup> Hobby Lobby, Inc. purchases full-page newspaper

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84. *Id.* § 2000bb-1(b).

85. 42 U.S.C. § 300gg-13(a).

86. *Id.* § 300gg-13(a)(4).

87. 26 U.S.C. §§ 4980D(a)-(b) (2012).

88. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d at 1122 (10th Cir.), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014).

89. *Id.*

90. *Id.*

91. *Id.* According to the Internal Revenue Service, “S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes.” IRS, *S Corporations* <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/S-Corporations> (last updated Nov. 12, 2014); *see* 26 U.S.C. § 1361.

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

93. *Id.*

94. *Id.*

95. *Id.*

ads welcoming others to “know Jesus as their Lord and Savior,” and does not engage in business activities that encourage alcohol use.<sup>96</sup> The Greens provide health insurance to the employees of the two companies, however because of their Christian faith they believe that life begins at conception,<sup>97</sup> they cannot provide coverage for drugs and devices they believe cause abortions. Furthermore, their insurance historically never covered contraceptive drugs and devices that could terminate a pregnancy.<sup>98</sup> The government did not dispute the sincerity of their beliefs.<sup>99</sup>

The plaintiffs in *Hobby Lobby Stores, Inc. v. Sebelius*<sup>100</sup> challenged the regulations that required employers to cover four of the twenty FDA approved methods of birth control,<sup>101</sup> because those four could prevent a fertilized egg from implanting.<sup>102</sup> FDA approved methods of birth control not found objectionable to the plaintiffs include the barrier method of a female condom, a diaphragm with spermicide, a sponge with spermicide, a cervical cap with spermicide, spermicide alone, oral contraceptives including a combined pill, a progestin only pill, an extended/continuous use pill, a patch, a vaginal contraceptive ring, and a progestin implant.<sup>103</sup> Methods deemed objectionable include emergency contraception including Plan B, a pill that blocks the hormone progesterone, and intrauterine devices (IUDs) that prevent sperm from reaching a fertilized egg.<sup>104</sup> According to the FDA, emergency contraception with the hormone progestin works

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96. *Id.*

97. *Id.* at 1122, 1125.

98. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012), *rev'd and remanded* 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014). *But see* Complaint at 14, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) (acknowledging that their insurances policies covered two of the challenged drugs prior to the passage of the ACA and that plaintiffs excluded those drugs once they reexamined their policies and became aware of the coverage for the first time).

99. *Hobby Lobby*, 723 F.3d at 1125.

100. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev'd and remanded* 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014).

101. *Hobby Lobby*, 723 F.3d at 1123, 1124-25. The plaintiffs only objected to four of the twenty methods: two intrauterine devices, Plan B (a morning after pill), and Ella (a week after pill). *Id.* at 1123. According to the Court of Appeals, “[t]he government does not articulate why accommodating such a limited request fundamentally frustrates its goals.” *Id.* at 1144.

102. *Id.* at 1124-25.

103. *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (last updated Aug. 27, 2013); *Hobby Lobby*, 723 F.3d at 1123.

104. *Hobby Lobby*, 723 F.3d at 1123; *see Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (last updated Aug. 27, 2013).

mainly by stopping the release of an egg, but may also prevent fertilization of the egg or implantation of the fertilized egg.<sup>105</sup> The Plan B pill that stops the hormone progesterone works mainly by stopping or slowing the release of an egg but may also change the lining of the womb, which prevents implantation of a fertilized egg.<sup>106</sup> The IUD works by preventing the sperm from reaching or fertilizing the egg, but may also prevent a fertilized egg from attaching to the uterus.<sup>107</sup>

Since they are for-profit, Hobby Lobby and Mardel do not fall into any of the exceptions, for less than fifty employees,<sup>108</sup> for a grandfathered plan,<sup>109</sup> or for a religious employer.<sup>110</sup> Hobby Lobby stood to be fined \$1.3 million per day for failure to provide the four forms of preventative care they objected to.<sup>111</sup> Anticipating potential significant financial loss, the Greens filed suit and sought a preliminary injunction on the grounds that their First Amendment rights and rights under RFRA were violated.<sup>112</sup>

The District Court held that the corporations lack free exercise rights and the plaintiffs were unlikely to establish a constitutional violation.<sup>113</sup> The

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105. *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (last updated Aug. 27, 2013).

106. *Id.*; see NAT'L INSTS. OF HEALTH, *Levonorgestrel*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a610021.html> (last updated Oct. 01, 2010) (stating that levonorgestrel may change the lining of the uterus).

107. *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (last updated Aug. 27, 2013).

108. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014).

109. *Supra* note 18 and accompanying text. Prior to the enactment of the mandate, Hobby Lobby did cover emergency contraceptives, but upon discovery of this, Hobby Lobby excluded those drugs. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1286 (W.D. Okla. 2012), *rev'd and remanded* 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014); Complaint at 14, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE). The district court stated that this was only a mistake by Hobby Lobby, and the government does not dispute that Hobby Lobby has excluded emergency contraceptives. *Hobby Lobby*, 870 F. Supp. 2d at 1286. Thus, Hobby Lobby argued that it was only asking to preserve the status quo, although they did not fall under the grandfathering clause. *Id.* Hobby Lobby is self-insured and elected not to maintain their grandfathered status before the contraceptive requirement was proposed. *Hobby Lobby*, 723 F.3d at 1124.

110. *Hobby Lobby*, 870 F. Supp. 2d at 1285.

111. The fine is \$100 per day for each person not covered. 26 U.S.C. § 4980D(b)(1) (2012). With 13,000 individuals insured, both men and women, Hobby Lobby would have faced nearly \$475 million per year in fines. *Hobby Lobby*, 723 F.3d at 1125.

112. *Hobby Lobby*, 870 F. Supp. at 1283, 1285.

113. *Id.* at 1288.

Court reasoned that while corporations have some constitutional rights, such as free speech rights, individual and corporate constitutional rights are not identical.<sup>114</sup> Additionally, the District Court further denied the motion for a preliminary injunction on the grounds that the plaintiffs did not demonstrate a probability of success on their RFRA claim, despite RFRA not defining the term “person.”<sup>115</sup> The Court of Appeals for the Tenth Circuit and the U.S. Supreme Court denied a motion for an injunction pending appeal.<sup>116</sup>

Sitting en banc, the Court of Appeals for the Tenth Circuit reversed the denial of the preliminary injunction, holding that Hobby Lobby and Mardel were entitled to bring RFRA claims, as they “established a likelihood of success that their rights under this statute [were] substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm.”<sup>117</sup> While the Court of Appeals unanimously held that Hobby Lobby and Mardel had standing to sue,<sup>118</sup> the court fractured on other issues.<sup>119</sup> A majority of five of the eight circuit judges reversed the district court’s ruling that Hobby Lobby and Mardel did not demonstrate a likelihood of success on their RFRA claim, and held that Hobby Lobby satisfied the first prong of the preliminary injunction test, and remanded on the other two prongs.<sup>120</sup> A plurality of four, however, would have also held that the other prongs, the balance of equities and the public interest, were also satisfied.<sup>121</sup>

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114. *See id.*; *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 364 (2010) (“The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”).

115. *Hobby Lobby*, 870 F. Supp. at 1291, 1296-97.

116. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 120-6294, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012) (order denying preliminary injunction), *aff’d* 133 S. Ct. 641 (2012).

117. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1121 (10th Cir. 2013), *aff’d sub nom. Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014).

118. *Hobby Lobby*, 723 F.3d at 1121 (“[T]hree judges would . . . hold that the Greens have standing to bring to RFRA and Free Exercise claims and that a preliminary injunction should be granted on their RFRA claim . . . [but] would also find that the Anti-Injunction Act is not jurisdictional and that the government has forfeited reliance.”). The Court’s disposition consisted of six additional concurring and dissenting opinions. *Id.* at 1116, 1121 n.1.

119. *Id.* at 1128.

120. *Id.*

121. *Id.* The appeals court remanded to the district court to decide the other two factors determining whether to grant or deny a preliminary injunction. *Id.* at 1121. The Court of Appeals concluded that both Hobby Lobby and Mardel had standing because they faced an imminent financial loss due to the mandate. *Id.* at 1126. On remand on July 19, 2013, the District Court granted the preliminary injunction. *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2013 U.S. Dist. LEXIS 107248, at \*5 (W.D. Okla. July 19, 2013).

The appellate court decided, on the merits, whether the closely held, for profit, corporations were persons under the RFRA.<sup>122</sup> Since the RFRA does not define “person,” the Dictionary Act states that in determining the meaning of any act of Congress, the word “person” includes individuals, corporations, companies, associations, and firms, among others.<sup>123</sup> The appellate court was less concerned with this distinction between persons and corporations, and more concerned with whether the rights do not and should not turn on a tax status.<sup>124</sup>

The court examined the question of whether a corporation’s First Amendment rights turn upon the tax code.<sup>125</sup> Under the federal tax code, non-profit corporations organized and operated exclusively for purposes such as religion, charity, science, and education may qualify for tax exemptions.<sup>126</sup> For-profit corporations may be closely held, such as the plaintiffs Hobby Lobby, Mardel, and Conestoga Wood Specialties, or publicly traded.<sup>127</sup> The IRS defines closely held corporations as corporations that are not personal service corporations and in the last half of the year have had over 50% of their stock held by five or fewer individuals.<sup>128</sup> According to the I.R.S. for-profit, publicly traded corporations, are made up of primarily stocks and are publically traded on one or more established securities markets in the United States or qualified foreign exchanges.<sup>129</sup> So while the majority of the Supreme Court kept the

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122. *Hobby Lobby*, 723 F.3d at 1128.

123. *Id.* at 1129 (citing 1 U.S.C. § 1 (2006)); *see generally*, Alan J. Meese and Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 275-77, 288 (2014); Gregory P. Magarian, *Hobby Lobby in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 71-72 (2014); Case Note, *Tenth Circuit Holds For-Profit Corporate Plaintiffs Likely to Succeed on the Merits of Substantial Burden on Religious Exercise Claim – Hobby Lobby Stores, Inc. v. Sebelius*, 127 HARV. L. REV. 1025, 1027 (2014); Jeremy Thomas Harbaugh, Case Note, *Federal Appellate Court Holds that a For-Profit Corporation Can Challenge the Contraception Mandate Under the RFRA*, 39 AM. J. L. & MED. 692, 692-93, 694 n.31 (2013).

124. *Hobby Lobby*, 723 F.3d at 1135. In his concurrence, Judge Hartz asserted that all corporations fall within First Amendment Free Exercise and RFRA protection. *Id.* at 1147 (Hartz, J., concurring); *see generally*, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 41-43 (2014).

125. *Hobby Lobby*, 723 F.3d at 1127-28, 1135.

126. I.R.C. § 501(c)(3) (2012).

127. Mary Pazanowski, *For-Profits, Closely Held Corporations Can Opt Out of Contraceptive Mandates*, BLOOMBERG BNA (July 1, 2014), <http://www.bna.com/forprofit-closely-held-n17179891700/>.

128. IRS, U.S. DEP’T OF TREAS., Corporations, Pub. No. 542, 3 (Rev. Mar. 2012), available at <http://www.irs.gov/pub/irs-pdf/p542.pdf>; *see also* 26 C.F.R. § 1.883-2(d)(3) (2014).

129. 26 C.F.R. § 1.883-2(a) (2014).



ruling narrowly tailored to closely-held corporations, the Tenth Circuit stated in *Conestoga Wood Specialties* that the Internal Revenue Code should not be determinative.<sup>130</sup> The focus, perhaps, should be on the religious beliefs and not the tax structure, and as a practical matter, it is harder to get a publicly-traded corporation to have a religious purpose.<sup>131</sup>

### C. *Conestoga Wood Specialties Corp. v. Sebelius*

The *Conestoga Wood Specialties Corp. v. Sebelius*<sup>132</sup> case is similar to *Hobby Lobby*,<sup>133</sup> except that the Court of Appeals for the Third Circuit, unlike the Court of Appeals for the Tenth Circuit, upheld the denial of the preliminary injunction.<sup>134</sup> The Hahn family, devout Mennonite Christians,<sup>135</sup> own Conestoga Wood Specialties Corporation, a closely held for-profit corporation, which makes custom wood cabinet doors and components,<sup>136</sup> and employ about 950 people.<sup>137</sup> Conestoga makes charitable contributions according to their religious beliefs, and the corporation adheres to the Hahn Family Statement on the Sanctity of Human Life.<sup>138</sup> Conestoga Wood Specialties Corporation's health plan does not cover contraceptive prescriptions or drugs that can be used to abort a pregnancy.<sup>139</sup>

Conestoga Wood Specialties Corporation and its five owners moved for a preliminary injunction against the ACA regulation requiring employee health insurance coverage for the twenty approved contraceptives,<sup>140</sup>

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130. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2760, 2764 (2014); *Hobby Lobby*, 723 F.3d at 1135.

131. Ilya Somin, *Can People "Exercise Religion" Through Publicly Traded Corporations?*, WASH. POST (July 12, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/12/can-people-exercise-religion-through-publicly-traded-corporations/>.

132. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (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), *rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

133. *See infra*, section "Hobby Lobby Stores, Inc v. Sebelius," at 3-19, and accompanying endnotes, at 101-133.

134. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013).

135. *Burwell*, 134 S. Ct. at 2764.

136. *About, Our Story*, CONESTOGA WOOD SPECIALTIES CORP., <http://www.conestogawood.com/about-conestoga/our-story> (last visited Dec. 02, 2014).

137. *Burwell*, 134 S. Ct. at 2764.

138. *Conestoga*, 917 F. Supp. 2d at 402-03, 403 n.5.

139. *Id.* at 403.

140. *Id.* at 400-01.

specifically those four which could cause an abortion.<sup>141</sup> In a case of first impression<sup>142</sup> the plaintiffs challenged the ACA regulations on First Amendment<sup>143</sup> and RFRA<sup>144</sup> grounds. Plaintiffs in *Conestoga Wood Specialties Corp.* analogized their First Amendment Free Exercise claim to the First Amendment Free Speech claim, which the Supreme Court approved in *Citizens United v. Federal Elections Commission*.<sup>145</sup> The District Court in *Conestoga Wood Specialties*, however, did not accept the plaintiffs' analogy reasoning that the two provisions of the First Amendment, the Free Speech Clause and the Free Exercise of Religion Clause, differ.<sup>146</sup> The District Court denied the motion for the preliminary injunction.<sup>147</sup> The District Court stated that the Free Exercise Clause is for individual religious freedom, and corporations cannot avail themselves of this Constitutional provision.<sup>148</sup> According to the District Court the Hahn's first amendment claim also failed because the regulations are geared towards a legitimate governmental interest.<sup>149</sup> The RFRA claim was similarly dismissed.<sup>150</sup>

The Court of Appeals for the Third Circuit affirmed the District Court's decision holding that a for-profit corporation cannot engage in protected religious exercise, either under the First Amendment or the RFRA.<sup>151</sup> The

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141. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 390 n.1 (3d Cir. 2013) (Jordan, J. dissenting), *rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

142. *Conestoga*, 917 F. Supp. 2d at 400. The district court stated that neither the Third Circuit nor the Supreme Court has decided whether a corporation has the religious rights of individuals. *Id.* at 406.

143. U.S. CONST. amend. I.

144. *Burwell*, 134 S. Ct. at 2765.

145. *Conestoga*, 917 F. Supp. 2d at 406. *Citizens United*, a non-profit corporation received donations predominantly from individuals but also from some corporations. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319 (2010). *Citizens United* brought declaratory and injunctive action against the Federal Elections Commission to ensure it did not run afoul of federal election laws. *Id.* at 321. The Supreme Court held that corporations have political free speech rights, and that the government may not suppress political speech because of the speaker's corporate identity. *Id.* at 365. The Supreme Court thus held that the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b, was unconstitutional. *Id.*

146. *Conestoga*, 917 F. Supp. at 407

147. *Id.* at 419.

148. *Id.* at 408 (stating that the Free Exercise Clause is a personal right and not available to corporations).

149. *Id.* at 410.

150. *Id.* at 413.

151. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The appeals court did not need to decide if a corporation is a person under the RFRA. *Id.*; Zachary J. Phillipps, Note, *Non-*

Court of Appeals addressed the application of the Supreme Court precedent of *Citizens United v. Federal Election Commission*.<sup>152</sup> While the Free Exercise and Free Speech clauses are in close proximity in the First Amendment, they have historically been treated differently.<sup>153</sup> The Appeals Court found that while there is free speech precedent to give corporations this right, there is an absence of case law giving corporations free exercise rights.<sup>154</sup> Further, the court stated that the Hahn family members, in their individual capacity, were not likely to succeed on their First Amendment or RFRA claims.<sup>155</sup> Thus, the denial of the preliminary injunction was affirmed.<sup>156</sup> The Third Circuit noted the Tenth Circuit's *Hobby Lobby* decision, but respectfully disagreed with the Tenth Circuit.<sup>157</sup> The dissent observed the irony that the majority determined religious rights by the tax code, with non-profits having an exemption while for-profit corporations don't have such rights.<sup>158</sup> The circuit split set the issue up for a Supreme Court resolution on the issue.

D. *Burwell v. Hobby Lobby Stores, Inc.: The Supreme Court Addresses Contraception Coverage*

In *Burwell v. Hobby Lobby Stores, Inc.* the Supreme Court affirmed the Court of Appeals for the Tenth Circuit in *Hobby Lobby* and reversed and remanded *Conestoga Wood Specialties, Corp.* to the Court of Appeals for the Third Circuit.<sup>159</sup> Justice Alito wrote for the majority and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.<sup>160</sup> According to the majority, the key issue was, whether HHS's requirement for closely-held corporations to provide health insurance that includes contraceptives violates the RFRA and the owners' sincere religious beliefs.<sup>161</sup> The majority concluded that "a federal regulation's restriction on

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*Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 CONN. L. REV. 39, 58-59 (2014).

152. See generally *Conestoga*, 724 F.3d at 383-86.

153. *Id.* at 386.

154. *Id.* at 384-85. The *Citizens United* analogy did not appear at Supreme Court oral arguments or in the Supreme Court decision. See generally Transcript of Oral Argument, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

155. *Conestoga*, 724 F.3d at 389.

156. *Id.*

157. *Id.* at 384 n.7.

158. *Id.* at 390.

159. See *Burwell*, 134 S. Ct. at 2785.

160. *Id.* at 2758.

161. *Id.* at 2759.

the activities of a for-profit closely-held corporation must comply with the RFRA.”<sup>162</sup>

In reaching this conclusion, the majority used the Dictionary Act to find a definition of “person” for the purpose of the RFRA.<sup>163</sup> Under the Dictionary Act, the Court found the word “person” includes corporations, companies, firms, and other business associations.<sup>164</sup> The Court observed that some lower court judges have suggested that the RFRA does not apply to for-profit corporations, but the Court suggested this suggestion “flies in the face of modern corporate law.”<sup>165</sup> The majority noted that corporations are human entities used to “achieve desired ends.”<sup>166</sup>

Since the RFRA applied, the Court then determined that the regulation’s mandate to provide abortion-causing contraception substantially burdens the plaintiff’s exercise of religion.<sup>167</sup> The Court pointed out in their opinion that the penalty per employee for failure to provide health insurance is expensive for the corporations.<sup>168</sup> In an unusual move, the majority rebutted an argument not espoused by a party to the litigation but raised by Justice Sotomayor during oral argument.<sup>169</sup> They addressed that the plaintiffs could pay the penalty and not provide the health insurance that has the offensive mandate.<sup>170</sup> While the government did not make the argument below, Justice Sotomayor did raise the issue at oral argument.<sup>171</sup> The majority found this argument “unpersuasive,” as the parties have religious reasons for not providing health insurance for their employees.<sup>172</sup>

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162. *Id.* at 2775. When deliberating whether a corporation fell within the RFRA’s definition of “persons,” the majority stated that “[a] corporation is simply a form of organization used by human beings to achieve desired ends.” *Id.* at 2768.

163. *Id.* at 2768-69; *see* 1 U.S.C. § 1 (2012) (defining “person”).

164. *Burwell*, 134 S. Ct. at 2768-69.

165. *Id.* at 2756.

166. *Id.* at 2768.

167. *Id.* at 2759, 2775. The Court observed that the Hahns and Greens religious beliefs about how life begins at conception are sincere. *Id.*

168. *Id.* at 2770, 2776.

169. Transcript of Oral Argument at 21-22, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

170. *Id.*

171. *Id.* (Sotomayor, J.) (“But isn’t there another choice nobody talks about, which is paying the tax, which is a lot less than a penalty and a lot less than - - than the cost of health insurance at all? These employers could choose not to give health insurance and pay not that high a penalty - - not that high a tax.”).

172. *Id.* at 23 (Sotomayor, J.) (“ . . . [employers] can just pay a greater salary and let the employees go in on the exchange.”); *Burwell*, 134 S. Ct. at 2777 (agreeing with Justice Sotomayor, the majority stated that approach also costs more because group health insurance is generally more costly than individual insurance.). In addition to raising wages to cover the cost of insurance for employees, the plaintiffs would have to pay the tax penalty for not providing health insurance. *Id.*

Since the Court found that the contraceptive mandate relating to the four objectionable methods did place a substantial burden on the exercise of religion, the Court had to determine whether the mandate survived the test for strict scrutiny.<sup>173</sup> The majority assumed that the interest in requiring cost-free employee access to the four methods of contraceptives in question was compelling.<sup>174</sup> The Court, however, concluded that the contraceptive mandate regulations “fail the least-restrictive-means test.”<sup>175</sup> The majority did not need to reach the First Amendment issues.<sup>176</sup>

In Justice Kennedy’s concurring opinion, he stated “freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law ... It means, too, the right to express those beliefs ... in the political, civic, and economic life of our larger community.”<sup>177</sup> Justice Kennedy suggested that the mandate could be placed on the insurance company and not the employer.<sup>178</sup>

However, Justice Ginsburg strongly dissented, calling the majority’s ruling a “decision of startling breadth.”<sup>179</sup> Justice Ginsburg stated that the Court “holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”<sup>180</sup> Justice Kennedy, in concurring, stated “the Court’s opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.”<sup>181</sup> With respect to Justice Ginsburg, the plaintiffs were closely-held for profit corporations, and the ruling may or may not extend to all commercial enterprises.<sup>182</sup>

### E. Subsequent Contraception Coverage Litigation

The Supreme Court’s decision in *Hobby Lobby v. Burwell*,<sup>183</sup> while narrowly tailored to cover only closely-held for-profit corporations with

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173. 42 U.S.C. § 2000bb-1(b) (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). Under strict scrutiny, the government needed to prove the mandate furthered a compelling governmental interest and is the least restrictive means for furthering that interest. 42 U.S.C. § 2000bb-1(b).

174. *Burwell*, 134 S. Ct. at 2780.

175. *Id.* at 2782.

176. *Id.* at 2785.

177. *Id.* at 2785 (Kennedy, J., concurring).

178. *Id.* at 2786.

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

180. *Id.*

181. *Id.* at 2785 (Kennedy, J., concurring).

182. *Id.* at 2760 (majority opinion) (noting the court’s holding does not extend to all commercial enterprise). *C.f. id.* at 2787 (Ginsburg, J. dissenting) (asserting the holding is, in fact, expansive enough to include commercial enterprise).

183. *Id.* at 2751.

sincerely held religious beliefs against the use of four FDA-approved contraceptives, is sure to spark additional litigation. Shortly after the *Hobby Lobby* decision, Wheaton College, a religious non-profit, requested, and was granted, an injunction pending appeal from the Supreme Court.<sup>184</sup> The Court decided whether an HHS required form must be completed to request an exemption from contraceptive coverage, or if written notice to the government, as Wheaton College used, suffices for exemption from contraceptive coverage.<sup>185</sup> The Court's order specifically stated that this is not an expression of the Court's views on the merits.<sup>186</sup> However, the dissent added their analysis concerning the injunction. Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented from the injunction pending appeal.<sup>187</sup> Justice Sotomayor stated that she strongly disagrees.<sup>188</sup> In addressing Wheaton College's request for an injunction, Justice Sotomayor expressed concern over granting relief in relation to a recently enacted law and published regulations when lower courts had not adjudicated the merits of the challenge and such relief is "extraordinary and reserved for the rarest of cases."<sup>189</sup> The Justice seems to overlook that, these cases challenging aspects of the ACA and its implementing regulations are the rarest of cases, pitting Constitutional and statutory religious freedoms against statutory and regulatory health care mandates.

Further, in *Mersino Management Company v. Burwell*,<sup>190</sup> for example, the Court of Appeals for the Six Circuit granted an injunction against the ACA contraceptive mandate pending appeal.<sup>191</sup> District courts have also granted preliminary injunctions against the enforcement of the contraceptive mandate after the Supreme Court's decision in *Hobby Lobby*.<sup>192</sup> Permanent

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184. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

185. *Id.* at 2807.

186. *Id.*

187. *Id.* at 2807-15 (Sotomayor, J. dissenting)

188. *Id.* at 2810.

189. *Id.*

190. Order Granting an Injunction Pending Appeal, No. 13-1944 (6th Cir. July 9, 2014).

191. *Id.*

192. See, e.g., *Catholic Benefits Ass'n LCA v. Sebelius*, No. CIV 14-240-R, 2014 U.S. Dist. LEXIS 75949 (W.D. Okla. June 24, 2014), *modified sub nom.* *Catholic Benefits Ass'n LCA v. Burwell*, No. 14-CV-685-R (W.D. Okla. July 1, 2014); *Holland v. U.S. Dep't of Health & Human Servs.*, No. 2:13-cv-15487 (S.D. W. Va. July 15, 2014).

injunctions have also been granted by district courts in numerous cases,<sup>193</sup> including in *Conestoga Wood Specialties Corp. v. Burwell*.<sup>194</sup>

Thus, while the Supreme Court decided the issue of the contraceptive mandate for religious based closely held corporations, this issue is not going away, and will likely continue to develop as courts and the public wrestle with the nuances of the Court's decision.<sup>195</sup> In subsequent cases, it is suggested, that the focus should be on the religious beliefs, and not the tax status, of the corporations involved.<sup>196</sup> While it is unlikely that publicly traded firms have a sincerely held religious belief, the RFRA focuses on religious beliefs, and tax status can change.<sup>197</sup>

In *Hobby Lobby*, the challenge involved only four of the twenty contraceptive methods, not all FDA approved contraceptive methods.<sup>198</sup> While this may not be the broad sweep that Justice Ginsburg states, which could allow corporations, partnerships, and sole proprietorships, to opt out of "any law" except tax laws, the outcome could well expand in subsequent litigation.<sup>199</sup> Justice Ginsburg further called the majority's rulings "extraordinary religion-based exemptions" which could bring havoc.<sup>200</sup> Lower courts will have to rule on a case-by-case basis on the pending cases and future cases which may develop on the contraceptive mandate.

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193. See, e.g., *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-104(EGS) (D.D.C. Oct. 20, 2014); *Midwest Fastener Corp. v. Burwell*, No. 13-0337 (ESH), (D.D.C. Oct. 24, 2014); *Johnson Welded Prods. v. Burwell*, No. 13-00609 (ESH), 2014 U.S. Dist. LEXIS 151306 (D.D.C. Oct. 24, 2014).

194. Order Denying Motion for Preliminary Injunction, No. 12-6744 (E.D. Pa. Oct. 2, 2014).

195. Emily Pitt Mattingly, "Hobby-Lobby"-ing for Religious Freedom: Crafting the Religious Employer Exemption to the PPACA, 102 KY. L. J. 183, 201 (2013) (discussing the "nationwide dissatisfaction with the narrowness of the religious employer exemption"); see, e.g., *Eternal World Television Network, Inc. v. Burwell*, No. CIV.A. 13-0521-CG-C, 2014 WL 2739347, at \*3, \*6 (S.D. Ala. June 17, 2014) (challenging the regulation that allows the plaintiff to opt out of providing contraception coverage by turning that responsibility to a third-party administrator because the act still facilitates access to contraception in violation of the company's "sincere religious beliefs").

196. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

197. Ilya Somin, *Can People "Exercise Religion" Through Publicly Traded Corporations?*, WASH. POST (July 12, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/12/can-people-exercise-religion-through-publicly-traded-corporations/>; see 42 U.S.C. §§ 2000bb(a)-(b) (2012); see also *Business Structures*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Business-Structures> (last updated Nov. 13, 2014).

198. *Burwell*, 134 S. Ct. at 2765 (majority opinion).

199. *Id.* at 2787 (Ginsburg, J., dissenting).

200. *Id.*

*F. Lingering Questions in the Contraception Coverage Debate*

The regulation at issue in *Burwell* mandating that corporations with religious beliefs cover all methods of approved birth control should be explicitly altered to accommodate sincerely-held religious beliefs of closely-held for profit corporations like Hobby Lobby, Mardel, and Conestoga. This would slow the race to the courthouse to get a preliminary or permanent injunction, and would clarify the issue for all. Justice Kennedy's suggestion in the concurrence that the insurance company should cover the types of birth control objected to by religious employers<sup>201</sup> is inadequate, as employers are still paying for health insurance that covers these methods, whether directly or indirectly, and thus there would still be the religious objection that they could be complicit in providing an abortion, which they object to on the basis of their religion.<sup>202</sup>

The long run effect on corporations who choose for religious purposes not to provide health insurance for the full range of contraceptives remains to be seen. There could be employees who choose to work elsewhere, where these four methods are covered under insurance plans. There could be other employees who share these values who choose to seek employment there. There could be customers who choose to shop elsewhere, while there could also be customers who seek out these stores because they share these values.

However it should be noted that the decision is not as sweeping as it may appear, as, according to the Tenth Circuit, the contraceptive mandate does not apply to tens of millions of people,<sup>203</sup> who are under grandfathered plans, exempt employers for religious reasons, or who work for companies with less than fifty employees.<sup>204</sup> Furthermore, after the decision, HHS on July 16, 2014 in a letter to Guam exempted the U.S. territories of Guam, Puerto Rico, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands, from some aspects of the ACA, at their request.<sup>205</sup> The 4.5

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201. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785-87 (2014) (Kennedy, J. concurring).

202. See generally, Mark L. Rienzi, *Constitutional Challenges: Religious Liberty and the HHS Mandate*, 29 J. CONTEMP. HEALTH L. & POL'Y. 1, 4-5 (2013).

203. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1124, 1143 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). This number has been put much higher, as high as 190 million people not covered by the mandate. Editorial, *Hooray! The War on Women is Back: The Supreme Court Unleashes a Wave of Liberal Misinformation*, WALL ST. J., July 3, 2014, at A12.

204. *Hobby Lobby*, 723 F.3d at 1124, 1143.

205. Letter from Marilyn Tavenner, Admin., Ctrs. for Medicare & Medicaid Servs., to Artemio B. Llagan, Comm'r of Guam Dep't. of Revenue & Taxation (Jul. 16, 2014), available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-llagan.pdf>.



million residents of these territories<sup>206</sup> are exempt from certain aspects of the ACA, such as guaranteed availability and essential health benefits, which apply to “states” under the statute, but not exempted from other requirements such as the preventive health screenings at question in this case.<sup>207</sup>

Thus, by deciding that employers in closely-held for profit corporations do not have to provide the four types of birth control that violate their religious beliefs, the court opened the door to further litigation.<sup>208</sup> Perhaps a better solution is exempt these religious employers, for profit and not for profit, from the requirement to provide the contraceptives deemed objectionable on the basis of religion.

### III. KING V. BURWELL: LOOKING AHEAD TO THE NEXT ACA CASE BEFORE THE SUPREME COURT

The litigation under the ACA on the contraceptive mandate and at least one other major issue continues at the time of this discussion.<sup>209</sup> In 2014, two federal appellate courts issued contradictory opinions on whether the federal health insurance exchange qualifies as an exchange established by the State under the ACA, setting up this issue for a showdown in the Supreme Court.<sup>210</sup> On November 7, 2014, the U.S. Supreme Court agreed to hear *King v. Burwell*, an ACA case that involved the validity of an IRS regulation allowing for an individual tax credit for purchasing health insurance through a federally-established exchange.<sup>211</sup>

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206. Editorial, *Territories Free of ObamaCare: The White House Issues Another Illegal Exemption*, WALL ST. J., July 21, 2014 at A12.

207. *Supra* note 7 and accompanying text.

208. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014); *see generally* Karen Gantt, *Balancing Women’s Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L.J. 1 (2014) (exploring the various lawsuits filed against the contraceptive mandate).

209. Abbe Gluck, *Symposium: The Grant in King – Obamacare Subsidies as Textualism’s big test*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), <http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test/>.

210. *Halbig v. Burwell*, 758 F.3d 390, 406, 412 (D.C. Cir. 2014), *vacated, reh’g granted* No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 04, 2014); *King*, 759 F.3d at 374-75.

211. *King v. Burwell*, 759 F.3d 358, 364-65 (4th Cir. 2014), *cert. granted*, No. 14-114, 2014 U.S. LEXIS 7428 (U.S. Nov. 7, 2014). 26 C.F.R. § 1.36B-2 states, in pertinent part, that a taxpayer whose household income is between 100% and 400% of the Federal poverty line is allowed a premium tax credit if the taxpayer is enrolled in a qualified health plan “through an Exchange.” 26 C.F.R. §§ 1.36B-2(a), (b)(1) (2013).

### A. *Individual Tax Credits*

The ACA states, “each State shall...establish an American Health Benefit Exchange.”<sup>212</sup> A state may elect to establish an exchange, according to another section, and if a state does not so elect, the Secretary of HHS shall establish and operate an exchange within the state.<sup>213</sup> A provision of the ACA allows for tax credits for those who purchase health insurance “through an Exchange established by the State.”<sup>214</sup> The IRS has interpreted this statutory provision broadly to also include individual in states that have a federal exchange, because the state chose not to establish an exchange.<sup>215</sup>

### B. *Halbig v. Burwell*

On May 2, 2013, individual and corporate plaintiffs filed suit to prevent the implementation of the IRS’s rule related to tax credits.<sup>216</sup> Without the rule extending the tax credit to federally-created exchanges, the individual plaintiffs would have been exempt from the individual mandate and excused from any fines for noncompliance because of their low incomes.<sup>217</sup> Once the IRS applied the tax credit to individuals in the District of Columbia (including the plaintiffs), the total cost of the least expensive qualifying plan would be less than eight percent of each plaintiff’s income and, therefore, each plaintiff would be required to purchase an insurance plan or pay a tax penalty.<sup>218</sup> Similarly, the corporate plaintiffs alleged that, while they currently were not required to provide health insurance to employees, any employee who was required to obtain coverage or pay a fine as a result of the tax credit would also trigger an obligation on plaintiffs’ part to provide similar plans for their employees.<sup>219</sup> Collectively, the plaintiffs argued that the plain language of the statute required that only those exchanges created by the states, and not federally-created exchanges, would be subject to the tax credit scheme and asked the court to strike down the IRS rule.<sup>220</sup> In short, plaintiffs in states with a federal exchange challenged the IRS rule

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212. Affordable Care Act, Pub. L. 111-148, § 1311(b)(1), 124 Stat. 119, 173 (2010); *King*, 759 F.3d at 364.

213. Affordable Care Act § 1321(c)(1); *King*, 759 F.3d at 364.

214. 26 U.S.C. § 36B(b)(1), (c)(2)(A)(i) (2012); *King*, 759 F.3d at 364.

215. 26 C.F.R. § 1-36B-2(a)(1); 45 C.F.R. § 155.20 (2014) (defining “Exchange”); *King*, 759 F.3d at 364.

216. *See generally* Complaint, *Halbig v. Burwell*, 27 F.Supp.3d 1 (D.D.C. 2014) (No. 13-623 (PLF), 2014 WL 129023.

217. *Id.* at 4-5.

218. *Id.*

219. *Id.* at 6-7.

220. *Id.* at 13-14.

because they did not want to pay the penalty tax for not purchasing health insurance.<sup>221</sup>

The District Court for the District of Columbia declined to do so.<sup>222</sup> Instead, the District Court granted the government's motion for summary judgment because the language of the ACA unambiguously granted the IRS the authority to promulgate the rule.<sup>223</sup> Specifically, the District Court held that, when viewed in the context of the ACA, the phrase "established by the State" includes both exchanges established by individual states and exchanges established by the federal government on behalf of states.<sup>224</sup> The District Court further noted that other provisions in the ACA and the Act's legislative history reflect Congress' intent to make the tax credits available to taxpayers who were part of state-created and federally-created exchanges.<sup>225</sup> Thus, the District Court held that Congress' intent was clear and upheld the IRS rule under the first step of the *Chevron* statutory interpretation analysis.<sup>226</sup>

On January 15, 2014, the Court of Appeals for the D.C. Circuit in *Halbig v. Burwell* reversed and vacated the IRS regulation since the ACA statute specifically states exchanges established by the State.<sup>227</sup> Unlike the District Court, the D.C. Circuit concluded that the plain language of the statute precluded the IRS from extending the tax credit to purchasers in federally-created exchanges.<sup>228</sup> Specifically, the D.C. Circuit found the phrase "established by the State" controlling and held that the relevant portion of the statute "plainly distinguishes Exchanges established by states from those

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221. *Halbig v. Burwell*, 758 F.3d 390, 393 (D.C. Cir. 2014), *vacated, reh'g granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 04, 2014).

222. *Halbig v. Sebelius*, 27 F.Supp.3d 1(D.D.C. Jan. 15, 2014), *rev'd sub nom. Halbig v. Burwell*, 758 F.3d 390, 393 (D.C. Cir. 2014), *vacated, reh'g granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 04, 2014). The District Court found that the Anti-Injunction Act applied and barred plaintiffs' attempt to prevent the collection of the assessable payment that the District Court deemed a "tax." *Id.* at 8-11. The Anti-Injunction Act is not the subject of this article and the analysis will instead focus on the District Court's alternative decision on the merits of the plaintiffs' statutory interpretation argument.

223. *Id.* at 17.

224. *Id.* at 20.

225. *See generally id.* at 19-24; *id.* at 24 n.13 (acknowledging that there was a "limited legislative record relating to the final version of the bill.").

226. *Id.* at 25, 25 n.14 (holding in the alternative that the "IRS Rule must be upheld at *Chevron* step two as . . . the Secretary's interpretation of the statute in promulgating the Rule was at least permissible.").

227. *Halbig v. Burwell*, 758 F.3d 390, 412 (D.C. Cir. 2014), *vacated, reh'g granted* No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 04, 2014).

228. *Id.* at 399.

established by the federal government.”<sup>229</sup> The D.C. Circuit disagreed with the lower court’s determination that the legislative history supported the government’s reading, stating instead that the “scant legislative history” did not demonstrate Congress’ intent.<sup>230</sup> The D.C. Circuit further reasoned that its decision was consistent with HHS’s exemptions of the five U.S. territories as not being “states” for purposes of aspects of the ACA.<sup>231</sup>

Following the D.C. Circuit’s decision, the Department of Justice filed a petition for rehearing *en banc*, arguing that the “disruption threatened by the panel majority’s erroneous interpretation and the direct conflict with *King* present a question of ‘exceptional importance’ warranting *en banc* consideration.”<sup>232</sup> On September 4, 2014, the Court of Appeals for the D.C. Circuit vacated its prior decision and granted rehearing *en banc*.<sup>233</sup> Oral argument was scheduled for December 17, 2014 but was removed from that calendar and the case held in abeyance pending the Supreme Court’s decision in *King v. Burwell*.<sup>234</sup>

### C. *King v. Burwell*

Plaintiff David King was not eligible for health insurance coverage either through an employer or through the government, and his income exempted him from the penalty or tax for not having health insurance.<sup>235</sup> His income qualified him for a subsidy through a state exchange, but Virginia is not one

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229. *Id.*; *see id.* at 403-05 (rejecting the government’s arguments that the D.C. Circuit’s interpretation will lead to “absurd” results and significantly weaken the ACA).

230. *Id.* at 407-08.

231. *See* 45 C.F.R. § 155.20 (2014) (defining “State” as all fifty states and the District of Columbia); Jason Millman, The Administration Just took Obamacare Away from the Territories, WASH. POST. (July 17, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/17/the-administration-just-took-obamacare-away-from-the-territories/>; Letter from Marilyn Tavenner, Admin., Ctrs. for Medicare & Medicaid Servs., to Gregory R. Francis, Comm’r of the Office of the Lieutenant Gov. of V.I., (July 16, 2014), <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Francis.pdf> (addressing concerns about the ACA’s applicability to health insurance issues in the U.S. territories).

232. Petition for Rehearing En Banc at 2, *Halbig v. Burwell*, 758 F.3d 390 (D.D.C. 2014) (No. 13–623 (PLF)).

233. Order, *Halbig*, No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 04, 2014).

234. Per Curiam Order, 758 F.3d 390 (Nov. 11, 2014); *see* Lyle Denniston, *Health Care Subsidies Issue Rushed to Court (FURTHER UPDATE)*, SCOTUSBLOG (Jul. 31, 2014, 11:20 PM), <http://www.scotusblog.com/2014/07/health-care-subsidies-issues-rushed-to-court/> (noting that the *en banc* rehearing process “a process that could take months, at least.”).

235. *King v. Sebelius*, 997 F. Supp. 2d 415, 420 (E.D.V.A. 2014), *aff’d sub nom. King v. Burwell*, 759 F.3d 358 (4th Cir.), *cert. granted*, No. 14-114, 2014 U.S. LEXIS 7428 (U.S. Nov. 7, 2014).

of the states that set up an exchange.<sup>236</sup> Mr. King did not want to procure health insurance and did not want to pay the penalty, but with the broadly written IRS rule that gives a subsidy for any “exchange,” he would either have to procure health insurance or pay the tax.<sup>237</sup> Mr. King and other plaintiffs filed suit contending that the IRS rule exceeds the IRS’s regulatory authority, is arbitrary and capricious, and is contrary to the Administrative Procedure Act.<sup>238</sup>

The District Court for the Eastern District of Virginia held that the plaintiffs had standing to sue but dismissed the plaintiffs’ complaint.<sup>239</sup> The District Court found that the IRS Rule carried out Congress’ clear intent to extend the tax credit to individuals who participated in federally-created exchanges.<sup>240</sup> Construing the statute as a whole, the District Court reasoned that the tax credit provision should be read to apply to all exchanges because “it furthers Congress’s intent to provide affordable health insurance for all.”<sup>241</sup> The District Court also looked to the trial court’s decision in *Halbig v. Burwell* and noted that “there is no evidence in the legislative record that [Congress] . . . ever entertained the idea of conditioning federal tax credits upon state participation.”<sup>242</sup> In the alternative, the District Court also held, even if the statutory language was ambiguous as to Congress’ intent, that the IRS Rule is a reasonable interpretation of that provision of the ACA and, therefore, worth of deference from the courts.<sup>243</sup>

The Court of Appeals for the Fourth Circuit in *King v. Burwell*<sup>244</sup> held that the IRS regulation is a permissible exercise of agency discretion, affirming the district court.<sup>245</sup> After affirming the holding that the parties have standing,<sup>246</sup> the Court of Appeals turned to the merits. Applying the two-step test of administrative deference from *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>247</sup> the Court of Appeals found under the first step that Congress did not speak definitively to the question; the statute is

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236. *King*, 759 F.3d at 365. The District of Columbia also has an exchange. *Id.* at 364.

237. *See id.* at 365.

238. *Id.* (citing the Administrative Procedure Act, 5 U.S.C. § 706 (2014)).

239. *King*, 997 F. Supp. 2d at 418.

240. *Id.* at 431.

241. *Id.* at 428.

242. *Id.* at 431.

243. *Id.* at 422-24, 432.

244. *King v. Burwell*, 759 F.3d 358, 363 (4th Cir.), *cert. granted*, No. 14-114, 2014 U.S. LEXIS 7428 (U.S. Nov. 7, 2014).

245. *Id.* at 363; *King v. Burwell*, 997 F. Supp. 2d 415, 432 (E.D.V.A. 2014).

246. *King*, 759 F.3d at 366.

247. *Chevron v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984); *King*, 759 F.3d at 367.

ambiguous and can be interpreted more than one way.<sup>248</sup> The Court then applied the second prong of the test and considered whether the agency's rule is based upon a permissible interpretation of the statute.<sup>249</sup> Finding that the ACA permits the IRS rule to give tax credits for insurance purchased on the federal exchange,<sup>250</sup> the Court of Appeals upheld the IRS rule as a permissible interpretation of the statute.<sup>251</sup>

The Supreme Court is expected to make a decision on this case by the end of June 2015.<sup>252</sup> If the Court limits the holding to the statutory language of exchanges run by the state, the Congress could amend the ACA section to state "exchanges" or "exchanges run by the state or federal government."<sup>253</sup> When enacting the law, in hindsight, that distinction should have been made. The litigation continues under the Affordable Care Act, and is expected to continue as new issues emerge.<sup>254</sup>

#### D. *Predicting the Supreme Court's Decision and Offering a Simple Legislative Fix*

Following the Supreme Court's ACA decisions related to the individual mandate and contraception coverage, *King v. Burwell* addresses the tension between efforts to compel compliance with the individual mandate while simultaneously excusing larger entities such as states and corporations from complying with large swathes of the Act. As noted by the court in *NFIB v. Sebelius*, the goals of the ACA could only be achieved with national compliance because a patchwork approach to health care reform would simply be ineffective.<sup>255</sup> At the same time, Congress carved out exceptions for large employers and other key players in the insurance marketplace to help ensure that the ACA would pass.<sup>256</sup> The Court in *Hobby Lobby*

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248. *King*, 759 F.3d at 372.

249. *Id.* (citing *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

250. *Id.* at 373-75.

251. *Id.* at 376.

252. David Bastawrous, *Gruber and Supreme Court Thrust Obamacare into the Spotlight*, FOXNEWS (Nov. 13, 2014), <http://www.foxnews.com/on-air/special-report-bret-baier/blog/2014/11/13/gruber-and-supreme-court-thrust-obamacare-spotlight>.

253. Such disposition would amend the ACA. See Affordable Care Act, Pub. L. 111-148, § 1311(b)(1), 124 Stat. 119, 173 (2010). Including how refundable credits are applied. 26 U.S.C. § 36B(b)(1), (c)(2)(A)(i) (2012); see also 26 C.F.R. § 1-36B-2(a)(1); 45 C.F.R. § 155.20 (2014) (defining "Exchange").

254. Steve Benen, *House Republicans Finally File Anti-Obama Lawsuit*, MSNBC (Nov. 21, 2014, 3:27 PM), <http://www.msnbc.com/rachel-maddow-show/house-republicans-finally-file-anti-obama-lawsuit>.

255. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012).

256. *Id.* at 2612 (explaining that Congress discarded a single-payer system that would have left "little, if any, room for private enterprise" and instead chose a system that "retains a robust role for private insurers and state governments."); see Group Health

articulated a broad exception to contraception coverage,<sup>257</sup> potentially opening up the door for more religious-based ACA exemption claims.<sup>258</sup> *King v. Burwell* is the inevitable clash of those two ideas and a decision vacating the IRS Rule would lead to a curious result: individuals would be compelled to participate in federally-created exchanges without receiving the same benefits (here, a tax credit) that their counterparts in state-created exchanges receive as a statutory right.

One must ask whether striking down the IRS rule would serve Congress' ultimate goals in creating these exchanges and building this interlocking group of tax-based incentives. The appellate courts in both *King v. Burwell* and *Halbig v. Burwell* seemed to have clear understanding of Congress' intent in mandating individual participation.<sup>259</sup>

Legal scholars and commentators agree that the case will have a significant impact on the ACA, regardless of the ruling.<sup>260</sup> Some suggest that striking down the IRS regulations would effectively undermine the entire individual mandate<sup>261</sup> while still others suggest that such a result would inevitably show that the ACA is "unworkable" without affirmative cooperation from the states.<sup>262</sup> Some law professors have characterized the statutory language as a "drafting error" that the Court should be able to

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Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 03, 2011) (codified at 45 C.F.R. pt. 147) (allowing grandfathered plans to avoid the contraception requirement).

257. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

258. See, e.g., Erika Eichelberger & Molly Redden, *In Hobby Lobby Case, the Supreme Court Chooses Religion Over Science*, MOTHER JONES, June 30, 2014, available at <http://www.motherjones.com/politics/2014/06/supreme-court-hobby-lobby-decision> (suggesting, for example, that Christian scientists might apply for a religious exemption in order to avoid providing insurance coverage for vaccinations).

259. *Halbig v. Sebelius*, No. 13-623(PLF), 2014 WL 129023, \*17-18 (D.D.C. Jan. 15, 2014), *rev'd sub nom. Halbig v. Burwell*, 758 F.3d 390, 393 (D.C. Cir. 2014), *vacated, reh'g granted*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 04, 2014); *King v. Sebelius*, 997 F. Supp. 2d 420, 431 (E.D.V.A. 2014), *aff'd sub nom. King v. Burwell*, 759 F.3d 358 (4th Cir.), *cert. granted*, No. 14-114, 2014 U.S. LEXIS 7428 (U.S. Nov. 7, 2014).

260. See Jonathan Adler, *Symposium: A Welcome Grant for a Straightforward Statutory Case*, SCOTUSBLOG (Nov. 9, 2014, 8:55 PM), <http://www.scotusblog.com/2014/11/symposium-a-welcome-grant-for-a-straightforward-statutory-case-2/> (describing *King v. Burwell* as "a proxy battle over the ACA itself"); Sam Baker, *How the Supreme Court Can Kill Obamacare Without Overturning It*, FORBES (Nov. 17, 2014), available at <http://www.nationaljournal.com/health-care/how-the-supreme-court-can-kill-obamacare-without-overturning-it-20141117>.

261. Baker, *supra* note 261.

262. Michael F. Cannon, *Symposium: Seven Myths about King v. Burwell*, SCOTUSBLOG (Nov. 10, 2014, 5:06 PM), <http://www.scotusblog.com/2014/11/symposium-seven-myths-about-king-v-burwell/>.

correct.<sup>263</sup> If the Supreme Court rejects the regulation, individuals in less than a third of the states will actually be eligible for the tax credit.<sup>264</sup> For others who currently rely on that credit to make health insurance affordable, losing the credit may make the choice between maintaining now-expensive insurance and paying a lower fine a difficult choice to make.<sup>265</sup>

The Court's discussion in *Sebelius* yields some clues as to how the Court may approach the question. There, the court recognized the ACA's overarching policy goals and the importance of requiring full participation for the system to be effective.<sup>266</sup> As many have noted,<sup>267</sup> the Court was willing to look beyond the text of the statute that referred to a "penalty" to find instead that Congress assessed a tax.<sup>268</sup> That approach seemed to ignore the plain language of the statute<sup>269</sup> and Congress' decision to characterize the payment as a penalty.<sup>270</sup> Arguably, the Court reached that result based both on their understanding of the penalty within the overall ACA framework and the importance of the individual mandate to the law's success.<sup>271</sup> Similarly, the Court here could choose to cast aside the plaintiffs' reading of the phrase "through an Exchange established by the

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263. Timothy Stoltzfus Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH (Sept 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits/> (suggesting that "[i]t is . . . highly unlikely that the House, whose bill included only a federal exchange, would have approved a bill that only provided tax credits through state exchanges but not through the federal exchange").

264. *King*, 759 F.3d at 364 (noting that only sixteen states and the District of Columbia have established state exchanges).

265. Daniel J. Arking & Miranda A. Franco, *Supreme Court Will Hear Case on ACA Health Insurance Tax Credits*, HOLLAND & KNIGHT (Nov. 18, 2014), <http://www.hklaw.com/publications/Supreme-Court-Will-Hear-Case-on-ACA-Health-Insurance-Tax-Credits-11-18-2014/> ("[M]illions of Americans currently enrolled in a health plan through a federally facilitated exchange [could] lose billions in premium tax credits, forcing many to drop their health coverage altogether."); see Baker, *supra* note 261 (suggesting four to five million individuals would lose the tax credit).

266. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2597 (2012) (discussing Congress' efforts to compel the purchase of individual insurance or the payment of a fine to the IRS); *id.* at 2610 (Ginsburg, J., dissenting) (noting that Congress enacted the framework because "all individuals inevitably participate" in the health care market).

267. See, e.g., Richard, *supra* note 74.

268. *Sebelius*, 132 S. Ct. at 2596.

269. 26 U.S.C. § 5000A(a) (2012)

270. *Id.* at § 5000A(a)-(c).

271. *Sebelius*, 132 S. Ct. at 2613 (Ginsburg, J., dissenting) (noting that the individual mandate helps achieve the "central aim" of the ACA); Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of National Federation of Independent Business v. Sebelius*, 46 LOY. L. A. L. REV. 514, 620 (2012) (noting the positive effects of the implementation of the ACA, including "creat[ing] opportunity for states and communities to help shape reform going forward").



State”<sup>272</sup> and instead rely on the framework of the ACA as a whole to determine that Congress only could have meant to extend the credit to all taxpayers, regardless of whether their exchange was created by a state or by the federal government for that state.<sup>273</sup> Further, the District Court in both cases explicitly acknowledged that the credit is a cornerstone of the ACA and, like the individual mandate, the ACA is unlikely to survive in an effective form without it.<sup>274</sup> Thus, looking back to the other tax-based ACA case taken up by the Supreme Court, there is reason to believe that the Court will read beyond any drafting issues to find a reasonable reading that shores up the health care exchange system.

At the same time, the Court has willingly carved out broad exceptions in the ACA as it relates to contraceptive coverage and it may do the same here when confronted with the broader constitutional questions. While the Court would do well to narrow its holding in *Hobby Lobby*,<sup>275</sup> its analysis there may also illuminate how it will address the upcoming tax credit question. Notably, the Court declined to credit the suggestion made by the Tenth Circuit Court of Appeals that the contraception coverage question be decided on the basis of taxation characteristics<sup>276</sup> and instead addressed the broader constitutional claims.<sup>277</sup> That decision may very well signal that, now that the Court has upheld the individual mandate, which is a key provision of the ACA, it is unwilling to advance further in service of the statute.<sup>278</sup> At the same time, it is important to acknowledge that challenges

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272. 26 U.S.C. § 36B(b)(1), (c)(2)(A)(i) (2012).

273. Brief of Respondents in Opposition, *King v. Burwell*, No. 14-114 (U.S. Oct. 3, 2014).

274. *Halbig v. Sebelius*, No. 13-623(PLF), 2014 WL 129023, \*16-18 (D.D.C. Jan. 15, 2014), *rev'd sub nom.* *Halbig v. Burwell*, 758 F.3d 390, 393 (D.C. Cir. 2014), *vacated, reh'g granted*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 04, 2014) (“Plaintiffs’ proposed construction in this case—that tax credits are available only for those purchasing insurance from state-run Exchanges—runs counter to this central purpose of the ACA: to provide affordable health care to virtually all Americans.”); *King v. Sebelius*, 997 F. Supp. 2d 420, 431 (E.D.V.A. 2014), *aff’d sub nom.* *King v. Burwell*, 759 F.3d 358 (4th Cir.), *cert. granted*, No. 14-114, 2014 U.S. LEXIS 7428 (U.S. Nov. 7, 2014) (“Congress assumed that tax credits would be available nationwide because every state would set up its own Exchange.”).

275. *See supra*, section II, part f “Lingering Questions in the Contraception Coverage Debate.”

276. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127-28 (10th Cir. 2013), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

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

278. Nicholas Bagley, *Symposium: The Court Will Hear King. That’s Bad News for the ACA*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), <http://www.scotusblog.com/2014/11/symposium-the-court-will-hear-king-thats-bad-news-for-the-aca/> (noting that the Court would only have taken up the issue if they believed that the case was wrongly decided below).

to a tax credit that would compel an otherwise exempt individual to purchase health insurance is not a divisive issue on par with contraception coverage. The justices who were willing to excuse religious corporations from providing contraception coverage may very well decline to intervene here.

In the event that Congress is willing to take up the cause, the easiest way to avoid this would be to amend the relevant ACA section to apply to “all Exchanges” rather than an “Exchanges established by the State.”<sup>279</sup> By pinning the tax credit section to a portion of the statute that explicitly addresses federally-created exchanges, Congress could remove the ambiguity from that portion of the statute.<sup>280</sup> The current Congress, however, likely will not pass such an amendment while the Fourth Circuit’s decision still stands.<sup>281</sup> Moreover, Congress is currently working to pass major legislation on topics unrelated to the ACA<sup>282</sup> before the 114th Congress is sworn in this January.<sup>283</sup> While the issue is of utmost importance to the ACA, there appears to be little desire to take up the sword for arguably the most controversial piece of legislation of President Obama’s administration. Thus, challenges under this enormous federal statute and its implementing regulations are not abating any time soon.

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279. Compare 42 U.S.C. § 18031(b)(1) (2012) (section of the statute incorporated into the tax credit provision that only refers to “[e]ach State” establishing an exchange), *with id.* § 18041(c)(1) (discussing how the Department of Health and Human Services may establish “such Exchange” if a state fails to do so).

280. *Halbig v. Sebelius*, No. 13-623(PLF), 2014 WL 129023, \*2 (D.D.C. Jan. 15, 2014), *rev’d sub nom. Halbig v. Burwell*, 758 F.3d 390, 393 (D.C. Cir. 2014), *vacated, reh’g granted*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 04, 2014).

281. Michael Hiltzik, *Will the Supreme Court Move America Closer to Two-Class Healthcare?*, L.A. TIMES (Nov. 10, 2014, 12:35 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-twoclass-healthcare-20141110-column.html#page=1> (noting that congressional Republicans have declined to take up ACA-related legislation except for proposals to repeat it completely). *But see* Michael Hiltzik, *The Congressional Deal that Could Save Obamacare*, L.A. TIMES (Nov. 10, 2014, 7:38 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-the-congressional-deal-that-could-save-obamacare-20141110-column.html> (suggesting that Democrats could fix the tax credit “wording glitch” by offering to undo the medical device tax and the employer mandate).

282. See Billy House & Rachel Roubein, *As Lame-Duck Session Begins, Congress to Focus on Appropriations, Ebola, and Islamic State*, NAT’L J. (Nov. 9, 2014), available at <http://www.nationaljournal.com/congress/as-lame-duck-session-begins-congress-to-focus-on-approps-ebola-and-islamic-state-20141109>.

283. Judy Schneider & Michael L. Koempel, Cong. Research Serv., RL30725, *The First Day of a New Congress: A Guide to Proceedings on the House Floor 1* (2014).

## CONCLUSION

The Affordable Care Act ushered in sweeping changes in America's health insurance and health care law.<sup>284</sup> Litigation has ensued, reaching the Supreme Court twice at the time of this writing, with a third decision expected in 2015.<sup>285</sup> While the Supreme Court clarified the issue for the parties in *Burwell*, litigation is expected to continue on that, and other issues, related to the Affordable Care Act.<sup>286</sup>

While the *Burwell* decision clarified the issue of exemption from the contraceptive mandate for religious-based closely-held for-profit corporations such as Hobby Lobby Stores and Conestoga Wood Specialties, the litigation continues on this issue, and other issues, such as the IRS rule allowing tax credits for health insurance purchased through "exchanges."<sup>287</sup>

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284. See generally Mark T. Morrell & Alex T. Krouse, *Accountability Partners: Legislated Collaboration for Health Reform*, 11 IND. HEALTH L. REV. 225 (2014) (discussing several sweeping changes the ACA brought).

285. *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), cert. granted, 135 S.Ct. 475 (Nov. 7, 2014). See Steve Benon, *House Republicans Finally File Anti-Obama Lawsuit*, MSNBC (Nov. 21, 2014, 3:27 PM), <http://www.msnbc.com/rachel-maddow-show/house-republicans-finally-file-anti-obama-lawsuit>.

286. E.g., Steve Benon, *House Republicans Finally File Anti-Obama Lawsuit*, MSNBC (Nov. 21, 2014, 3:27 PM), <http://www.msnbc.com/rachel-maddow-show/house-republicans-finally-file-anti-obama-lawsuit>.

287. *King v. Burwell*, 759 F.3d 358, 365, 376 (4th Cir. 2014), cert. granted, 135 S.Ct. 475 (Nov. 7, 2014).