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# Free Exercise of Religion by Secular Organizations and Their Owners: Implications for the Affordable Care Act (ACA)

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## Summary

The Supreme Court's grant of review in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services* and *Hobby Lobby Stores v. Sebelius*, along with recent federal court decisions, has highlighted the ongoing controversy over the scope of the Affordable Care Act's (ACA's) contraceptive coverage requirement, which requires an employer to provide certain contraceptive coverage to its employees under its group health plan. Some employers have objected to the requirement, citing objections to the facilitation of the use of contraceptives in conflict with the religious tenets by which their businesses operate. An analogous issue has arisen in state courts in the context of same-sex weddings. Several private businesses that qualify as public accommodations have objected to state requirements that they provide services without discriminating based on sexual orientation despite the owners' religious objections to same-sex marriage. These issues have raised a novel legal question for the courts: What rights do secular businesses that operate for profit have to pursue legal claims to protect their religious exercise?

Although a number of statutory exemptions exist to protect individuals and organizations' religious beliefs and objections (e.g., employment discrimination under Title VII, disability discrimination under the Americans with Disabilities Act, etc.), courts have applied those exemptions only to individuals and nonprofit, religious organizations. A number of legal challenges to the contraceptive coverage requirement have examined a range of questions related to the rights of these businesses. As a threshold question, courts have had to analyze whether the business itself is eligible for protection under the Religious Freedom Restoration Act (RFRA) and Free Exercise jurisprudence. The businesses have asserted that they qualify as "persons" under RFRA and, in the alternative, that they are entitled to pursue their claims on behalf of their owners under what is known as the "pass-through" theory of corporate rights. Courts have also considered whether the business owners may pursue independent legal claims asserting their objections, or if their individual rights are forfeited at the time of the company's incorporation.

If a court determines that the business or its owners are eligible for free exercise protection, it may then consider the merits of the case, including whether the mandate constitutes a substantial burden on religious exercise; whether the government has a compelling interest to do so; and whether the government used the least restrictive means to achieve that interest. Five federal circuit courts have considered these questions in the context of the contraceptive coverage requirement, and have reached different conclusions on the range of questions raised.

This report examines the constitutional and statutory protections related to free exercise of religion, including current Supreme Court interpretations, as well as judicial and legislative avoidance of defining the parameters of religious belief. It also discusses significant examples of existing religious exemptions in current law, including employment nondiscrimination, health care, and public accommodations law. Finally, it analyzes recent federal judicial decisions that have considered the religious freedom rights of commercial entities whose owners have religious objections to the contraceptive coverage requirement.

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Recent court decisions have highlighted the ongoing controversy over the scope of the Affordable Care Act's (ACA's) contraceptive coverage requirement<sup>1</sup> and, more generally, whether religious freedom rights extend to commercial entities as well as nonprofits and individuals.<sup>2</sup> Although illustrated by the contraceptive coverage requirement, the question of whether secular, for-profit entities qualify for religious freedom protections reaches farther than the ongoing debate over ACA. Congress has enacted a number of exemptions to accommodate religious objections to legislative requirements, but those exemptions generally have been limited to individuals and nonprofit organizations.<sup>3</sup> That is, for-profit entities' right to exercise religion generally has not been recognized in existing law. Litigation of the contraceptive coverage requirement as well as cases involving commercial entities' objections to providing services for same-sex wedding ceremonies reflects heightened attention in courts to the question of accommodation for such objections.<sup>4</sup> Several federal courts and some state decisions that have considered the issue have reached different conclusions, and the U.S. Supreme Court, by granting certiorari in *Conestoga* and *Hobby Lobby Store*, appears poised to provide guidance on this issue in the future.<sup>5</sup>

This report examines the constitutional and statutory protections related to free exercise of religion, including current Supreme Court interpretations, as well as judicial and legislative avoidance of defining the parameters of religious belief. It also discusses significant examples of existing religious exemptions in current law, including employment nondiscrimination, health care, and public accommodations law. Finally, it analyzes recent federal judicial decisions that have considered the religious freedom rights of commercial entities whose owners have religious objections to the contraceptive coverage requirement.

## Legal Protections Preventing Government Interference with Religious Belief

Since 1879, the Supreme Court has drawn an important distinction in religious freedom cases, noting that religious exercise includes both protection of religious beliefs and actions based on those beliefs.<sup>6</sup> The Court has permitted the government to regulate actions stemming from

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<sup>1</sup> Patient Protection and Affordable Care Act, P.L. 111-148, §1001(5), 111<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2010). ACA was amended by the Health Care Education and Reconciliation Act of 2010 (HCERA; P.L. 111-152) (2010). These acts will be collectively referred to in this report as "ACA."

<sup>2</sup> See *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8418 (November 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, 724 F.3d 377 (3<sup>rd</sup> Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8419 (November 26, 2013) (No. 13-354); *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152 (6<sup>th</sup> Cir. 2013); *Gilardi v. U.S. Department of Health and Human Services*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. 2013); *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 U.S. App. LEXIS 22748 (7<sup>th</sup> Cir. 2013).

<sup>3</sup> See, e.g., 42 U.S.C. §2000e-1(a) (exempting any "religious corporation, association, educational institution, or society" from prohibition on employment discrimination based on religion); 26 U.S.C. §1402(g) (exempting individuals who are members of religious sects having beliefs in conflict with the acceptance of insurance benefits from self-employment tax requirements).

<sup>4</sup> See *Bernstein v. Ocean Grove Camp Meeting Association*, No. PN34XB-03008 (N.J. Office of Administrative Law, January 12, 2012); *Elane Photography v. Willock*, No. 33,687, 2013 N.M. LEXIS 284 (N.M. 2013).

<sup>5</sup> *Supra* notes 2 and 4.

<sup>6</sup> *Reynolds v. United States*, 98 U.S. 145, 162-64 (1879).

religious belief, but not the religious belief itself.<sup>7</sup> Over time, the constitutional protection against interference with religious beliefs has been augmented by statute.<sup>8</sup>

## Constitutional Protection

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”<sup>9</sup> Historically, the U.S. Supreme Court had interpreted the Free Exercise Clause to require that the government show a compelling interest for any government action that interfered with a person’s exercise of religious beliefs.<sup>10</sup> However, in 1990, the Court reinterpreted that standard, issuing a decision in *Employment Division, Department of Human Resources of Oregon v. Smith* in which the Court explained that the Free Exercise Clause never “relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability.”<sup>11</sup> The Court’s decision lowered the constitutional baseline of protection, meaning that laws that do not specifically target religion are not subject to heightened review under the First Amendment. Accordingly, it is less likely that individuals and entities with religious objections will be able to argue successfully for constitutional protection from laws that only incidentally burden their religious exercise.

The Court’s decision in *Smith* emphasized that the legislature remained free to consider whether an exemption for the accommodation of religious exercise would be appropriate through the political process, even if the exemption were not required as a matter of constitutional law.<sup>12</sup> In other words, religious exemptions generally are a matter of legislative discretion under current Court jurisprudence.

## Statutory Protection

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA), which essentially reinstated the heightened standard of protection applied to government actions that interfered with the free exercise of religion.<sup>13</sup> RFRA requires that a statute or regulation of general applicability may substantially burden a person’s exercise of religion only if it (1) furthers a compelling governmental interest and (2) uses the least restrictive means to further that interest.<sup>14</sup> RFRA has been interpreted to apply only to federal government actions, but it should be noted that state legislatures have enacted similar protection against interference with religious exercise by state government actions.<sup>15</sup> Legal protection under RFRA is a matter of statutory law,

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<sup>7</sup> *Id.* at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”). *See also* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“[T]he [First] Amendment embraces two concepts,—freedom to belief and freedom to act.”).

<sup>8</sup> *See, e.g.*, Religious Freedom Restoration Act of 1993, P.L. 103-141, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (November 16, 1993), codified at 42 U.S.C. §§2000bb et seq.

<sup>9</sup> U.S. Const., amend. I.

<sup>10</sup> *See* *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>11</sup> 494 U.S. 872, 879 (1990) (internal quotes omitted).

<sup>12</sup> *Id.* at 890.

<sup>13</sup> P.L. 103-141, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (1993), codified at 42 U.S.C. §2000bb et seq.

<sup>14</sup> 42 U.S.C. §2000bb-1(b).

<sup>15</sup> *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

meaning that a future Congress may choose to preempt RFRA or otherwise amend the protection it provides.<sup>16</sup>

## Avoidance of Defining the Scope of Religious Belief

One of the principles underlying the First Amendment is the prevention of government interference with religious institutions and matters of religion. The Court has long recognized that such institutions have a right to address their internal matters independently and without interference from government institutions.<sup>17</sup> Furthermore, such action by the government likely would entangle the legal system in an inquiry of religious doctrine, suggesting the type of probing interference historically considered unconstitutional by the Court.<sup>18</sup> The Court has explained that the First Amendment ensures the freedom to believe, even if those beliefs cannot be proven, and thus has prohibited courts from judging the veracity of religious beliefs.<sup>19</sup> Accordingly, Congress and the Court have refused to define with specificity what constitutes religion.

While courts must avoid determining the validity of religious beliefs, at times it may be necessary to determine whether beliefs would qualify as religious for certain purposes, including religious exemptions for statutory requirements. To do so, the Supreme Court has explained that the test for whether a belief is religious depends on whether the belief is sincerely held and whether it is applied consistently by the objector.<sup>20</sup> This test illustrates a subjective standard by which courts evaluate the religious practice of parties challenging interference with religious exercise.

Legislative attempts to define religion have reflected similar aversion to stating explicitly the parameters of religious belief, practice, or exercise. Statutory definitions related to religion often use the word to define itself. For example, Title VII of the Civil Rights Act of 1964 includes an exemption for religious institutions and is often used as a model for exemptions in other contexts.<sup>21</sup> Title VII defines religion to include “all aspects of religious observance and practice, as well as belief....”<sup>22</sup> Religious practices and observances are defined “to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>23</sup>

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<sup>16</sup> Generally, under the legal principle of entrenchment, a legislative action cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See Fletcher v. Peck*, 10 U.S. 87, 135 (Chief Justice Marshall) (“The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.”). The U.S. Supreme Court has noted the long history of this rule. *See United States v. Winstar Corp.*, 518 U.S. 839, 872-74 (1996).

<sup>17</sup> *See, e.g., Watson v. Jones*, 80 U.S. 679, 728-29 (1872).

<sup>18</sup> *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). The tripartite *Lemon* test has traditionally been used by the Court to determine whether a governmental action comports with the Establishment Clause. It requires that a challenged law (1) have a secular purpose; (2) have a neutral primary effect; and (3) not foster excessive entanglement with religion. *Id.* at 612-13.

<sup>19</sup> *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

<sup>20</sup> *See United States v. Seeger*, 380 U.S. 163, 185 (1965); *Welsh v. United States* 398 U.S. 333, 339-40 (1970). *See also Quaring v. Peterson*, 728 F.2d 1121 (8<sup>th</sup> Cir. 1984).

<sup>21</sup> P.L. 88-352, Title VII, 78 Stat. 253, codified at 42 U.S.C. §§2000e et seq.

<sup>22</sup> 42 U.S.C. §2000e(j).

<sup>23</sup> 29 C.F.R. §1605.1. *See also Seeger*, 380 U.S. 163; *Welsh*, 398 U.S. 333.

The aversion of courts and legislatures to identify specific parameters of religion often leads to the adoption of general exemptions. If an exemption is specifically tailored to identify particular religions that would qualify, it may violate the Establishment Clause by indicating a preference of particular sects or exclusion of others.<sup>24</sup> However, if the exemption is offered generally to individuals or entities having a religious belief in conflict with the requirement interfering with religious practice, it likely will meet the subjective standard used by the court and avoid both the appearance of preferential treatment in violation of the Establishment Clause as well as the infringement on religious exercise in violation of the Free Exercise Clause.

## **Selected Examples of Religious Objections and Related Exemptions Affecting Secular Organizations**

The statutory exemptions discussed below attempt to accommodate religious objections to legislative mandates. These exemptions are limited to the statutory context in which they were adopted and, therefore, the definitions enacted in statute or adopted by courts cannot be conferred to other contexts automatically, unless the exemption was written in such a way that cross-references one exemption to incorporate it into another. These exemptions and their interpretations serve as examples of how Congress and the courts have addressed the scope of religious objections thus far.

### **Employment Non-Discrimination and Conflicts Between Religious Beliefs in the Workplace**

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.<sup>25</sup> It prohibits employers from discriminating against employees on the basis of their religious beliefs and requires employers to make reasonable accommodations for employees' religious practices.<sup>26</sup> However, Congress has recognized that while these provisions protect employees' religious exercise, restrictions on employment decisions by religious employers may interfere with the employer's religious practices.

As a result, Title VII includes exemptions for religious entities, allowing qualifying employers to consider religion in hiring decisions. The general exemption available to religious organizations states that the prohibition against religious discrimination does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<sup>27</sup> Title VII also includes a separate, but similar exemption that applies specifically to religious educational

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<sup>24</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). See also *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216-217 (1963); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>25</sup> 42 U.S.C. §2000e-2.

<sup>26</sup> *Id.* See also 42 U.S.C. §2000e(j).

<sup>27</sup> 42 U.S.C. §2000e-1(a).

institutions. That exemption allows educational institutions “to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular [religious organization], or if the curriculum of [the institution] is directed toward the propagation of a particular religion.”<sup>28</sup>

Title VII’s religious exemption often is used as a model for other religious exemptions, but it does not define which organizations would qualify for exemption. The Supreme Court has declined to review cases in which the parameters of the exception are unclear, and courts have not established a uniform standard, though many have considered the issue. For example, the U.S. Court of Appeals for the Ninth Circuit explained that an entity would qualify for exemption “if it is organized for a religious purpose, is engaged primarily in carrying out that purpose, holds itself out to the public as an entity for carrying out that purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>29</sup> Overall, lower courts generally have appeared to agree upon several factors relevant to deciding whether an organization qualifies for exemption, including (1) the purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization; and (4) the extent of religious practices in or the religious nature of the products and services offered by the organization and whether it operates for a profit.<sup>30</sup>

## Conflicts Arising from Religious Practices Related to Health Benefits Available in Group Health Plans

As discussed earlier in this report, the contraceptive coverage requirement enacted under ACA has brought the debate over which organizations qualify as “religious” in order to claim legal protection from generally applicable policy mandates. The contraceptive coverage requirement requires that group health plans and health insurance issuers provide coverage for certain preventive health services, including a range of contraceptives, without imposing cost-sharing requirements.<sup>31</sup> Among the stated goals and benefits of the preventive health services requirements at issue are the improvement of public health and the equitable distribution of costs for preventive services, both of which have been deemed compelling interests by courts when considering claims of interference with religious exercise.<sup>32</sup> However, some employers have objected to the requirement for contraceptive coverage, arguing that doing so would mean facilitating access to services that directly conflict with their religious beliefs regarding human reproduction.

Accordingly, implementing regulations have been adopted that create an exemption from compliance for certain religious employers and an accommodation for other entities with

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<sup>28</sup> 42 U.S.C. §2000e-2(e)(2).

<sup>29</sup> *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9<sup>th</sup> Cir. 2011) (per curiam), *cert. denied*, 132 S.Ct. 96 (2011).

<sup>30</sup> *See, e.g., LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217, 226-27 (3<sup>rd</sup> Cir. 2007) (providing a summary discussion of the circuit courts’ interpretations of which organizations qualify for exemption under Title VII).

<sup>31</sup> *See* 42 U.S.C. §300gg-13.

<sup>32</sup> *See* 75 Fed. Reg. 41,733. *See also* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

objections to the required coverage.<sup>33</sup> Employers who do not qualify for exemption or accommodation must include contraceptive coverage as part of group health plans offered to their employees. Generally, “religious employers” are exempt from the requirement, meaning their employees are not provided coverage for contraceptives through the employer or the issuer.<sup>34</sup> The regulations define a religious employer as “an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.”<sup>35</sup> The referenced subsections of the tax code respectively refer to “churches, their integrated auxiliaries, and conventions or associations of churches” and to “the exclusively religious activities of any religious order.”<sup>36</sup>

Additionally, other eligible employers with objections to the coverage of contraceptive service may qualify for an accommodation, meaning that their employees must be offered contraceptive coverage but the cost is covered by the health plan issuer, rather than the employer.<sup>37</sup> To qualify for the accommodation, an organization must (1) have religious objections to the provision of coverage for any of the required contraceptive services; (2) be organized and operate as a nonprofit entity; (3) hold itself out as a religious organization; and (4) self-certify that it meets these criteria.<sup>38</sup>

By the definitions of religious employer and eligible organizations, an entity seeking to avoid compliance with the contraceptive coverage requirement must be a nonprofit. A number of employers that do not qualify for either the exemption or accommodation have challenged the scope of the regulations, particularly the exclusion of for-profit entities that would be required to provide coverage in conflict with asserted religious objections.<sup>39</sup> These cases are discussed in further detail later in this report.

## Denial of Services to Same-Sex Couples by Places of Public Accommodation

Title II of the Civil Rights Act of 1964 prohibits discrimination in public accommodations.<sup>40</sup> Public accommodations, which are defined as establishments that serve the public and that have a connection to interstate commerce, include hotels, restaurants, and entertainment venues.<sup>41</sup> Federal protection against discrimination by entities qualifying as public accommodations under Title II applies only if the discrimination is based on race, color, religion, or national origin, and does not include sexual orientation.<sup>42</sup> However, some states have adopted broader analogous

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<sup>33</sup> Coverage of Certain Preventive Health Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013).

<sup>34</sup> 45 C.F.R. §147.131(a).

<sup>35</sup> *Id.*

<sup>36</sup> 26 U.S.C. §6033(a)(3)(A)(i), (iii).

<sup>37</sup> 45 C.F.R. §147.131(c)(2).

<sup>38</sup> 45 C.F.R. §147.131(b).

<sup>39</sup> Dozens of lawsuits have been filed challenging the contraceptive coverage requirement under the First Amendment and RFRA with mixed success. Cases may be tracked at HHS Mandate Information Central, The Becket Fund for Religious Liberty, *available at* <http://www.becketfund.org/hhsinformationcentral/>.

<sup>40</sup> P.L. 88-352, Title II, 88<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1964), codified at 42 U.S.C. §2000a et seq.

<sup>41</sup> 42 U.S.C. §2000a(b).

<sup>42</sup> *See* 42 U.S.C. §2000a(a).

protections that prohibit public accommodations from discriminating in the provision of goods and services on the basis of sexual orientation.<sup>43</sup>

Certain public accommodations have objected to the lack of exemption for entities with religious objections to same-sex relationships. These objections have arisen mainly in the context of same-sex marriage and civil union ceremonies.<sup>44</sup> However, there also have been examples of objections to equal treatment of same-sex families in other contexts, such as adoption services, medical services, and housing.<sup>45</sup> As a general rule, although states that have recognized same-sex marriage may have included a religious exemption to protect the rights of religious clergy to refuse to perform or sanctify such unions, only some states have provided similar protection for other officials or for organizations that may provide services related to weddings.<sup>46</sup>

Despite the possible lack of exemptions available under public accommodations laws for individuals with religious objections to certain sexual orientations, entities with such objections may avoid violating the law in many instances if they limit the availability of related services to certain purposes. In other words, if the public accommodations law applies only to entities that are generally open or otherwise available to the public, an entity may limit its liability under the law by restricting access for a particular purpose. For example, if an entity is open to the public for weddings and other such ceremonies, but attempts to deny a same-sex couple from having access, it likely would be in violation of public accommodations law.<sup>47</sup> On the other hand, if the entity is open to the public for other purposes, but not for weddings, then it would not violate the public accommodations law. The controversy arises in these scenarios when an entity attempts to make a service available to most of the public, but attempts to exclude a particular group for the same purpose.

## **Eligibility of Secular Entities for Exemptions Based on Religious Objections**

The U.S. Supreme Court has never considered the merits of a case challenging the eligibility of secular, for-profit corporations to claim protection for religious exercise, although it has recognized the rights of individuals and of religious, nonprofit organizations to claim such

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<sup>43</sup> The scope of state protections against discrimination by public accommodations based on sexual orientation varies. For a review of states that have included sexual orientation as a protected class under public accommodations laws, see LGBT-Inclusive Public Accommodations Laws, Human Rights Campaign, *available at* <http://www.hrc.org/resources/entry/lgbt-inclusive-public-accommodations-laws1>.

<sup>44</sup> *See, e.g.*, *Bernstein v. Ocean Grove Camp Meeting Association*, No. PN34XB-03008 (N.J. Office of Administrative Law, January 12, 2012); *Elane Photography v. Willock*, No. 33,687, 2013 N.M. LEXIS 284 (N.M. 2013).

<sup>45</sup> *See* Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, Catholic News Service (March 13, 2006), *available at* <http://www.catholicnews.com/data/stories/cns/0601456.htm>; *North Coast Women's Care Medical Group, Inc. v. Superior Court of San Diego County*, 189 P.3d 959 (Cal. 2008) (holding Free Exercise rights do not exempt physicians from complying with state nondiscrimination laws prohibiting discrimination based on sexual orientation); *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001) (challenging university's decision to deny housing to homosexual couple).

<sup>46</sup> *See, e.g.*, N.H. Rev. Stat. Ann. §457:37; Conn. Gen. Stat. §46b-35a.

<sup>47</sup> *See, e.g.*, *Bernstein v. Ocean Grove Camp Meeting Association*, No. PN34XB-03008 (N.J. Office of Administrative Law, January 12, 2012).

protection.<sup>48</sup> Recent controversy arising from the contraceptive coverage mandate has brought the question of secular entities' religious freedom rights before a number of federal courts, resulting in a split among the federal circuits, and has led the Supreme Court to grant review of two of the key cases on this issue.<sup>49</sup>

Among the questions posed by the contraceptive cases are whether secular corporations may pursue legal challenges related to religious freedom under either the First Amendment or RFRA; whether the corporations' for-profit status should be considered in eligibility for legal protection; whether the religious rights of the owners of closely held corporations "pass-through" to the corporation itself; and whether those owners may pursue distinct legal challenges separate from the corporation. These threshold questions must precede consideration of the merits of any such corporation or owners' claim that the mandate imposes a substantial burden on religious exercise.

It is important to note that the contraceptive cases discussed below consider whether the parties seeking exemption qualify for injunctive relief to avoid compliance with the pending contraceptive coverage requirements. If injunctive relief is denied, the parties who refuse to comport with the requirement face significant financial penalties for the duration of the litigation. Decisions to grant or deny such preliminary injunctions determine, in part, whether the parties have a likelihood of success on the merits, such that forcing them to comply during the pending challenge would result in a violation of their religious exercise rights in the meantime. Courts that have determined that the corporations or owners have met the threshold requirements mentioned above, therefore, consider the merits of the decision, but their decision does not constitute a final judgment on the merits of the case.

Three of the five circuits (Seventh, Tenth, and D.C.) that have issued decisions on the contraceptive mandate have granted preliminary injunctive relief under RFRA, finding that either the corporation, its owners, or both may assert rights under the statute and that the mandate imposes a substantial burden that lacks a compelling interest achieved by the least restrictive means.<sup>50</sup> The remaining two circuits (Third and Sixth) have held that secular corporations do not qualify for protection under RFRA.<sup>51</sup> Each of the employers bringing these challenges is a closely held corporation that is family owned or controlled. The companies generally offer secular goods and services (e.g., craft supplies, cabinet manufacturing, automotive and medical manufacturing, grocery services, and construction).<sup>52</sup> Courts and the owners of these companies generally have conceded that they are not religious organizations, but instead are commercial entities that are operated in accordance with the owners' religious principles.

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<sup>48</sup> See, e.g., *Sherbert*, 374 U.S. 398; *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>49</sup> See *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8418 (November 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, 724 F.3d 377 (3<sup>rd</sup> Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8419 (November 26, 2013) (No. 13-354); *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152 (6<sup>th</sup> Cir. 2013); *Gilardi v. U.S. Department of Health and Human Services*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. 2013); *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 U.S. App. LEXIS 22748 (7<sup>th</sup> Cir. 2013).

<sup>50</sup> *Korte*, 2013 U.S. App. LEXIS 22748; *Hobby Lobby Stores*, 723 F.3d 1114; *Gilardi*, 2013 U.S. App. LEXIS 22256.

<sup>51</sup> *Conestoga*, 724 F.3d 377; *Autocam Corp.*, 2013 U.S. App. LEXIS 19152.

<sup>52</sup> Only one company provides products explicitly related to religion, but it is not considered a religious organization. See *Hobby Lobby Stores*, 723 F.3d 1114 (challenge by owners of two companies, including a craft store chain and a Christian bookstore chain).

## Historic Exclusion from Eligibility for Exemption Under Title VII

Early consideration of whether secular corporations could qualify for legal protection of religious exercise arose in the context of Title VII, which requires that parties seeking exemption be religious organizations. That litigation treated the rights of a for-profit corporation and its owners as synonymous, but illustrated a reluctance to apply Title VII's religious exemption to for-profit, secular organizations. In *Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co.*, the U.S. Court of Appeals for the Ninth Circuit held that a closely held corporation that manufactured mining equipment founded by owners with the intent to operate their business in accordance with their Christian faith could not be considered a qualifying religious organization for the purposes of Title VII.<sup>53</sup> The court explained that the exemption for religious corporations was not intended to cover businesses like the manufacturing company in the case.

In its decision, the court emphasized that corporations would qualify for protection under the statute's exemption only if their purpose and character were primarily religious.<sup>54</sup> The court found that the company's status as a for-profit organization demonstrated a secular entity.<sup>55</sup> Additional factors indicating its secular identity included the production of secular products, the lack of affiliation with or support from a church, and the lack of religious purpose in the company's articles of incorporation.<sup>56</sup> The owners' religious activities and statements, even if used in their official capacity within the business, were insufficient to overcome the secular characterization, according to the court.<sup>57</sup>

However, the court also recognized that the owners of that company were protected by their Free Exercise rights which Title VII could not affect.<sup>58</sup> As discussed further below, the court addressed the accompanying Free Exercise claim as an issue of the owners' constitutional rights, not the company's. Ultimately, it found that the owners' Free Exercise rights may be affected under Title VII, but that such limitation was justified by the overriding governmental interest.<sup>59</sup> According to the court, "[w]here the practices of employer and employee conflict ..., it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."<sup>60</sup> The court noted that the owners may continue to require employees to comport with their religious beliefs as adopted in the scope of the business, but that it must provide the option for employees with objections to be excused.<sup>61</sup> In other words, under the court's rationale, owners' decisions based on religious beliefs need not be voluntary for all employees, but must be voluntary to employees with religious objections.

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<sup>53</sup> *Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9<sup>th</sup> Cir. 1988).

<sup>54</sup> *Id.* at 618.

<sup>55</sup> *Id.* at 619.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 620.

<sup>59</sup> *Id.* at 621.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

The *Townley* decision illustrates the distinction between religious and secular organizations' eligibility for religious exemptions. However, it is important to keep in mind that statutory exemptions are applied within the parameters of their respective statutes. That is, if a court interprets the Title VII exemption to be limited to religious organizations only, that limitation does not transfer to religious exemptions in other statutes. Courts may review the interpretation of similar exemptions for guidance in understanding the scope of another exemption, but they are not bound to apply the same scope to all exemptions. As the Court has recognized, Congress is empowered to enact and limit the scope of statutory exemptions at its discretion.<sup>62</sup>

## **Rights of Secular Corporations Claiming Interference with Religious Exercise**

The rights of secular corporations to challenge governmental mandates that infringe upon the religious beliefs by which the businesses are operated largely depends on whether courts recognize the corporations as protected by the particular provision of law. In the context of the contraceptive coverage mandate, corporations have asserted their rights as persons protected by RFRA and Free Exercise jurisprudence generally, and they have asserted their rights as passed to them by their owners. Circuit courts have split regarding whether corporations may assert these rights under the former theory, but the circuits that have considered contraceptive mandate challenges under the so-called passed through theory have rejected it as grounds for the corporation to assert a legal challenge.

### **Recognizing Privately Held Corporations as Persons Under RFRA**

RFRA prohibits governmental burdens on “a person’s exercise of religion” but does not define person under the statute.<sup>63</sup> In the absence of a definition within the statute itself, courts have looked to the Dictionary Act, which provides guidance for the meaning of common terms used in legislation. The Dictionary Act states that when “determining the meaning of any Act of Congress, unless the context indicates otherwise ... the word[] ‘person’ ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>64</sup>

The Third and Sixth Circuits—the two courts that have denied contraceptive coverage challenges so far—held that the companies raising the challenge could not “exercise religion” and therefore could not avail themselves of RFRA’s protection.<sup>65</sup> That is, even if the contraceptive mandate burdened the companies, lacked a compelling interest, or could have been implemented by other means, secular companies have no legal recourse because they are not protected under the statute. Under the Sixth Circuit’s interpretation of the Dictionary Act, “RFRA’s relevant context [shows] strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as ‘persons’ under RFRA.”<sup>66</sup> The court explained that the purpose of RFRA was to restore free exercise protections historically applied by the Supreme Court,

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<sup>62</sup> *Smith*, 494 U.S. at 890.

<sup>63</sup> 42 U.S.C. §2000bb-1(a).

<sup>64</sup> 1 U.S.C. §1.

<sup>65</sup> *Conestoga*, 724 F.3d 377; *Autocam Corp.*, 2013 U.S. App. LEXIS 19152.

<sup>66</sup> *Autocam Corp.*, 2013 U.S. App. LEXIS 19152 at 21-22.

“which were fundamentally personal.”<sup>67</sup> According to the court, “Congress did not intend to expand the scope of the Free Exercise Clause” and although the Court’s historic interpretation recognized free exercise rights of certain individuals engaged in for-profit businesses and nonprofit religious organizations, “it has never recognized similar rights on behalf of corporations pursuing secular ends for profit.”<sup>68</sup>

In June 2013, the U.S. Court of Appeals for the Tenth Circuit issued a surprising decision in light of the historic exclusion of secular companies from religious exemption in other contexts, a decision with which the U.S. Court of Appeals for the Seventh Circuit agreed in November 2013. In *Hobby Lobby Stores v. Sebelius*, the Tenth Circuit held that two family-owned and operated for-profit, secular corporations could be considered “persons” whose religious exercise would be protected under RFRA.<sup>69</sup> Relying upon the plain text of the Dictionary Act, the courts found that the companies could be eligible for protection under RFRA.<sup>70</sup> The courts noted that judicial precedent, including Supreme Court jurisprudence, recognized the religious exercise rights of corporations and organizations, although the cases cited involved only religiously affiliated corporations.<sup>71</sup> The courts explicitly rejected the argument that religious exemptions are limited to religiously affiliated, nonprofit entities “by implication from judicial interpretation of two unrelated employment-nondiscrimination statutes.”<sup>72</sup> Citing Title VII as an example of an exemption restricted to “religious” entities, the Seventh Circuit explained that Congress would have indicated a similar restriction had it intended to impose the same limitation on eligibility for protection under RFRA.<sup>73</sup> Rather, RFRA does not indicate an explicit limitation and as a result, the Seventh and Tenth Circuits held that RFRA’s protection must be interpreted more broadly to allow secular organizations to seek protection for religious exercise.

It is notable that the Tenth Circuit implied that some secular businesses may be distinguished from protection under RFRA.<sup>74</sup> Though it recognized that closely held companies, like those in the case before it, exercised religion openly and proselytize as a form of religious exercise, the court acknowledged the difficulty of determining the sincerity of religious belief and religious exercise of a large, publicly traded corporation.<sup>75</sup> The *Hobby Lobby* decision was confined to the smaller, family-owned, closely held corporations, which the court explained could demonstrate adherence to a set of religious beliefs in the course of their business dealings in addition to its proselytizing activities. Courts generally avoid deciding issues beyond the scope of the cases before them, so any decision on which secular businesses may be eligible for RFRA protection is still undecided by any court. However, the Tenth Circuit’s reasoning arguably may appear to be internally inconsistent. It relies on a broad reading of the term person under the Dictionary Act when determining that “persons” under RFRA could include either type of corporation—religious or secular—because the type of corporation is not explicitly restricted to religious corporations. However, it then implies that it would question whether eligible secular corporations include both

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<sup>67</sup> *Autocam Corp.*, 2013 U.S. App. LEXIS 19152 at 22.

<sup>68</sup> *Autocam Corp.*, 2013 U.S. App. LEXIS 19152 at 22-23.

<sup>69</sup> *Hobby Lobby Stores*, 723 F.3d 1114.

<sup>70</sup> *Hobby Lobby Stores*, 723 F.3d at 1129; *Korte*, 2013 U.S. App. LEXIS 22748 at 49-52.

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

<sup>72</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 53.

<sup>73</sup> *Id.* at 54-55.

<sup>74</sup> *See Hobby Lobby Stores*, 723 F.3d at 1136-37.

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

closely held and publicly traded corporations, despite having stated that there is no indication of a restriction on the type of corporation that would qualify as a person.

## Potential Distinction Between For-Profit and Nonprofit Entities

Courts have not seemed to focus solely on a corporation's for-profit status when determining its eligibility for free exercise protections as much as they have addressed the corporation's status as a secular or religious entity. In some discussions, these distinctions appear to be used interchangeably, i.e., if a company operates for profit, it is a secular corporation, whereas religious corporations are assumed to be nonprofit. For example, the Third and Sixth Circuits treated the characterizations jointly, both finding that the companies were simultaneously for-profit and secular.<sup>76</sup>

As discussed above, the Tenth Circuit held that for-profit, secular corporations could exercise religion and that the companies in that case had done so through their engagement in evangelism through religious advertising purchased by the business. The remaining circuits have explained that a corporation's commercial status is not determinative in its eligibility for free exercise protection:

It's common ground that *nonprofit* religious corporations exercise religion in the sense that their activities are religiously motivated. So unless there is something disabling about mixing profit-seeking and religious practice, it follows that a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated.<sup>77</sup>

The Seventh Circuit noted that the question of whether an entity's for-profit status would impact its ability to claim free exercise protections has never been decided by the Supreme Court, but that the Court had considered free exercise claims in other commercial contexts.<sup>78</sup> The Court indeed has recognized and adjudicated free exercise claims brought by individuals related to for-profit activities. In employment discrimination cases, courts have upheld free exercise rights of employees despite their claims arising from issues related to wages in commercial jobs.<sup>79</sup> The Seventh Circuit also referenced a free exercise case in which merchants challenged Sunday-closing laws, stating "if profit-making alone was enough to disqualify the merchants from bringing the claim, the Court surely would have said so. It did not. Instead, the Court addressed and rejected their free-exercise claim on the merits."<sup>80</sup> Finally, courts have pointed to the Court's decision in *United States v. Lee*, in which an Amish man sought an exemption from paying social security taxes for his employees because the program conflicted with his religious beliefs.<sup>81</sup> The Seventh Circuit concluded that "[t]hese cases show that far from categorically excluding profit-seekers from the scope of the free-exercise right, the Supreme Court has considered their claims

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<sup>76</sup> *Conestoga*, 724 F.3d 377; *Autocam Corp.*, 2013 U.S. App. LEXIS 19152.

<sup>77</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 64-65.

<sup>78</sup> *Id.* at 65.

<sup>79</sup> *Id.* at 65-66 (citing *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) and *Sherbert*, 374 U.S. 398).

<sup>80</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 66-67 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

<sup>81</sup> *See* 455 U.S. 252 (1982).

on the merits, granting exemptions in some and not others based on the compelling-interest test.”<sup>82</sup>

The Tenth Circuit agreed, noting that the Court’s analysis of these cases did not depend on corporate status:

[W]e cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before. This cannot be about the protections of the corporate form, such as limited liability and tax rates. Religious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights.<sup>83</sup>

As discussed earlier, profit-status and commercial activity has been considered relevant in analyses of organizations’ eligibility for exemption under certain statutes such as Title VII. However, it does not appear to be dispositive in cases involving eligibility for RFRA. Rather, courts’ opinions seem to focus on whether the entity can practice religion, regardless of whether it profits while doing so. The critical inquiry appears to be the nature of religious exercise. As some decisions have noted, such entities cannot worship or exercise religion in the traditional sense,<sup>84</sup> but as others have noted, these entities can express religious values, which may also be encompassed as a form of religious exercise.<sup>85</sup> It may be argued that an entity’s for-profit status would not affect the analysis if the business itself is providing a good or service somehow related to its religious values. However, if the religious nature of the business is merely aspirational, e.g., limited to religious principles stated in the company’s mission and does not extend into business operations, it may be argued that the business is not exercising religion. The difficulty with such arguments is that courts would need to decide whether the religious beliefs and activities are sufficient to be considered religious exercise protected under the law, an inquiry generally avoided by any court as discussed earlier in this report.

## Direct Protection Under the U.S. Constitution

Although it appears widely accepted that the contraceptive coverage requirement would be considered a neutral law of general applicability that does not target religious practice and therefore would not be subject to First Amendment protection, the expansion of the Supreme Court’s First Amendment jurisprudence in other areas has led to questions regarding the scope of the religion clauses. In 2010, the Supreme Court issued a landmark decision in *Citizens United v. Federal Election Commission*, in which it held that “First Amendment protection extends to corporations,” citing a line of cases recognizing Free Speech rights of corporations.<sup>86</sup> The Court noted its rejection of “the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”<sup>87</sup> *Citizens United* examined the scope of the Free Speech Clause of the First Amendment, but did not address the application of the remainder of the First Amendment (including the religion clauses) to corporations.

<sup>82</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 68.

<sup>83</sup> *Hobby Lobby Stores*, 723 F.3d at 1134-35.

<sup>84</sup> *Conestoga*, 724 F.3d 377; *Autocam Corp.*, 2013 U.S. App. LEXIS 19152; *Gilardi*, 2013 U.S. App. LEXIS 22256.

<sup>85</sup> *Hobby Lobby Stores*, 723 F.3d 1114; *Korte*, 2013 U.S. App. LEXIS 22748.

<sup>86</sup> 558 U.S. 310, 342 (2010).

<sup>87</sup> *Id.* at 343.

The Tenth Circuit's decision in *Hobby Lobby* raised questions of the scope of First Amendment protections that may be available to secular corporations seeking protection of their religious exercise. The court relied on *Citizens United* to demonstrate that corporations may express themselves as a matter of religious exercise for the purposes of RFRA, explaining that "the Free Exercise Clause is *not* a purely personal guarantee" but instead extends to associations, even if those associations have organized themselves by incorporation.<sup>88</sup> Noting that "religious conduct includes religious expression, which can be communicated by individuals and for-profit corporations alike," the court stated that the companies' efforts to proselytize through the purchase of newspaper advertisements that encouraged readers to "know Jesus as Lord and Savior" constituted protected religious exercise.<sup>89</sup>

Because [the companies] express themselves for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.<sup>90</sup>

The court's decision was not based on its assessment of the constitutional right, but it relied on the *Citizens United* theory to demonstrate corporations' ability to exercise religion and therefore qualify for protection under RFRA. The Seventh Circuit, which reached the same conclusion as the Tenth Circuit on the question of whether secular corporations could claim protection as persons protected by RFRA and the corporations' likelihood of success on the merits, explained that its decision centered on statutory interpretation of RFRA and avoided defining the parameters of the constitutional rights involved.<sup>91</sup>

However, other circuits have disagreed with the Tenth Circuit's conclusion, emphasizing that the Free Speech and Free Exercise Clauses are distinct legal protections with separate precedential history and rationales that cannot be transferred between the two. The Third Circuit rejected the idea that the clauses' grouping in the same constitutional amendment meant they "must be interpreted jointly."<sup>92</sup> It explained that "*Citizens United* is grounded in the notion that the Court has a long history of protecting corporations' right to free speech" but that there is no "similar history of courts providing free exercise protection to corporations."<sup>93</sup>

The D.C. Circuit likewise held that secular corporations could not exercise religion for purposes of RFRA or the First Amendment.<sup>94</sup> That court found that free exercise rights had been granted to individuals but that such rights also applied to groups, noting "the foundational principle that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause."<sup>95</sup> The court recognized that the Supreme Court had a

<sup>88</sup> *Hobby Lobby Stores*, 723 F.3d at 1134 (internal quotations and citations omitted).

<sup>89</sup> *Id.* at 1134-35.

<sup>90</sup> *Hobby Lobby Stores*, 723 F.3d at 1135 (internal citation omitted).

<sup>91</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 71-73.

<sup>92</sup> *Conestoga*, 724 F.3d at 386.

<sup>93</sup> *Id.* at 384.

<sup>94</sup> *Gilardi*, 2013 U.S. App. LEXIS 22256 at 9 (noting that RFRA does not clarify the meaning of person or exercise of religion, and explaining that it must examine "the full body of our free-exercise caselaw to discern whether the [companies qualify for protection] under the statute").

<sup>95</sup> *Id.* at 13.

long history of cases “recognizing that all corporations speak” but “has only indicated that people and churches worship.”<sup>96</sup> The Court’s silence with respect to secular corporations did not provide the D.C. Circuit with sufficient legal basis to support a right to free exercise by such organizations.

## Protection Under the Pass-Through Theory of Corporate Rights

Companies challenging the contraceptive mandate have sought relief under the pass-through theory of corporate rights introduced in the *Townley* case, discussed earlier. In *Townley*, the Ninth Circuit framed the constitutional issue in the case as one of the owners’ rights. It explained that the company was “merely an instrument through and by which [its owners] express their religious beliefs” and held that it was “unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. [The company] presents no rights of its own different from or greater than its owners’ rights.”<sup>97</sup> The court provided little more discussion to explain its decision on that point, but it affirmed its holding in *Townley* in 2009, “declin[ing] to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examin[ing] the rights at issue as those of the corporate owners.”<sup>98</sup> In that case, the court explained that the corporation was “an extension of the beliefs of the members of the [owning] family, and that the beliefs of the ... family are the beliefs of [the corporation]. Thus, [the company] does not present any free exercise rights of its own different from or greater than its owners’ rights. ...[A]s in *Townley*, [the corporation] has standing to assert the free exercise rights of its owners.”<sup>99</sup>

Other courts generally have rejected the Ninth Circuit’s recognition of pass-through rights. The D.C. Circuit characterized the argument that a corporation which is owned by a few individuals sharing the same religious values by which they operate the company could serve as a surrogate of the owners’ beliefs as “logically and structurally appealing.”<sup>100</sup> However, the court noted that the *Townley* precedent did not provide sufficient “legal substantiation” and ultimately held that it “had no basis for concluding a secular organization can exercise religion.”<sup>101</sup>

The Third and Sixth Circuits have rejected the pass-through theory of corporate standing as well, explaining that the nature of incorporation negates the ability of owners to assert their rights through the corporate business. The Third Circuit opined that the Ninth Circuit’s rationale was based on “erroneous assumptions” about the nature of incorporation:

It is a fundamental principle that “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers and privileges different from those of the natural individuals who created” the corporation. The “passed through” doctrine fails to acknowledge that, by incorporating their business, the [owners] themselves created a distinct legal entity that has legally distinct rights and responsibilities from [its owners].<sup>102</sup>

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<sup>96</sup> *Id.* at 16.

<sup>97</sup> *Townley*, 859 F.2d at 619-20.

<sup>98</sup> *Stormans v. Selecky*, 586 F.3d 1109, 1119 (9<sup>th</sup> Cir. 2009).

<sup>99</sup> *Id.* at 1120.

<sup>100</sup> *Gilardi*, 2013 U.S. App. LEXIS 22256 at 18.

<sup>101</sup> *Id.* at 18-20.

<sup>102</sup> *Conestoga*, 724 F.3d at 387-88 (internal citations omitted).

The court emphasized that any penalties imposed by the contraceptive coverage mandate were the responsibility of the company, not its owners. Recognizing that, as the sole shareholders of the corporation, the owners of closely held corporations are impacted by the corporation's financial dealings, the court nonetheless found the distinction between the corporation and owners as separate legal parties significant.<sup>103</sup> Both the Third and Sixth Circuits emphasized that the benefits of incorporation include trade-offs for owners: "The corporate form offers several advantages 'not the least of which was limitation of liability,' but in return, the shareholder must give up some prerogatives, 'including that of direct legal action to redress an injury to him as primary stockholder in the business.'"<sup>104</sup>

## Rights of Corporate Owners with Religious Objections to Legislative Mandates

Because the Third and Sixth Circuits held that the corporations and their owners were separate legal entities, which were subject to distinct sets of legal rights, both courts rejected the owners' ability to challenge the mandate on behalf of their companies.<sup>105</sup> Standing to assert legal claims requires that a party be injured by the challenged action.<sup>106</sup> If the company is injured, it must seek redress for that injury itself, not through a third party, which is how those courts would characterize the owners of the company. As the Sixth Circuit explained, owners' actions "are not actions taken in an individual capacity, but as officers and directors of the corporation."<sup>107</sup> As such, they cannot be separated from the corporation for a distinct legal claim.

Other courts recognized the rights of the owners to assert a distinct claim related to their operation of their corporations. The D.C. Circuit held that secular organizations could not exercise religion and therefore could not pursue legal claims to protect any such right.<sup>108</sup> To determine whether the owners could assert a free exercise claim in their individual capacity, the court instead looked to the rules of shareholder standing, which generally prohibits shareholders from raising claims for injuries to the corporation.<sup>109</sup> The court held that the owners qualified for an exception to the rule because they were "injured in a way that is separate and distinct from an injury to the corporation," a conclusion with which the Seventh Circuit agreed.<sup>110</sup> The D.C. Circuit explained that "[i]f the companies have no claim to enforce—and as nonreligious corporations, they cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to the [owners], existing independently of any right of the ... companies."<sup>111</sup>

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<sup>103</sup> *Id.* at 388.

<sup>104</sup> *Id.* See also *Autocam Corp.*, 2013 U.S. App. LEXIS 19152 at 15.

<sup>105</sup> *Conestoga*, 724 F.3d 377; *Autocam Corp.*, 2013 U.S. App. LEXIS 19152.

<sup>106</sup> There are generally three constitutionally required elements to standing: (1) the individual must have personally suffered an actual or threatened injury; (2) the injury must be fairly traced to the challenged action; and (3) the injury must be likely to be redressed by a favorable decision. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>107</sup> *Autocam Corp.*, 2013 U.S. App. LEXIS 19152 at 14.

<sup>108</sup> *Gilardi*, 2013 U.S. App. LEXIS 22256 at 20.

<sup>109</sup> *Id.* at 20-22.

<sup>110</sup> *Id.* at 21 (quotation and citation omitted). See also *Korte*, 2013 U.S. App. LEXIS 22748 at 32-34.

<sup>111</sup> *Gilardi*, 2013 U.S. App. LEXIS 22256 at 22.

Noting the objections raised in other cases regarding the inherent trade-offs of incorporation, the D.C. Circuit reasoned that shareholders generally forgo certain rights in exchange for the benefits of incorporation because the company has the authority to exercise those rights on the shareholders behalf.<sup>112</sup> If the corporation cannot exercise a particular right, it would be unjust, according to the court, to refuse the owner’s analogous right. Otherwise, “the price of incorporation [would be] not only the loss of RFRA’s statutory free-exercise right, but the constitutional one as well. And that would create a risk of an unconstitutional condition in future cases.”<sup>113</sup> The court therefore refused to hold that a person’s statutory rights under RFRA depended on the form by which an individual chooses to operate his business.<sup>114</sup>

## Applying RFRA to Religious Objections to the Contraceptive Coverage Requirement

Of the five circuit courts that have considered contraceptive coverage cases, the Third and Sixth Circuits rejected the ability of the parties—either as corporations or their owners in their individual capacity—to challenge free exercise rights, and therefore did not address the likelihood on the parties’ success on the merits. The remaining three circuits that found at least one party had standing to pursue the claim held that the claim was likely to succeed on the merits and granted a preliminary injunction preventing enforcement of the mandate with respect to those companies and individuals. Those courts considered the three elements of RFRA claims: whether the mandate imposed a substantial burden on religious exercise of the claimants; whether the government demonstrated a compelling interest in such a burden; and whether the government used the least restrictive means.

### Substantial Burden

Courts generally have recognized the burden imposed by the contraceptive mandate on the companies as substantial, explaining that the significance of the penalties assessed for noncompliance with the contraceptive mandate—\$100 per employee, per day of noncompliance—constituted substantial pressure on the company.<sup>115</sup> However, in its defense of the mandate, the government has alleged that the coverage requirements should not be considered to burden objecting employers’ religious exercise. According to the government’s arguments, the contraceptive requirement is not a direct burden. That is, it does not require any employer or employee who has an objection to the use of contraceptives to use or to encourage the use of such devices. The government instead has argued that the required insurance coverage is analogous to compensation, an issue on which the various challenging corporations do not have religious objections.<sup>116</sup> However, the courts have emphasized the deference due to religious objectors regarding the nature of their beliefs and related objections, citing the Supreme Court’s long history of recognizing that it is not the role of the courts to determine the reasonableness of religious beliefs.<sup>117</sup>

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<sup>112</sup> *Id.* at 27-28.

<sup>113</sup> *Id.* at 30.

<sup>114</sup> *Id.* at 29.

<sup>115</sup> *Hobby Lobby Stores*, 723 F.3d at 1140. *See also Korte*, 2013 U.S. App. LEXIS 22748 at 76-77.

<sup>116</sup> *Hobby Lobby Stores*, 723 F.3d at 1141.

<sup>117</sup> *Id.* at 1141.

In response to arguments that the mandate does not burden employers “because an employee’s decision to use her insurance coverage to purchase contraception or sterilization services ‘cannot be attributed to’ the [owners of the corporations],” the Seventh Circuit elaborated on the deference owed to the corporations.<sup>118</sup> Echoing the D.C. Circuit’s finding that the burden occurs when the employer must choose between managing a health plan that includes contraceptive coverage and paying penalties for a non-compliant plan, the court reasoned that the burden analysis should focus on the objection that the employer has to paying for coverage, not the employees’ potential use of that coverage.<sup>119</sup> It emphasized that courts should not consider whether the employers’ characterization of the religious conflict fits with the tenets of a particular religion or whether it is a reasonable or accurate religious belief.<sup>120</sup> The courts’ assessment is consistent with Supreme Court jurisprudence and means that if an employer can demonstrate that its characterization of its objection is sincerely held, the requisite deference increases the probability that courts will find the employers’ religious exercise is substantially burdened.<sup>121</sup>

### Compelling Interest

Each of the courts considering the merits of the RFRA claims also found that the government’s interest was not sufficiently compelling. The courts uniformly agreed that the government’s justifications for the contraceptive coverage requirement—public health and gender equality—were too vague. The Tenth Circuit explained that the stated interests were too broadly formulated with no justification offered for the absence of specific exemptions in violation of the Supreme Court’s decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.<sup>122</sup> In that case, the Court explained that the government must provide a compelling interest if it offers an exception to one group but refuses to provide an exemption to another group from the same requirement.<sup>123</sup> The Tenth Circuit also explained that the interests could not be considered compelling because the requirement excluded tens of millions of people.<sup>124</sup>

The D.C. Circuit criticized the government’s stated interests as “sketchy and highly abstract,” explaining that there was an insufficient “nexus between this array of issues and the mandate.”<sup>125</sup> For example, it suggested that public health may justify a number of governmental actions but the specific application of the contraceptive mandate did not achieve the goal of public health broadly.<sup>126</sup> However, the court did not foreclose the possibility that the government could show a compelling interest in maternal or fetal health.<sup>127</sup> The Seventh Circuit echoed the D.C. Circuit’s criticism:

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<sup>118</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 78.

<sup>119</sup> *Id.* at 80-81. See also *Gilardi*, 2013 U.S. App. LEXIS 22256 at 24-25.

<sup>120</sup> *Korte*, 2013 U.S. App. LEXIS 22748 at 81-82.

<sup>121</sup> As discussed earlier in this report, courts assess the sincerity of religious beliefs by determining whether the objector adheres to the belief consistently in his or her practices. In other words, it cannot be an objection established with the ulterior motive of avoiding compliance with an unpopular mandate.

<sup>122</sup> *Hobby Lobby Stores*, 723 F.3d at 1143-44.

<sup>123</sup> 546 U.S. 418 (2006).

<sup>124</sup> *Hobby Lobby Stores*, 723 F.3d at 1143.

<sup>125</sup> *Gilardi*, 2013 U.S. App. LEXIS 22256 at 33.

<sup>126</sup> *Id.* at 33-34.

<sup>127</sup> *Id.* at 38.

By stating the public interests so generally, the government guarantees that the mandate will flunk the test. ... Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty.<sup>128</sup>

## Least Restrictive Means

The courts also rejected assertions that the mandate constituted the least restrictive means. The Seventh and D.C. Circuits noted that the government granted so many exceptions to the mandate that its arguments against exempting the companies with religious objections were unsustainable.<sup>129</sup> The D.C. Circuit noted that “[t]he regulatory scheme grandfathers, exempts, or ‘accommodates’ several categories of employers ... and does not apply to others (those with fewer than 50 employees.)”<sup>130</sup> It also noted that the government could use other methods to provide access to free contraceptive services without burdening the objectors, such as a public insurance option for contraceptive insurance; tax incentives to contraceptive providers who provide free services; and tax subsidies to individuals using contraceptive services, each of which would achieve the government’s goal of facilitating access to contraceptive services while avoiding burdens posed on employers with objections.<sup>131</sup> The Tenth Circuit reasoned that litigants in that case requested exemption only from coverage of four of the twenty contraceptive methods required by the mandate and noted that the government failed to explain how the mandate “would be undermined” by granting such a limited exception.<sup>132</sup>

The D.C. Circuit reasoned that the government had failed to justify its refusal to offer an exemption, noting that an exemption claimed on similar grounds was claimed in *United States v. Lee*. *Lee* involved a challenge to the social security tax program and the Supreme Court held that providing the exemption requested would make the program unworkable and therefore undermine the government’s interest in effectively administering the program. In the contraceptive mandate case, the D.C. Circuit explained that “there is nothing to suggest that the preventive-care statute would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement,” noting that the company’s employees would still be eligible for a wide range of preventive health services also required by the statute.<sup>133</sup>

## Supreme Court Review of *Conestoga* and *Hobby Lobby Stores*

On November 26, 2013, the Supreme Court agreed to review *Conestoga* and *Hobby Lobby Stores*. The two cases have been consolidated, with one hour of oral argument scheduled for both cases. The Court appears poised to address both the constitutional and statutory questions raised by ACA’s contraceptive coverage requirement. A decision that recognizes the free exercise rights of

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<sup>128</sup> Korte, 2013 U.S. App. LEXIS 22748 at 84.

<sup>129</sup> *Id.* at 85; Gilardi, 2013 U.S. App. LEXIS 22256 at 41 (noting that because of the large numbers already exempt from regulation, “the mandate is unquestionably underinclusive”).

<sup>130</sup> Korte, 2013 U.S. App. LEXIS 22748 at 85-86.

<sup>131</sup> *Id.* at 86.

<sup>132</sup> *Hobby Lobby Stores*, 723 F.3d at 1144.

<sup>133</sup> Gilardi, 2013 U.S. App. LEXIS 22256 at 44-45.

secular, for-profit corporations would likely have an impact beyond the ACA requirement, and could lead to such corporations seeking exemptions from other requirements.

The Court's interest in the free exercise issues raised by *Conestoga* and *Hobby Lobby Stores* was further demonstrated in *Little Sisters of the Poor Home for the Aged v. Sebelius*.<sup>134</sup> Unlike Conestoga Wood Specialties Corporation and Hobby Lobby Stores, Little Sisters of the Poor Home for the Aged is a nonprofit entity that could arguably seek an accommodation in connection with the contraceptive coverage requirement. The organization argued, however, that signing and providing the self-certification form that is needed for an accommodation would violate its religious beliefs.<sup>135</sup> In January 2014, the Court enjoined the Department of Health and Human Services (HHS) from enforcing the contraceptive coverage requirement against Little Sisters of the Poor Home for the Aged pending final disposition by the Tenth Circuit if it informed the HHS Secretary in writing that it was a nonprofit organization with religious objections to providing contraceptive services. The Court indicated that the organization did not have to use the self-certification form prescribed by the federal government.<sup>136</sup>

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<sup>134</sup> 134 S.Ct. 1022 (2014).

<sup>135</sup> See Emergency Appl. for Inj. Pending Appellate Review or, in the Alternative, Pet. for Writ of Cert. and Inj. Pending Resolution, *Little Sisters of the Poor Home for the Aged v. Sebelius*, Nos. 13A691 (S.Ct. December 31, 2013), available at <http://www.becketfund.org/wp-content/uploads/2013/12/Little-Sisters-v-Sebelius-Supreme-Court-Injunction-Application.pdf>.

<sup>136</sup> See note 134.

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