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Jane Perkins

Dipti Singh

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## ACA Implementation: The Court Challenges Continue

*Jane Perkins\* and Dipti Singh\*\**

### I. INTRODUCTION

In 2012, the United States Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (ACA).<sup>1</sup> The Court's decision did not, however, bring an end to litigation against the ACA, and the judicial system remains clogged with cases.

This article provides an overview to ACA litigation, dividing the litigation into three rounds. Round One, summarized in Section II, covers litigation that culminated in the 2012 Supreme Court ruling. Almost uniformly, that litigation sought to repeal the ACA in its entirety. Section III discusses the second round of litigation, comprised of cases filed since the 2012 decision and dominated by cases seeking to curtail an ACA requirement for health insurers to cover contraception without cost sharing. Notably, there have been a large number of such cases (approaching 100, to date), and the Supreme Court has agreed to decide whether for-profit businesses have religious rights entitling them to an exemption from the contraceptive coverage requirement. Finally, Section IV introduces an emerging Round Three. In contrast to previous court activity, Round Three litigation seeks to enforce the ACA so that its benefits can be realized.

### II. ROUND ONE: LITIGATING TO REPEAL

President Obama signing the ACA into law on March 23, 2010 unleashed an aggressive use of the court system by individuals and entities objecting to the law. The first lawsuit was filed within minutes after he signed the ACA.<sup>2</sup> By the end of the day, three cases were pending.<sup>3</sup> Within a few

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\* J.D., Legal Director, National Health Law Program; Senior Attorney, Network for Public Health Law-Southeast Region, Carrboro, North Carolina.

\*\* J.D., Staff Attorney, National Health Law Program, Los Angeles, California.

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

2. Kevin Arts, Legal Challenges to Health Reform: An Alliance for Health Reform Toolkit (May 18, 2010),

3. See Nat'l Health Law Program, *ACA LITIGATION—Closed Case Docket Mar. 2010-Dec. 2012 (NFIB Linked)* (last updated Jan. 10, 2013), <http://www.healthlaw.org/component/jfssubmit/showAttachment?tmpl=raw&id=00Pd0000006E6ttEAC>.

months, at least nineteen cases were filed in federal district courts nationwide; eventually, approximately half of these were appealed to the federal courts of appeals.<sup>4</sup>

While the legal claims raised during Round One were far ranging, the cases uniformly sought to strike down the ACA in its entirety. The vast majority of cases focused on the “individual mandate,” a provision of the ACA that requires most individuals to hold qualified health insurance or pay a penalty.<sup>5</sup>

Round One culminated in *National Federation of Independent Business v. Sebelius* (*NFIB*), a case the Supreme Court took on certiorari from the Eleventh Circuit Court of Appeals.<sup>6</sup> Reflecting the divisions generated by the ACA, the Court devoted six hours to oral argument and received over 140 briefs in the case (an all-time record).<sup>7</sup> By now, *NFIB* is well-known for its holdings. The Court did not strike down the ACA. Even though a majority of the Court found the individual mandate exceeded Congress’s power under the Commerce Clause, it concluded that the law was a valid exercise of Congress’s power to tax.<sup>8</sup>

While acknowledging that past Supreme Courts had interpreted the Commerce Clause expansively to allow Congress to regulate not just interstate commerce itself, but individual activities that, in the aggregate, “substantially affect” interstate commerce, Chief Justice Robert’s opinion concludes that these cases uniformly reach “activity.”<sup>9</sup> This contrasts, he said, with the individual mandate, which is an attempt to regulate “inactivity,” i.e., the refusal to purchase health insurance.<sup>10</sup> He concluded that this attempt at regulation went beyond what the Commerce Clause allows and moved instead into the area of “police power,” which is exclusively vested in the States.<sup>11</sup>

The federal government argued that the Court could also uphold the individual mandate under Congress’s constitutional power to lay and collect taxes. This argument was definitely a secondary theory, representing only 217 lines in the voluminous transcript of the oral argument before the Court. Yet, in a part of the opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Chief Justice Roberts held that the individual mandate is a valid exercise of Congress’s taxation power. To reach this result, the

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4. *See id.*

5. *See* 26 U.S.C.A. § 5000A(b)(1) (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014).

6. *See NFIB*, 132 S. Ct. at 2566.

7. *See* Nat’l Health Law Program, *ACA LITIGATION*, *supra* note 3.

8. *NFIB*, 132 S. Ct. at 2594-95.

9. *Id.* at 2587.

10. *Id.* at 2590.

11. *Id.* at 2591.

Court took a functional approach, noting that the exaction for being uninsured is paid to the Treasury when taxpayers file their tax returns; it does not apply to individuals who do not pay federal income taxes; it is determined by familiar factors such as number of dependents, taxable income and joint filing status; it is found in the Internal Revenue Code and enforced by the IRS; and it produces at least some revenue for the Government.<sup>12</sup>

Finally, in a surprise move, the Court reversed the Eleventh Circuit's decision and held the ACA's "Medicaid expansion" was unduly coercive on the states.<sup>13</sup> The Medicaid expansion provision requires states that have not already done so to expand Medicaid to non-disabled, non-elderly adults with incomes below roughly 138% of the federal poverty level (FPL).<sup>14</sup> The Court remedied the coercion by enjoining the federal government from withholding federal funding to a state refusing to expand, thus effectively making the expansion a state option.<sup>15</sup>

*NFIB* is still reverberating. Currently, twenty-one states are refusing to expand Medicaid.<sup>16</sup> The states' decision not to expand Medicaid raises a number of questions regarding health care financing and health status in these states, including how far the federal government is willing to go to bring states into the expansion fold. An increasing number of states are pressuring the federal government to allow them to expand Medicaid through a provision of the Social Security Act that authorizes the Secretary of the Department of Health and Human Services to allow states to implement experimental projects that are consistent with the objectives of the Medicaid Act.<sup>17</sup> For example, the federal government has approved Iowa's request to expand Medicaid through a premium assistance program that asks individuals with very low incomes to pay premiums for coverage—even though the Medicaid Act prohibits the imposition of such premiums.<sup>18</sup> Every approval of this kind sets the stage for another state to press the fed-

12. *Id.* at 2593-600.

13. *See id.* at 2608.

14. *Id.* at 2601 (discussing 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII)). Note that while *NFIB* states that the threshold is 133% of the FPL, under the ACA, the first five percent of income is disregarded, effectively making the threshold 138% of the FPL. *See* § 1396a(e)(14)(I)(i).

15. *See id.* at 2607-08. As written, states had to accomplish their Medicaid expansions by January 1, 2014. § 1396a(a)(10)(A)(i)(VIII)).

16. *See* Advisory Bd. Co., *Where the States Stand on Medicaid Expansion* (Feb. 7, 2014, 12:44 PM), <http://www.advisory.com/daily-briefing/resources/primers/medicaidmap>.

17. *See* 42 U.S.C.A. § 1315.

18. *Compare* Letter from Marilyn Tavenner, CMS Administrator, to Jennifer Vermeer, Iowa Medicaid Director (Dec. 30, 2013), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/ia-marketplace-choice-plan-ca.pdf> (authorizing state to use premiums) with 42 U.S.C.A. §§ 1396o, 1396o-1 (prohibiting state Medicaid programs from implementing premiums on populations with incomes below the federal poverty level).

eral government for further concessions. For example, Pennsylvania asked the federal government to allow it to expand Medicaid by, among other things, imposing a work requirement as a condition of Medicaid eligibility, although it has now abandoned this effort and modified the request to include “work incentives” rather than a requirement.<sup>19</sup> Left unchecked, these federal-state activities could usher in widespread policies that do away with the essential ingredients of Medicaid coverage—provisions that Congress included in the Medicaid Act to ensure that the program meets the needs of low-income individuals and people with disabilities.

### III. ROUND TWO: LITIGATION DOUBLES DOWN

Despite the *NFIB* Court’s decision upholding the constitutionality of the ACA, litigation has continued full steam. Since the Court heard *NFIB*, more than 100 federal cases have been filed; two cases (consolidated) were decided by the Court during the 2013-14 Term.<sup>20</sup> With a couple of important exceptions (discussed below), the vast majority of Round Two cases differ from Round One because they seek to strike particular provisions of the ACA, not repeal it altogether.

#### A. Continuing Efforts to Strike Down the ACA in its Entirety

Two legal claims now before the appellate courts would, if successful, gut the ACA. The first theory contends that the ACA is unconstitutional because it violates the Origination Clause of the Constitution, a provision that requires bills for raising revenues to originate in the House of Representatives.<sup>21</sup> Federal district courts in the District of Columbia and Texas have rejected the argument.<sup>22</sup> Both courts rely on Supreme Court precedent that applies the Origination Clause narrowly, only to bills whose “primary pur-

19. Kate Giammarise, *Corbett changes course on Medicaid Pursuing work incentive instead of requirement*, PITTSBURGH POST-GAZETTE, Mar. 6, 2014, <http://www.post-gazette.com/news/politics-state/2014/03/06/Gov-Corbett-backs-down-on-work-search-requirement/stories/201403060288#ixzz2yofQ23Fh>; but see Corey Davis, Nat’l Health Law Program, *Medicaid Expansion Work Requirements* (Oct. 4, 2013), <http://www.healthlaw.org/about/staff/corey-davis/all-publications/Medicaid-expansion-work#.UwJtg4VFDks> (discussing why states should not be able to impose work requirements on ACA Medicaid expansion populations).

20. See Jamie Fuller, *Here’s what you need to know about the Hobby Lobby case*, WASH. POST, Mar. 25, 2014, 6:30 AM, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/> (discussing *Hobby Lobby v. Sebelius* and *Conestoga Wood Specialties Corp. v. Sebelius*).

21. See U.S. CONST. art. I, § 7, cl. 1.

22. See *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013), *appeal docketed*, No 13-5202 (D.C. Cir. July 8, 2013); *Hotze v. Sebelius*, No. 4:13-CV-01318, 2014 WL 109407, at \*1 (S.D. Tex. 2014), *appeal docketed*, No. 14-20039 (5th Cir. Jan. 16, 2014).

pose” is the collection of revenue.<sup>23</sup> As noted by the Texas court, the ACA is not such a bill because it is “plainly designed to expand health insurance coverage.”<sup>24</sup> The lower courts also point out that although the Senate largely replaced the House bill with its own ACA language, the plaintiffs failed to explain how the bill, introduced as *House of Representatives* Bill Number 3590, originated in the Senate. These cases accordingly conclude that the Origination Clause has no “germaneness” requirement.<sup>25</sup>

Another set of cases challenge IRS regulations that implement the ACA’s premium subsidies nationwide in an attempt to undermine the entire framework of the Act’s implementation.<sup>26</sup> The ACA makes insurance affordable for limited-income individuals by offering them premium tax subsidies,<sup>27</sup> and it establishes American Health Benefit Exchanges (or Marketplaces) in each state through which individuals can obtain this coverage.<sup>28</sup> The ACA gives states the option to establish a state-run Exchange, a partnership Exchange with the federal government, or to refuse to create an Exchange, in which case the federal government will operate the Exchange.<sup>29</sup>

Litigants in the District of Columbia,<sup>30</sup> Indiana,<sup>31</sup> Oklahoma,<sup>32</sup> and Virginia<sup>33</sup> cite a seven-word phrase in an ACA subsection to argue that premium subsidies are available only “through an Exchange *established by the State*.”<sup>34</sup> Under this argument, individuals would not have access to premium subsidies (and almost certainly would not be able to afford health insurance) if they live in a state where the federal government is operating the Exchange. As part of the “ObamaCare” backlash, thirty-four states (representing about seventy-five percent of the people nationwide who qualify for premium subsidies)<sup>35</sup> are using a federally facilitated Exchange.<sup>36</sup> Clearly, if

23. See *Sissel*, 951 F. Supp. 2d at 167-68; *Hotze*, 2014 WL 109407, at \*9.

24. *Hotze*, 2014 WL 109407, at \*10 (quoting *NFIB*, 132 S. Ct. at 2596).

25. See *Sissel*, 951 F. Supp. 2d at 173; *Hotze*, 2014 WL 109407, at \*11.

26. See 26 C.F.R. § 1.36B-1(k) (West, WestlawNext through May 22, 2014; 79 Fed. Reg. 29,379) (referring to 45 C.F.R. § 155.20), Health Insurance Premium Tax Credits; 77 Fed. Reg. 30,377 (May 23, 2012) (to be codified at 26 CFR Parts 1 and 602).

27. See generally 42 U.S.C.A. §§ 18081-18082 (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014); see also 26 U.S.C.A. § 36B (setting forth how tax credit is determined).

28. See 42 U.S.C.A. §§ 18031(b), 300gg-91(d)(21).

29. 42 U.S.C.A. §§ 18031(b)(1), 18041(c)(1).

30. *Halbig v. Sebelius*, No. 13-623 (PLF), 2014 WL 129023 (D.D.C. Jan. 15, 2014).

31. Complaint for Declaratory and Injunctive Relief and Judicial Estoppel, *Ind. v. IRS*, No. 1:13-cv-1612 (S.D. Ind. Oct. 8, 2013), ECF No. 1.

32. Amended Complaint for Declaratory and Injunctive Relief, *Okla. ex rel. Pruitt v. Sebelius*, No. 6:11-cv-030 (E.D. Okla. Sept. 19, 2012), ECF No. 35.

33. *King v. Sebelius*, No. 3:13-CV-630, 2014 WL 637365 (E.D. Va. Feb. 18, 2014).

34. See 26 U.S.C.A. § 36B(b)(2)(A) (emphasis added).

35. Barack Obama, President of the United States, Speech to Congress (Sept. 9, 2009), in White House, *Remarks by the President to a Joint Session of Congress on Health Care* (Sept. 9, 2009, 8:16 PM), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-](http://www.whitehouse.gov/the_press_office/Remarks-by-the-)

successful, these lawsuits could “blow [the ACA] to smithereens.”<sup>37</sup>

To date, the leading case is *Halbig v. Sebelius*. The case was filed by the same counsel, and has one of the same plaintiffs, as *NFIB*. In January 2014, the district court rejected the plaintiffs’ arguments.<sup>38</sup> The opinion relies upon established rules of statutory construction that require statutes to be read as a whole, rather than as phrases in isolation.<sup>39</sup> Placing the disputed seven-word phrase in context, the court found it clear that Congress intended the subsidy provisions to apply to all Exchanges.<sup>40</sup> The court provided a number of examples to place the phrase in proper context.<sup>41</sup> For instance, Title I of the ACA, where the contested words are found, is headed “Quality Affordable Care for *All* Americans.”<sup>42</sup> Further, the court noted that the ACA requires *all* Exchanges to report on the extent of premium subsidies.<sup>43</sup> The plaintiffs have appealed the district court’s decision.<sup>44</sup> Given the ACA litigation track record, regardless of how the appellate court resolves *Halbig*, the cases underway in other states will almost certainly also proceed to the appellate level. Unless the political landscape changes, the parties will almost certainly seek Supreme Court review.

### B. Taking Aim at Preventive Contraceptive Services

As noted above, the vast majority of Round Two cases challenge a specific ACA provision that requires most health insurance plans to cover preventive health services without cost sharing, including colorectal, diabetes, and cholesterol screening and, with respect to women, preventive care and screenings in guidelines issued by the Health Resources and Services Administration (HRSA).<sup>45</sup> Implementing regulations exempt from the contra-

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President-to-a-Joint-Session-of-Congress-on-Health-Care.

36. See Kaiser Family Found., *State Decisions for Creating Health Insurance Marketplaces, 2014*, (May 28, 2013), <http://kff.org/health-reform/state-indicator/health-insurance-exchanges/> (noting that twenty-seven states have chosen a federally-facilitated Exchange and seven others have chosen to partnership Exchanges).

37. George F. Will, *Four words in the ACA could spell its doom*, WASH. POST, Jan. 29, 2014, [http://www.washingtonpost.com/opinions/george-f-will-four-words-in-the-aca-could-spell-its-doom/2014/01/29/e26a33cc-884a-11e3-a5bd-844629433ba3\\_story.html](http://www.washingtonpost.com/opinions/george-f-will-four-words-in-the-aca-could-spell-its-doom/2014/01/29/e26a33cc-884a-11e3-a5bd-844629433ba3_story.html).

38. *Halbig v. Sebelius*, No. 13-623 (PLF), 2014 WL 129023 (D.D.C. Jan. 15, 2014). For an analysis of the case, see generally Abbe R. Gluck, *A Legal Victory for Insurance Exchanges*, 370 NEW ENG. J. MED. 896 (2014), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1400707>.

39. *Halbig*, 2014 WL 129023.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See Brief for Appellants, *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir. Jan. 30, 2014), E.C.F. No. 21.

45. 42 U.S.C.A. § 300gg-13(a)(4) (West, WestlawNext through Pub. L. No. 113-93

ceptive coverage requirement group health plans of a “religious employer,” which are generally churches and the exclusively religious activities of any religious order.<sup>46</sup> The regulations also provide an accommodation for group health plans of other non-profit organizations that hold themselves out as religious and have religious objections to covering contraception, including religiously affiliated colleges and universities.<sup>47</sup> After an organization self-certifies that it meets the eligibility criteria for the accommodation, women who participate in the organization’s health plan will have access to contraceptive coverage directly through a third party insurer and the organization will not have to contract, arrange, pay, or refer a patient for contraception.<sup>48</sup>

Not satisfied with the exemption and accommodation, plaintiffs have filed dozens of lawsuits across the country challenging the contraceptive coverage requirement.<sup>49</sup> The plaintiffs in these cases are generally nonprofit religious entities that do not want to complete the self-certification form and for-profit secular corporations and their owners asserting religious objections to providing their employees with health insurance that covers some or all methods of contraception. The Supreme Court has ruled in favor of three closely held for-profit corporations in two consolidated cases,<sup>50</sup> and has issued injunctions pending appeals in two cases involving nonprofit entities.<sup>51</sup>

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(excluding Pub. L. No. 113-79) approved Apr. 1, 2014); Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (West, WestlawNext through May 22, 2014; 79 Fed. Reg. 29,379). Because HRSA did not have existing coverage guidelines, it asked the Institute of Medicine (IOM) to develop recommendations. *See generally* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871-73 (July 2, 2013) (codified in various parts of the C.F.R.). Among other things, the IOM recommended that women have access to the full range of Food and Drug Administration approved contraceptive methods—a recommendation HRSA accepted. *See* U.S. Dep’t of Health & Human Servs., Health Res. & Servs. Admin., *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, <http://www.hrsa.gov/womensguidelines> (last visited June 2, 2014).

46. 45 C.F.R. § 147.131(a). A “religious employer” is a non-profit organization described in a tax code provision that refers to “churches, their integrated auxiliaries, and conventions or associations of churches” and “the exclusively religious activities of any religious order.” *Id.* (referring to 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii)).

47. *See* 45 C.F.R. § 147.131(a)-(b) (defining “eligible organization”).

48. *See* § 147.131(c) (stating an eligible organization may provide “benefits through one or more group health insurance issuers” and an “issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly” to an eligible organization).

49. *See* Nat’l Health Law Program, *Health Reform Litigation Docket* (Updated May 2014), <http://www.healthlaw.org/component/jsfsubmit/showAttachment?tmpl=raw&id=00Pd0000006BgoKEAS>.

50. *See* *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356, 2014 WL 2921709 (U.S. June 30, 2014).

51. *See* *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (stating the “respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient protection and Affordable Care Act and related regulations” pend-



In these cases, the plaintiffs allege violations of the First Amendment to the U.S. Constitution, but the claims receiving the most attention are those brought under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>52</sup> RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion” unless the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>53</sup> In adjudicating the RFRA claims, courts focus on four questions: (1) whether corporations can assert RFRA claims; (2) whether the contraceptive coverage provision substantially burdens the plaintiffs’ exercise of religion; (3) whether it furthers a compelling government interest; and (4) whether it is the least restrictive means of furthering that interest.<sup>54</sup>

### 1. For-Profit Corporation Challenges

In a 5-4 decision, the Court held that RFRA allows closely held corporations to exclude coverage of contraception.<sup>55</sup> As a threshold matter, the Court concluded that closely held for-profit corporations are persons within the meaning of RFRA.<sup>56</sup> RFRA makes no mention of for-profit corporations, and does not define “person.”<sup>57</sup> The Court thus turned to the Dictionary Act, which states that a “person . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” “unless the context indicates otherwise.”<sup>58</sup> The Court concluded that the context did not justify any other interpretation of “person,” finding unpersuasive the government’s argument that for-profit corporations exist primarily to make money and cannot exercise religion.<sup>59</sup> According to the majority, because for-profit corporations can pursue “worthy objectives” like “costly pollution-control and energy conservation measures,” there is no reason they cannot also exercise religion.<sup>60</sup>

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ing appeal to the Tenth Circuit); *Wheaton Coll. v. Burwell*, No. 13-A-1284, 1-2 (U.S. July 3, 2014) (granting injunction pending appeal permitting appellants to refuse to complete self-certification form and instead send letter directly to HHS).

52. Free Exercise of Religion Protected Act, 42 U.S.C.A. § 2000bb-4 (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014).

53. § 2000bb-1(a)-(b). Although the Supreme Court has held that the RFRA does not apply to the state regulation through the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), the RFRA continues to apply to the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

54. *See, e.g., Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at \*1.

55. *Id.* \*19.

56. *Id.* at \*13-14.

57. *Id.* at \*14.

58. *Id.* at \*15-16.

59. *Id.* at \*15.

60. *Id.* at \*18.

Having concluded that the closely held corporations can assert RFRA claims, the Court turned to whether the contraceptive coverage provision substantially burdens their religious exercise. The Court accepted as true the owners' contention, although factually inaccurate, that covering certain types of contraception violated their religious beliefs because they were abortifacients.<sup>61</sup> The Government did not disagree with that contention, but argued that connection between the challenged rule and religious objection was too attenuated to be substantial because the decision to use contraception is made by independent third-parties, i.e., the employees.<sup>62</sup> However, the Court assumed that the burden was substantial because the corporations sincerely believed it was substantial.<sup>63</sup> In her dissent, Justice Ginsburg noted that, although a court must accept as true, factual allegations that religious beliefs are sincerely held, whether government action imposes a substantial burden is a legal conclusion that a court is required to analyze.<sup>64</sup>

The five-member majority also concluded that the contraceptive coverage provision failed the least-restrictive means test. It assumed for purposes of its analysis that the Government had a compelling interest in "guaranteeing cost-free access to the four challenged contraceptive methods."<sup>65</sup> On this last prong of the RFRA analysis, the Court opined that the "most straightforward way" of furthering this interest would be for the Government to pay for the contraception of women working for employers who object to contraception.<sup>66</sup> The Court did not "rely on that option," however, because in its judgment, the Department of Health and Human Services (HHS) was already using a less restrictive means for some religious non-profits with religious objections to contraceptive coverage, i.e., the accommodation, discussed above.<sup>67</sup> And, thus, the Court held that the contracep-

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61. *Id.* at \*19-20. In these and other cases, parties and judges have incorrectly accepted the characterization of certain types of contraception as abortifacients, prompting medical and public health organizations to file *amici curiae* briefs to establish that "emergency contraception approved by the FDA and the Copper Intrauterine Device, CuT380A ("Cu IUD"), also effective for emergency contraception, are not 'abortifacients.'" Brief for Physicians for Reproductive Health et al. as Amici Curiae Supporting Respondents 8, *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013) (No. 12-2673).

62. *Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at \*21.

63. *Id.* at \*22 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does.") (internal citations omitted).

64. *Id.* at \*38 (Ginsburg, J., dissenting).

65. *Id.* at \*23.

66. *Id.* at \*24.

67. *Id.*; *but see id.* at \*42 (Ginsburg, J., dissenting) (stating that "in view of what Congress sought to accomplish, i.e., comprehensive preventive health care for women furnished through employer-based health plans, none of the[se] proffered alternatives would satisfacto-

tive coverage provision, “as applied to closely held corporations, violates RFRA.”<sup>68</sup>

The day after deciding *Hobby Lobby* the Court granted petitions for review in for-profit cases from the D.C. and Sixth Circuits.<sup>69</sup> In *Gilardi v. U.S. Department of Health & Human Services*, the D.C. Circuit court case, the Court granted a closely held corporation’s request to review the D.C. Circuit’s denial of their RFRA claim, summarily vacated the lower court decision, and remanded to the D.C. Circuit for consideration of the company’s RFRA claim in light of *Hobby Lobby*.<sup>70</sup> The Sixth Circuit in *Eden Foods v. Burwell* and *Autocam v. Burwell* had rejected both closely held companies’ RFRA claims, finding that secular, for-profit companies cannot exercise religion, and that their owners lack standing to challenge rules that apply to the companies, not to the owners.<sup>71</sup> Here, too, the Court granted the companies’ petition for review, summarily vacated the lower court decision, and remanded.<sup>72</sup> On remand, both the D.C. and Sixth Circuits must apply *Hobby Lobby Stores, Inc.* and decide whether the companies in those cases are also “persons” for purposes of RFRA, and therefore entitled under RFRA to refuse to offer insurance that covers contraception.

## 2. Nonprofit Challenges

The nonprofit challenges also continue to move through the courts and are likely to end up before the Supreme Court. Well before Congress enacted the contraceptive coverage provision, the courts had recognized the free exercise rights of churches and other religious nonprofit entities.<sup>73</sup> So too here, courts tend to recognize the free exercise rights of churches and other religious nonprofit entities. “[T]he reason why is hardly obscure. [Unlike for-profit corporations,] [r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith.”<sup>74</sup> Thus, the applicability

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rily serve the compelling interests to which Congress responded”).

68. *Id.* at \*27.

69. *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-567, 2014 WL 2931834 (U.S. July 1, 2014); *Autocam Corp. v. Burwell*, No. 13-482, 2014 WL 2931833 (U.S. July 1, 2014); *Eden Foods, Inc. v. Burwell*, No. 13-591, 2014 WL 2931836 (U.S. July 1, 2014).

70. *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-915, 2014 WL 2931853 (U.S. July 1, 2014) (denying petition); *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-567, 2014 WL 2931834 (U.S. July 1, 2014) (granting petition).

71. *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), *vacated sub nom.* *Autocam v. Burwell*, No. 13-482, 2014 WL 2931833 (U.S. July 1, 2014); *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013), *vacated sub nom.* *Eden Foods, Inc. v. Burwell*, No. 13-591, 2014 WL 2931836 (U.S. July 1, 2014).

72. *Autocam v. Burwell*, No. 13-482, 2014 WL 2931833, at \*1 (U.S. July 1, 2014); *Eden Foods, Inc. v. Burwell*, No. 13-591, 2014 WL 2931836, at \*1 (U.S. July 1, 2014).

73. *See, e.g., Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

74. *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356, 2014 WL 2921709, at

of RFRA tends not to be in dispute in nonprofit challenges.

The substantial burden question arises in the non-profit cases, but the analysis differs. As noted, federal regulations provide an accommodation for certain non-profit religious organizations. However, some organizations claim that the very act of completing the self-certification form violates their religious beliefs by facilitating the subsequent provision of contraceptive coverage by a third party. Some district courts agree.<sup>75</sup> *Roman Catholic Archbishop of Washington v. Sebelius*,<sup>76</sup> while deciding that the self-certification requirement did not burden a fully-insured plaintiff, concluded that it did impose a substantial burden on self-insured plaintiffs, forcing them to choose between incurring monetary fines or facilitating access to contraception devices which the institution considered sinful and immoral.<sup>77</sup>

By contrast, in *Michigan Catholic Conference v. Burwell*, the Sixth Circuit explained that “[t]he obligation to cover contraception will not be triggered by the act of self-certification—it already was triggered the enactment of the ACA.”<sup>78</sup> The court accordingly concluded that the “inability to ‘restrain the behavior of a third party that conflicts with [one’s] religious beliefs, dot not impose a burden on the . . . exercise of religion.”<sup>79</sup> Similarly, in *Wheaton College v. Burwell*, the district court refused to enter an injunction, and Wheaton College appealed.<sup>80</sup> The Seventh Circuit denied Wheaton College’s motion for an injunction pending appeal and, just after issuing Hobby Lobby, the Court granted the College’s application for an injunction

\*36 (Ginsburg, J., dissenting).

75. See e.g., *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Geneva Coll. v. Sebelius*, No. 12-0207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013).

76. *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515, at \*2 (D.D.C. Dec. 20, 2013), *emergency motion for injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013).

77. *Id.* at \*20, 22 (holding that self-certification requirement did not impose substantial burden on university offering health insurance through insured group plan and finding “obligation to take affirmative steps to identify and contract with a willing third-party administrator if the existing third-party administrator declines, forces the religious organization to do something to accomplish an end that is inimical to its beliefs” and it does so “upon pain of substantial financial penalties”).

78. *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, Nos. 13-2723 & 13-6640, 2014 WL 2596753, at \*9 (6th Cir. June 11, 2014); see also *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 555-56 (7th Cir. 2014) (affirming district court’s denial of preliminary relief and reasoning that ACA, not self-certification form, requires health plan to cover contraception).

79. *Mich. Catholic Conference*, 2014 WL 2596753, at \*9-10.

80. *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910, 2014 WL 2826336, at \*5 (N.D. Ill. June 23, 2014), *injunction pending appeal granted* No. 13A1284, 2014 WL 3020426, \*1-2 (U.S. July 3, 2014).

pending review, which the Court granted.<sup>81</sup> That same day, the *Hobby Lobby* Court had described the accommodation as “a system that seeks to respect the religious liberty of religious nonprofit entities while ensuring that the entities have precisely the same access to all [FDA-approved] methods of birth control.”<sup>82</sup> Yet, the Court enjoined the requirement that Wheaton College complete the self-certification form, holding that if Wheaton College informed HHS in writing that it qualified for the accommodation, HHS could not apply the contraceptive coverage provision to the college.<sup>83</sup>

As the merits of these and other nonprofits’ appeals are being decided by the appellate court, the compelling government interest prong of the RFRA test will almost certainly be pivotal. As noted, if a nonprofit plaintiff establishes a substantial burden, the burden shifts to the government to show that it has a “compelling government interest” that justifies that burden. As in the for-profit cases, the parties tend not to dispute that the government has compelling interests in promoting public health, women’s autonomy, and gender equality. Instead, the dispute centers on whether applying the contraceptive coverage mandate to the particular claimant furthers those compelling interests.<sup>84</sup> *Hobby Lobby* did not decide this issue, as explained above, but the majority appears skeptical in suggesting that the existing exemptions and accommodations to the contraceptive coverage requirement could be understood to undermine any purported compelling interests.<sup>85</sup> In his concurrence, however, Justice Kennedy writes that “[i]t is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.”<sup>86</sup>

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81. *Wheaton Coll.*, 2014 WL 3020426, at \*1-2.

82. *Id.* at \*3 (Sotomayor J., dissenting).

83. *Id.* at \*2; *see also* *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (granting injunction pending appeal).

84. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (“RFRA requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law “to the person”—the particular claimant whose sincere exercise of religion is being substantially burdened.”).

85. *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13–354, 13–356, 2014 WL 2921709, at \*23 (U.S. June 30, 2014) (“[I]t is arguable that there are features of the ACA that support [the objecting parties’] view.”); *but see Gilardi v. U.S. Dep’t. of Health & Human Servs.*, 733 F.3d 1208, 1240 (D.C. Cir. 2013) (Edwards, J., concurring in part, dissenting in part) (“[T]he exemptions are not as broad as the Gilardis make them out to be.”), *vacated in part* 2014 WL 2931834, at \*1 (U.S. July 1, 2014); *Korte v. Sebelius*, 735 F.3d 654, 728 (7th Cir. 2013) (Rovner, J., dissenting) (“The exemptions already provided for in the ACA neither undermine the compelling nature of the government’s interests in broadening American’s access to healthcare and ensuring that women have comprehensive healthcare nor do they make religious-based exemptions any more reasonable or feasible.”), *cert. denied sub nom. Burwell v. Korte*, No. 13-937, 2014 WL 2931855 (U.S. July 1, 2014).

86. *See e.g., Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at \*28 (Kennedy, J., concurring).

In these cases, as in the for-profit ones, the government must establish not only a compelling interest, but also that it has used the least restrictive means to further that interest.<sup>87</sup> Here, the nonprofit plaintiffs argue that the government can achieve its coverage goals by providing the contraceptive services or coverage directly to the plaintiffs' employees or through tax incentives to consumers.<sup>88</sup> Some district courts agree,<sup>89</sup> and the Supreme Court is likely to ultimately resolve whether the accommodation violates RFRA.

That decision, as well as the one in *Hobby Lobby*, will have broad implications, not only for health insurance benefits for women, but for employee coverage in general. The *Hobby Lobby* Court wrote that it was not addressing other coverage requirements, such as immunizations and antidepressants, or handing a "shield" to employers seeking to discriminate in hiring on the basis of race or other prohibited factors.<sup>90</sup> But while those issues were not before Court, the Court did not explain why its analysis would not apply equally to these other contexts. Indeed, broad potential ramifications for civil rights and fair housing have also been noted.<sup>91</sup> Further, it remains to be seen which types and how many other corporations could assert RFRA claims under *Hobby Lobby*.<sup>92</sup>

#### IV. ROUND THREE: SEEKING TO ENFORCE THE ACA

Unlike previous litigation, which has overwhelmingly sought to strike down or obstruct enforcement of the ACA, Round Three litigation is emerging to enforce provisions of the ACA. In recent months, lawsuits have asked courts to enjoin state laws that restrict the activities of individuals who are federally certified to inform and assist uninsured individuals to enroll in qualified health plans (QHPs) under the ACA.

The ACA includes comprehensive provisions to ensure that consumer assisters are available to provide individuals with accurate, impartial, and timely information about their health insurance options and, thereafter, to

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87. See 42 U.S.C.A. § 2000bb-1(b)(2) (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014).

88. See, e.g., *E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, 2013 WL 6838893, at \*23-24 (S.D. Tex. Dec. 27, 2013) (discussing less restrictive alternatives identified by courts).

89. See, e.g., *id.*; *Diocese of Fort Wayne-South Bend, Inc. v. Sebelius*, No. 1:12-CV-0159, 2013 WL 6843012, at \*15-17 (N.D. Ind. Dec. 27, 2013).

90. *Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at \*26.

91. Laurie Sobel & Alina Salganicoff, Kaiser Family Found., *A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement 6* (2013), <http://kaiserfamilyfoundation.files.wordpress.com/2013/12/8523-guide-to-the-supreme-courts-review-of-the-contraceptive-coverage-requirement1.pdf>.

92. *Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at \*38 (Ginsburg, J., dissenting).

help them enroll in a QHP.<sup>93</sup> The ACA establishes different types of consumer assisters, including Navigators and Certified Application Counselors. Navigators are federally qualified and funded to provide assistance.<sup>94</sup> Certified Application Counselors (CACs) are federally created and regulated to provide assistance to individuals who live in states where the federal government is operating the Exchange.<sup>95</sup> The ACA preempts state laws that prevent the application of the ACA consumer assistance provisions.<sup>96</sup>

As of July 2013, nineteen states had enacted laws that restrict the activities of federally approved consumer assisters,<sup>97</sup> which prompted litigation to enforce the ACA provisions. In one such case, a federal court temporarily enjoined a Tennessee law regulating consumer assisters, finding that the law was an unconstitutional restraint on speech in violation of the First Amendment.<sup>98</sup>

In January 2014, a federal court in Missouri enjoined a state law restricting consumer assisters.<sup>99</sup> In *St. Louis Effort for Aids v. Huff*, a federally certified CAC, along with other entities and individuals who wanted to help uninsured Missourians enroll in health coverage, argued that the state navigator law violated the Supremacy Clause, the First Amendment, and the Due Process Clause.<sup>100</sup>

The court granted the plaintiffs' request for a preliminary injunction based on the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>101</sup> The court enjoined state provisions that required individuals to be licensed as insurance agents in Missouri to engage in certain enrollment activities.<sup>102</sup> According to the court, "[S]tate laws that make operation of the FFE [federally facili-

93. See 42 U.S.C. § 18031(b)(1) (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014); 45 C.F.R. § 155.225 (West, WestlawNext through May 22, 2014; 79 Fed. Reg. 29,379).

94. 42 U.S.C.A. § 18031(i)(3); See Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act, 45 C.F.R. § 155.210, 155.215.

95. See 45 C.F.R. § 155.225(d)(4).

96. See 42 U.S.C.A. § 18041(d).

97. See Peter Shin et al., *Assessing the Potential Impact of State Policies on Community Health Centers' Outreach and Enrollment Activities*, GEORGE WASHINGTON UNIV. OF PUB. HEALTH 7 (Jan. 14, 2014), available at [https://sphhs.gwu.edu/pdf/eIR/GGRCHN\\_PolicyResearchBrief\\_35.pdf](https://sphhs.gwu.edu/pdf/eIR/GGRCHN_PolicyResearchBrief_35.pdf) (finding greater outreach and enrollment challenges in states with restrictive consumer assister laws).

98. Temporary Restraining Order at 1-2, No. 3:13-1090 (D. Tenn. Oct. 7, 2013); See Plaintiffs' Suggestions in Support of Motion for Preliminary Injunction at 9, 11, 13, No. 2:13-cv-4246 (W.D. Mo. Nov. 26, 2013).

99. *St. Louis Effort for Aids v. Huff*, No. 13-4246-CV-C-ODS, 2014 WL 273201, at \*10 (W.D. Mo. Jan. 23, 2014).

100. *Id.* at \*2.

101. *Id.* at \*2-3; U.S. CONST. art. VI, cl. 2.

102. *St. Louis Effort for Aids*, 2014 WL 273201, at \*5-6.

tated Exchange] more difficult or onerous run afoul of the ACA's purpose and are subject to preemption."<sup>103</sup> Notably, the court was more concerned by other significant restrictions on consumer assisters.<sup>104</sup> For example, the court enjoined a state provision that made it illegal for a consumer assister who is not licensed as an insurance agent to provide advice about the features of a particular health plan, because the ACA specifically requires consumer assisters to provide this information.<sup>105</sup> From the beginning of the opinion and repeatedly thereafter, the court notes that Missouri could have operated a state Exchange but decided not to do so.<sup>106</sup> Rather, it made the decision to allow the federal government to operate the Exchange and regulate the assister programs.<sup>107</sup> The court concluded, "any attempt by Missouri to regulate the conduct of those working on behalf of the FFE is preempted."<sup>108</sup>

#### V. CONCLUSION

President Obama signing the ACA into law in March 2010 ignited a litigation conflagration. More than a hundred cases have been filed; scores, decided—often in conflicting ways by the appellate courts. The Supreme Court has decided that the ACA is constitutional; however, it is currently reviewing whether for-profit corporations and their owners have religious liberties and whether the ACA violates those rights. Plaintiffs' aggressive use of the courts to attack the ACA will almost certainly mean that the Supreme Court will be asked to consider other ACA provisions. While high school civics teaches that laws are enacted, amended, and repealed by the legislative branch of government, the ACA is providing a different lesson as hundreds of plaintiffs are using the judicial branch of government in their efforts to repeal the ACA in whole or in part. Only recently have individuals begun to ask courts to enforce provisions of the ACA so that they can obtain the benefits of the law.

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103. *Id.* at \*3.

104. *Id.* at \*6.

105. *Id.*

106. *Id.* at \*2.

107. *Id.*

108. *Id.* at \*7.