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A Primer on Hobby Lobby: For-Profit Corporate Entities' Challenge to the HHS Mandate, Free Exercise Rights, RFRA's Scope, and the Nondelegation Doctrine

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Abstract

Earlier this term, the United States Supreme Court heard oral argument in the consolidated case of Burwell v. Hobby Lobby Stores, Inc.*, the first of a litany of cases in which for-profit business entities are invoking the Religious Freedom Restoration Act (RFRA) in support of their claims that the Affordable Care Act's Health and Human Services (HHS) mandate (the Mandate) violates their freedom of religion. In particular, these plaintiffs argue that the Mandate's requirement that employer-provided health insurance cover the costs of contraceptives, the "morning after" pill, and other fertility-related drugs conflicts with their deeply held religious belief*

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A previously co-authored paper on the Mandate as applied to non-profit, religious organizations may seem at odds with the opinions and conclusions drawn here. However, as co-authors, we do not share a single voice in terms of our personally held views on the Mandate generally. Applying legal principles to specific facts often creates an exercise of line drawing for courts and scholars. This paper represents the authors' "line drawing" on this issue. *See* Day & Diaz, *The Affordable Care Act and Religious Freedom: The Next Battleground*, 11 GEO. J.L. & PUB. POL'Y 63 (2013).

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that life begins at conception and is, therefore, unconstitutional. While the Mandate does exempt religious employers from this requirement, it does not excuse all secular, for-profit corporations from complying simply because their officers, founders, or directors may have religious beliefs that conflict with the Mandate's provisions.

Authors Day and Diaz were sitting just feet away from the advocates during the riveting Hobby Lobby *oral argument. One question by Justice Kennedy piqued their interest in the nondelegation doctrine and the principle of separation of powers as they apply to the Mandate. As the first academic article authored during the crucial time between oral arguments and the Court's decision, this Article breaks down the complex legal issues and provides a solid dose of common sense in analyzing what will ultimately be a decision with momentous and far-reaching consequences.*

*First, this Article sets the stage for the Court's forthcoming decision by providing some background and insight into the parties' arguments, the history of free exercise jurisprudence, and RFRA—the centerpiece of Hobby Lobby's claim. The Article poses critical and timely questions, such as whether this decision will reinstate or expand the pre-*Smith *standard for assessing religious exercise claims and whether Hobby Lobby, as a for-profit commercial business, has standing under RFRA to bring a free exercise claim.*

Second, this Article deconstructs the complexities of RFRA, providing a step-by-step analysis of its legal framework. It first provides a comprehensive overview of the dense "substantial burden" inquiry, which asks whether the government has imposed a substantial burden on the plaintiffs' religious beliefs. Then, it outlines and analyzes the strict scrutiny standard applied in RFRA cases.

Next, the Article simplifies the complex and less widely discussed nondelegation doctrine and addresses the dangerous trend spreading countrywide, in which states are enacting their own RFRA laws to exempt religious employers from complying with public accommodation laws. These exemptions essentially condone a new wave of discrimination that gives wedding vendors and other businesses license to refuse service to same-sex couples or homosexual patrons.

Lastly, the Article cautions that, in the wake of Hobby Lobby *and the other RFRA cases, where the clash between religion, politics, and the law have met head-on, the Court must be cautious not to set a dangerous precedent that would shield for-profit, secular businesses from liability when*

they fail to comply with public accommodation laws based on their asserted religious beliefs. Not only do we face a crucial crossroad in this country's free exercise jurisprudence, but we also risk overlooking an impermissible delegation of legislative authority, which, when coupled with deference to administrative decision-making, threatens the constitutional structure and separation of powers. An accretion of administrative agency power—the headless fourth branch of government—threatens all of our rights, not just religious freedom.

I. PREFACE

Prior to the submission of this Article, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*[1] and *Wheaton College v. Burwell*.[2]

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that the Mandate as applied to closely held corporations violated RFRA), *aff'g* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 114 (10th Cir. 2013), *and rev'g* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013). On April 11, 2014, Kathleen Sebelius resigned as Secretary of the Department of Health and Human Services, and on that date, President

These decisions do not render the authors' article moot or less relevant. Instead, the decisions strengthen the authors' unique focus on the nondelegation doctrine.[3] As the administration scrambles to consider options to provide contraceptive coverage to thousands of women, who will now be denied the benefits of the Mandate due to their employers' religious beliefs,[4] the next legal battles will be exactly as the authors predict. Scores of pending cases raising claims under the First Amendment and the Administrative Procedure Act[5] (APA) will raise the critical issues surrounding the nondelegation doctrine.

While making different points in their separately authored *Hobby Lobby* opinions, both Justices Kennedy and Ginsburg hinted at Congress' inappropriate delegation of decision-making authority to an administrative agency.[6] In his concurring opinion, Justice Kennedy concluded that the accommodation afforded to the nonprofit religious entities should be applied to Hobby Lobby.[7] He reasoned "an agency such as HHS" cannot discriminate "between different religious believers."[8] In her dissent, Justice Ginsburg stated her concern about commercial employers imposing their religious beliefs on employees and, consequently, depriving them of the benefits provided by the Mandate.[9] She opined that Hobby Lobby employees should not be deprived of benefits "available to workers at the shop next door, at least in the absence of directions from the Legislature . . . ."[10]

Obama named Sylvia Burwell as her successor. Julie Pace & Ricardo Alonso-Zaldivar, *Obama Announces Sebelius Resignation, Successor,* CONCORD MONITOR, Apr. 12, 2014, http://www.concordmonitor.com/home/11549187-95/obama-announces-sebelius-resignation-successor. Thus, the named party in these cases changed from "Sebelius" to "Burwell."

2. Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014) (granting preliminary injunction against enforcement of the self-certification procedure established as an accommodation to nonprofit religious entities allowing them to opt out of the Mandate requirement).

3. *See* discussion *infra* Parts IV–V.

4. Robert Pear & Adam Liptak, *Obama Weighs Steps to Cover Contraception*, N.Y. TIMES, July 5, 2014, http://www.nytimes.com/2014/07/05/us/politics/obama-weighs-steps-to-cover-contraception.html?_r=0.

5. *See* discussion *infra* Part V.

6. *Hobby Lobby*, 134 S. Ct. at 2785–86 (Kennedy, J, concurring); *id*. at 2804 (Ginsburg, J, dissenting).

7. *Id*. at 2786 (Kennedy, J., concurring).

8. *Id*.

9. *Id*. at 2801 (Ginsburg, J., dissenting).

10. *Id*. at 2804.

As discussed more fully below,[11] the Mandate and agency-created regulations providing exemptions and accommodations to those entities wishing to opt out for religious purposes, regardless of whether they are arbitrary and capricious under the APA,[12] demonstrate the unraveling of a government initiative when Congress delegates to an administrative agency the hard choices of legislating policy. This is especially true when the policy choices involve controversial issues and ones that raise constitutional concerns. In an addendum to this article, the authors discuss the Supreme Court opinions and how those opinions strengthen the force of the two main points articulated in the following article.[13] First, the Mandate represents an inappropriate delegation of legislative authority to an unaccountable, unelected administrative body.[14] Second, the Court's conclusion in *Hobby Lobby* that a sincerely held religious belief impacted by a neutral government regulation automatically satisfies the substantial burden prong of RFRA will open the door to discrimination.[15]

II. INTRODUCTION

There was a sense of nervous excitement in the U.S. Supreme Court as Chief Justice Roberts signaled the Court's readiness to hear the oral argument in *Burwell v. Hobby Lobby Stores, Inc*.[16] People had lined up

11. *See infra* Part V.

12. Under the Administrative Procedure Act, a challenged agency regulation promulgated pursuant to Congress' explicit delegation of authority will be upheld unless the action is found to be arbitrary and capricious. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009); *see also* Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for* Pacifica v. FCC, 3 CHARLOTTE L. REV. 469, 485 (2012). However, a finding that a regulation is not arbitrary and capricious does not preclude a constitutional challenge. *See infra* Part IV. Indeed, the cases discussed in this Article raise First Amendment challenges to the Mandate as well. *See infra* Part IV; *see also* Autocam Corp. v. Sebelius, 730 F.3d 618, 627–28 (6th Cir. 2013), *vacated sub nom*, Autocam Corp. v. Burwell, 134 S. Ct. 2901, 2901 (2014). While the Court has determined that the Mandate violates RFRA as to a closely held corporation, *Hobby Lobby*, 134 S. Ct. at 2785, other employers may further unravel the Mandate, a "signature piece" of Obamacare, by successfully claiming the Mandate violates the nondelegation doctrine.

13. *See infra* Part VIII.

14. *See infra* Part V.

15. *See infra* Part VI.

16. 134 S. Ct. 2751 (2014) (ruling on the consolidated cases of Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 114 (10th Cir. 2013), and Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013), which were consolidated on

outside the Supreme Court for days before the actual oral argument.[17] It was reported that interested parties paid others to hold their place in line.[18] The atmosphere was reminiscent of lines of shoppers thronged in front of Best Buy, camping out on a cold November night before "Black Friday," hoping to be one of the lucky few to purchase the newest generation of high-tech equipment at bargain prices,[19] or lines of die-hard fans waiting to purchase Bruno Mars tickets.[20]

Although the decorum inside the Supreme Court on March 25, 2014,[21] was far from the push and shove of retail shopping or the deafening sound decibels of pop music concerts, the ultimate decision in these cases will have reverberating effects, touching the lives of Americans—as employers, employees, and consumers of goods and services. Much has been written about the *Sebelius*[22] and *Conestoga Wood*[23] cases.[24] There is a plethora of law review articles discussing the legal issues,[25] a slew of information based

appeal). *See supra* note 1 (explaining the change in party names).

17. Authors Day and Diaz were in Washington, D.C., and observed firsthand the line of people forming around the Supreme Court on Sunday, March 23, 2014, three days before oral argument.

18. Authors Day and Diaz were sworn into the Supreme Court bar on March 24, 2014. Personnel in the Clerk's Office confirmed the practice of paying for "line place-holders," a practice that is common in high profile Supreme Court cases.

19. *See, e.g.*, Ann Hoevel, *Why Black Friday Shoppers Endure the Crush,* CNN (Nov. 22, 2012, 7:44 AM), http://www.cnn.com/2012/11/21/living/secret-of-black-friday/.

20. *See* Jesse Lawrence, *Could "The Bruno Mars Act" Change the Way Tickets are Bought for High Demand Concerts?*, FORBES (Feb. 12, 2014, 12:13 AM), http://www.forbes.com/sites/jesselawrence/2014/02/12/could-the-bruno-mars-act-change-the-way-tickets-are-bought-for-high-demand-concerts/.

21. Oral argument was on Tuesday, March 25, 2014. *See* Transcript of Oral Argument at 56, Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 678 (2014) (Nos. 13-354, 13-246), *argued*, Sebelius v. Hobby Lobby Stores, Inc., *and* Conostoga Wood Specialties Corp. v. Sebelius.

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

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

24. In this Article, any reference to *Hobby Lobby* is intended to include the *Sebelius* and *Conestoga Wood* cases, unless the authors expressly distinguish the two cases.

25. *See, e.g.*, Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1 (2014); Mark L. Rienzi, *Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 VA. L. REV. IN BRIEF 10 (2013); Willis J. Stevens, *Corporations, Taxes, and Religion: The* Hobby Lobby *and* Conestoga *Contraceptive Cases*, 65 S.C. L. REV. 1 (2013); Evelyn M. Tenenbaum, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 ALB. L.J. SCI. & TECH. 539 (2013); Jeremy M. Christiansen, Note, "*The Word[] 'Person' . . .*

on partisan opinions and political views,[26] and "average" citizens' comments posted on blogs.[27] This Article will not attempt to provide exhaustive coverage of the issues or a prediction of the Court's decision. Rather, it is meant to deconstruct the legal complexities and discuss some of the legal, as well as practical, consequences of a decision favoring Hobby Lobby.

Part III provides background on these first cases to reach the Supreme Court. Part IV presents a "primer" on this recent challenge to the Mandate, examining Hobby Lobby's and the Government's opposing arguments. This section discusses the Mandate, RFRA, and the multiple challenges circulating in the federal courts.[28] During oral argument, Justice Kennedy

Includes Corporations": Why the Religious Freedom Restoration Act Protects Both For- And Nonprofit Corporations, 2013 UTAH L. REV. 623 (2013); Recent Case, *First Amendment—Free Exercise of Religion—Tenth Circuit Holds For-Profit Corporate Plaintiffs Likely to Succeed on the Merits of Substantial Burden on Religious Exercise Claim*—Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), 127 HARV. L. REV. 1025 (2014); Christopher S. Ross, Note, *Shall Businesses Profit if Their Owners Lose Their Souls? Examining Whether Closely Held Corporations May Seek Exemptions From the Contraceptive Mandate*, 82 FORDHAM L. REV. 1951 (2014); Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301 (2013).

26. *See, e.g.*, Hal C. Lawrence, III, *Women's Health: A Priority, Not an Afterthought*, HUFFINGTON POST, Apr. 8, 2014, http://www.huffingtonpost.com/hal-c-lawrence-iii-md/hobby-lobby-contraception-case_b_5028051.html; Adam Serwer, *Hobby Lobby's Contraception Hypocrisy*, MSNBC (Apr. 3, 2014, 10:45 AM), http://www.msnbc.com/msnbc/hobby-lobbys-contraception-hypocrisy; Charmaine Yoest, *Why* Hobby Lobby *Case Matters—White House Hides Anti-Life Agenda in ObamaCare*, FOX NEWS (Mar. 25, 2014), http://www.foxnews.com/opinion/2014/03/25/why-hobby-lobby-case-matters-white-house-hides-anti-life-agenda-in-obamacare/.

27. *See, e.g.*, *Hobby Lobby = Radical Right Wing Hypocrisy*, A PENIGMA – A MYSTERY, UNDER A PSEUDONYM (Apr. 3, 2014), http://penigma.blogspot.com/2014/04/hobby-lobby-radical-right-wing-hypocrisy.html; Gryphen, *Hobby Lobby Hypocrisy Alert*, THE IMMORAL MINORITY (Apr. 2, 2014), http://theimmoralminority.blogspot.com/2014/04/hobby-lobby-hypocrisy-alert.html; Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Reply to McConnell on Hobby Lobby and the Establishment Clause*, BALKINIZATION (Mar. 30, 2014), http://balkin.blogspot.com/2014/03/reply-to-mcconnell-on-hobby-lobby-and.html.

28. Not-for-profit, religious institutions object to the Mandate because, as they argue, the Affordable Care Act requires them to provide contraceptives to their employees, either directly or through a third party, with the threat of severe penalties for failing to do so. Plaintiffs' Motion for Class Certification & Memorandum in Support at 4–6, Little Sisters of the Poor v. Sebelius, No. 13–CV–2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013). Fifty-three non-profit lawsuits have been filed, with thirty-one injunctions granted. THE BECKET FUND FOR RELIGIOUS LIBERTY, HHS MANDATE INFORMATION CENTRAL: LEGAL CHALLENGES TO THE HHS MANDATE (2014) [hereinafter BECKET FUND, HHS MANDATE INFORMATION CENTRAL], *available at* http://www.becketfund.org/hhsinformationcentral/.

questioned the constitutional basis upon which Congress could delegate to the Department of Health and Human Services (HHS) the authority to grant religious exemptions.[29] Although not presently an issue in the case, the initial authority to promulgate the Mandate, which potentially violates constitutional rights, is subject to attack under the nondelegation doctrine. Part V of this Article suggests that Congress' "punting" of the controversial issue of mandated free health insurance coverage for contraceptives to HHS insulates Congress from voter accountability and violates the nondelegation doctrine. While the legislative accountability issue may be a purely academic concern, opponents of Hobby Lobby's position raise the real-world concern of the slippery slope. Part VI addresses the concerns raised by Justices Sotomayor and Kagan in the *Hobby Lobby* oral argument,[30] the legal challenge raised in *Elane Photography, LLC. v. Willock*,[31] and the recent legislative attempts to "legalize" violations of public accommodation laws in the name of religious freedom.[32]

In conclusion, Part VII proposes some common sense considerations. Our Founding Fathers intended to create a wall of separation between church and state by adopting the First Amendment balance, which allows individuals to freely exercise religion to the extent those individuals do not burden other people's rights,[33] and prevents the government from establishing religion.[34] While this "wall" is not impenetrable, if the government mandates national standards for health insurance coverage, religion should not play a factor. The overall goal of the Affordable Care Act was to increase access to health insurance coverage and to reduce

29. Transcript of Oral Argument, *supra* note 21, at 56.

30. *Id*. at 4.

31. 309 P.3d 53 (N.M. 2013).

32. The Governor of Arizona recently vetoed Arizona Senate Bill 1062 (2014); furthermore, Mississippi law, Miss. S.B. 2681 (2014), state Religious Freedom Restoration Act, defines "person" as "all public and private corporations." *See, e.g.*, Zack Ford, *Legislature Passes 'Religious Liberty' Bill That Legalizes Discrimination Against Gay People*, THINKPROGRESS (Apr. 2, 2014, 9:03 AM), http://thinkprogress.org/lgbt/2014/04/02/3421938/mississippi-religious-discrimination/. Opponents say this law will allow companies to violate public accommodation laws (for example, bakers and photographers not wanting to provide services for same-sex marriages) based on religious beliefs. *Id*. Although the Arizona law faced the Governor's veto, and similar bills in Georgia, Ga. S.B. 377 (2013), Idaho, Idaho H.B. 427 (2014), Maine, Me. L.D. 1428 (2013), and Ohio, Ohio H.B. 376 (2013), have failed, similar bills are still pending in Missouri, Mo. S.B. 916 (2014), and Oklahoma, Okla. H.B. 2873 (2014).

33. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

34. U.S. CONST. amend. I.

costs.[35] To effectuate those goals, decisions of health insurance coverage should be driven by economics. Prior to the Affordable Care Act and its mandates, the issue of employer-provided insurance coverage for employees' reproductive needs was a decision of the economic marketplace and the doctor–patient relationship. Unfortunately, an attack on the Affordable Care Act has transformed into a religious war.

III. BACKGROUND

Hobby Lobby, an arts and crafts chain, operates 514 stores and employs 13,240 full-time employees.[36] Owned and operated by the Green family, Hobby Lobby is incorporated as a closely held S-corporation.[37] In addition to its arts and crafts stores, the family owns a chain of 35 Christian bookstores that employ approximately 400 employees and operate under the name of Mardel, Inc.[38] Both corporations are for-profit businesses and operate according to the Greens' religious tenants.[39] For instance, statements of purpose for both chains include the family's intention to conduct business "in a manner consistent with Biblical principles,"[40] all stores in the Hobby Lobby and Mardel, Inc. chains are closed on Sundays,[41] and customers hear Christian music playing in the store while they shop.[42]

Hobby Lobby and Mardel operate their business through a management trust; the Greens are the trustees, and religious principles guide the trust.[43] "A Trust Commitment," which the trustees are obligated to sign, contains an

35. *See* 156 CONG. REC. E618–04 (daily ed. Apr. 22, 2010) (statement of Rep. Jerry McNerney).

36. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

37. *Id*.

38. *Id*.

39. *Id*.

40. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2766. Hobby Lobby's statement of purpose includes "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id*. at 2770 n.23. Mardel asserts that it is "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013).

41. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2766.

42. Brief for Respondents at 9, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354), *decided sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

43. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

oath to "maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer."[44]

As a result of the Affordable Care Act, Hobby Lobby and its affiliate Mardel are required to comply with a provision of the Act to provide "preventive care and screenings" for women without cost-sharing "'as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA].'"[45] Because guidelines did not exist when Congress passed the ACA, HHS sought advice from the Institute of Medicine to determine what services and treatments should be included in the no cost, mandated "preventive care and screenings" for women.[46] One of the recommendations of the Institute included "'[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider."[47]

HHS adopted this recommendation.[48] Now, "employment-based group health plans covered by ERISA . . . must include FDA-approved contraceptive methods."[49] Hobby Lobby objected on religious grounds to four of the twenty FDA-approved contraceptives required by the Mandate.[50]

According to Hobby Lobby, the Mandate's required coverage for contraceptives that "risk destroying a human embryo"[51] places a substantial burden on its free exercise rights.[52] Faced with the choice to comply, which compels Hobby Lobby to act contrary to its religious beliefs or face substantial fines,[53] Hobby Lobby and the Greens filed suit in federal district

44. *Id*.

45. *Id*. (quoting 42 U.S.C. § 300gg-13(a)(4)).

46. *See id*. at 1123.

47. Brief for Respondents, *supra* note 42, at 4 (discussing 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)).

48. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d at 1123.

49. *Id*.; *see also* 42 U.S.C. § 300gg-13 (2006); 29 U.S.C. § 1185 (2006 & Supp. 5) (mandating that group health plans offered as employment benefits and governed by the Employee Retirement Income Security Act (ERISA) must provide preventive health services).

50. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d at 1123. Specifically, Hobby Lobby objected to "[f]our of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella." *Id*. It is any contraceptive device that "risks destroying a human embryo" to which Hobby Lobby objects. Brief for Respondents, *supra* note 42, at 34–35.

51. Brief for Respondents, *supra* note 42, at 34–35.

52. *Id*.

53. *Id*.

court.[54] The plaintiffs sought a preliminary injunction and challenged the Mandate under RFRA, the Free Exercise Clause of the First Amendment, and the APA.[55]

Meanwhile, Conestoga Wood Specialties ("Conestoga"), one of the largest manufacturers of wood doors and kitchen and bath furniture, and the Hahn family filed a nearly-identical lawsuit in the Third Circuit claiming that the Mandate violated its religious freedom under RFRA and seeking injunctive relief.[56] Conestoga, a Pennsylvania for-profit company with 950 full-time employees, is owned and operated by the Hahn family.[57] In addition to being the only voting shareholders, members of the Hahn family hold positions on the company's board of directors.[58]

The Hahns are practicing Mennonite Christians who operate their business "in accordance with their religious beliefs and moral principles."[59] For example, in October 2012, the board of directors adopted "The Hahn Family Statement on the Sanctity of Human Life," which provides that:

> [H]uman life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. . . . [I]t is against our moral conviction to be involved in the termination of human life through abortion . . . .[60]

Indeed, the Mennonite Church "teaches that [the] taking of life which includes anything that terminates a fertilized embryo is an intrinsic evil and a sin against God to which they are held accountable."[61] Pursuant to these deeply held religious beliefs, Conestoga objects to two of the drugs that must

54. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd* 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

55. *Id*.

56. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 401–02 (E.D. Pa. 2013), *aff'd sub nom*. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Heatlh & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

57. *Id*. at 402.

58. *Id*.

59. *Id*.

60. *Id*. at 403 n.5.

61. Conestoga Wood Specialty Corp. v. Sec'y of the U.S. Dep't of Health and Human Servs., 724 F.3d 377, 381–82 (3d Cir. 2013).

be provided by group health insurance plans pursuant to the Mandate.[62]

The Tenth Circuit granted Hobby Lobby's motion for injunctive relief.[63] In contrast, the Third Circuit denied Conestoga's motion for a preliminary injunction on similar claims.[64] Creating a circuit split, the Supreme Court granted certiorari to address the application of RFRA to the for-profit corporations' claims.[65] The two cases were consolidated at the Supreme Court.[66]

The question presented before the Supreme Court was whether RFRA, which provides that the government "'shall not substantially burden a person's exercise of religion'" unless that burden is the least restrictive means to further a compelling governmental interest,[67] allows a for-profit corporation to deny its employees the health coverage for contraceptives—to which the employees are otherwise entitled under federal law—based on the religious objections of the corporation's owners.[68]

IV. CHALLENGING THE HHS MANDATE

In passing the Affordable Care Act (Act), Congress established minimum coverage standards for various health insurance plans.[69] Applicable to Hobby Lobby, the minimum standards apply to employer-provided group health plans covered by ERISA.[70] One of the essential benefits that must be provided, without cost sharing, is preventive services

62. *Id*. at 382. Specifically, the Hahns object to "emergency contraception" drugs Plan B (the "morning after pill") and Ella (the "week after pill"). *Id*.

63. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121–22 (10th Cir. 2013).

64. *Conestoga Wood*, 724 F.3d at 389.

65. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014).

66. *Id*.

67. *Id*. (quoting 42 U.S.C. § 2000bb (1993)).

68. Petition for a Writ of Certiorari at I, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354).

69. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2788 (Ginsburg, J., dissenting). These essential benefits apply to non-grandfathered, employer-sponsored group health plans, as well as group and individual plans offered in the exchanges. *Id*. at 2788 n.2 (citing 42 U.S.C. § 300gg-13).

70. *See id*. at 2762. Employer-provided group insurance plans belong to the bundle of employee benefits governed by the Employee Retirement Insurance Security Act of 1974 (ERISA). *See* 29 U.S.C. § 1001 *et. seq*.; *see also* 29 § U.S.C. 1185(d). ERISA provides enforcement mechanisms that plan participants and beneficiaries can use to require employers to provide the benefits mandated under ERISA. 29 U.S.C. §§ 1132(a)(1)(B); 1132(a)(3). A qualified plan that complies with both the ACA and ERISA could be privately enforced under ERISA. *See id*.

coverage, including screenings.[71] Congress did not specify what type of services fall under this essential benefits provision.[72] Instead, Congress deferred to the Health Resources and Services Administration (HRSA), a division of the Department of Health and Human Services (HHS), to develop comprehensive guidelines for determining what services must be provided under the preventive care and screenings provision of the Act.[73]

Adopting the recommendations of the Institute of Medicine, HHS included in the mandatory essential benefits preventive services category "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[74] Dubbed the "Mandate," this has become one of the most controversial requirements of the ACA.[75]

Hobby Lobby is the first case to reach the Supreme Court, but it is only one of a long list of cases challenging the Mandate as violative of the claimants' free exercise rights.[76] To date, three hundred plaintiffs in twenty-four states have filed over ninety-four cases challenging the constitutionality of the Mandate.[77] Of these ninety-four cases, the number of lawsuits filed on

71. *Hobby Lobby*, 134 S. Ct. at 2744 (citing 42 U.S.C. § 300gg-13(a)(4)).

72. *Id*.

73. *Id*.

74. *Id*. at 2789 (citing 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)).

75. *See*, *e.g*., Terri R. Day & Leticia M. Diaz, *The Affordable Care Act and Religious Freedom: The Next Battleground*, 11 GEO. J.L. & PUB. POL'Y 63, 65 (2013); Eugene R. Milhizer, *The Morality and Legality of the HHS Mandate and the "Accommodations"*, 11 AVE MARIA L. REV. 211, 214 (2013).

76. *See, e.g*., Grote v. Sebelius, 708 F.3d 850, 853 (7th Cir. 2013) (private, for-profit auto-lighting company); Korte v. Sebelius, 528 F. App'x 583, 586 (7th Cir. 2012) (private, for-profit Catholic contractor business); Little Sisters of the Poor v. Sebelius, No. 13-CV-2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013) (non-profit Christian services provider for Roman Catholic Congregation of Sisters); Barron Indus, Inc. v. Sebelius, No. 13-CV-1330 (KBJ) (D.D.C. Sept. 25, 2013) (for-profit business); Mersino Dewatering v. Sebelius, No. 13-cv-01329-RLW (D.D.C. Sept. 3, 2013) (for-profit business); Criswell Coll. v. Sebelius, No. 12-CV-4409 (N.D. Tex. Apr. 9, 2013) (Baptist college); EWTN v. Sebelius, 935 F. Supp. 2d 1196 (N.D. Ala. 2013) (largest non-profit, Catholic television network founded by Mother Angelica, a cloistered nun); Colo. Christian Univ. v. Sebelius, No. 11-CV-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013) (non-profit, nondenominational Christian university); Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) (for-profit business); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (private, for-profit Catholic HVAC manufacturer); Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 (D.D.C. 2012) (non-profit private Catholic school founded by Benedictine monks).

77. *See* BECKET FUND, HHS MANDATE INFORMATION CENTRAL, *supra* note 28. "The Becket Fund for Religious Liberty has led the charge against the . . . HHS Mandate." THE BECKET FUND

behalf of for-profit entities is exactly half.[78] Of the cases filed on behalf of the forty-seven for-profit entities, thirty-three of them have been decided in the plaintiff's favor, with the court granting an injunction, while six of them have resulted in the government's favor, with the court denying injunctive relief.[79] Of the cases filed on behalf of the forty-seven nonprofit entities, twenty of them have been decided in the plaintiff's favor, with the court granting an injunction, while eleven of them have resulted in the government's favor, with the court denying injunctive relief.[80] The remaining cases have either been dismissed on procedural grounds or are still pending.[81]

Although not all of the ninety-four cases are mirror images, asserting the same claims and arguments, RFRA is the keystone on which these cases rely. RFRA generally prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[82] This "is an exacting standard, and the government bears the burden of satisfying it."[83] Invoking RFRA, the plaintiffs in nearly all of the nintety-four cases challenging the Mandate argue that it places a substantial burden on their sincerely held religious beliefs.[84]

In addition to arguing that the Mandate violates RFRA, plaintiffs challenging its directives submit that it violates both the Religion and Free

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FOR RELIGIOUS LIBERTY, TOP 5 THINGS YOU NEED TO KNOW ABOUT THE NEW HHS REGULATIONS, http://www.becketfund.org/hhs-new-rule/ (last visited Oct. 9, 2014).

78. *See* BECKET FUND, HHS MANDATE INFORMATION CENTRAL, *supra* note 28.

79. *Id*.

80. *Id*.

81. *Id*.

82. *See* 42 U.S.C. § 2000bb-1(a)–(b) (2006) (codifying the strict scrutiny test established in Sherbert v. Verner, 374 U.S. 398 (1963)); Grote v. Sebelius, 708 F.3d 850, 855 (2013) ("[T]he government has not . . . made an effort to satisfy strict scrutiny [at this point]. In particular, it has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception."); *see also Sherbert*, 374 U.S. 398 (establishing strict scrutiny review as the test for evaluating claims asserted under the Free Exercise Clause); Wisconsin v. Yoder, 406 U.S. 205 (1972).

83. *Grote*, 708 F.3d at 854 (citing Korte v. Sebelius, 528 F. App'x 583, 586 (7th Cir. 2012)).

84. *See, e.g.*, Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss and in the Alternative for Summary Judgment at 1, Little Sisters of the Poor Home for the Aged v. Sebelius, No. 1:13-cv-02611-WJM-BNB, 2013 WL 6195303 (D. Colo. Nov. 22 2013) (No. 13-1540).

Speech Clauses of the First Amendment.[85] Specifically, because the government has exempted some churches and other religious objectors, including "integrated auxiliaries,"[86] some litigants maintain that the Mandate discriminates against them by showing a preference toward certain church-run organizations and not to others.[87] In this way, they argue that the Mandate "inappropriately 'interfer[es] with an internal . . . decision that affects the faith and mission'[88] of a religious organization" and results in "explicit and deliberate distinctions between different religious organizations."[89] Similarly, litigants challenging the Mandate argue that it violates the First Amendment because it imposes upon them an impermissible obligation to both "speak"[90] in favor of a viewpoint that contradicts their beliefs and to be silent with respect to a viewpoint that is consistent with their beliefs.[91]

A. Religious Freedom Restoration Act: Pre- and Post- Employment Division v. Smith[92]

One of the key issues in the *Hobby Lobby* case is whether a for-profit commercial business has standing under RFRA to bring a free exercise

85. *See, e.g.*, Brief of Appellants at 47–55, Little Sisters of the Poor Home for the Aged v. Sebelius, 2013 WL 6839900 (No. 13-1540), *available at* http://www.becketfund.org/wp-content/uploads/2014/02/LSP-CA10-Opening-Brief-AS-FILED-No-addendum.pdf.

86. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871–74 (July 2, 2013). This regulation exempts from the Mandate those religious employers that: "(1) Ha[ve] the inculcation of religious values as its purpose; (2) primarily employ[] persons who share its religious tenets; (3) primarily serve[] persons who share its religious tenets; and (4) [are] . . . nonprofit organization[s] described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code." *Id.* at 39871.

87. *See, e.g.*, Brief of Appellants at 50–51, Little Sisters of the Poor Home for the Aged v. Sebelius, 2013 WL 6839900 (No. 13-1540).

88. *Id.* at 49 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012)).

89. *Id.* at 48–49 (quoting Larson v. Valente, 456 U.S. 228, 246 n.23 (1982) ("striking down laws that created differential treatment between 'well-established churches' and 'churches which are new and lacking in a constituency'")).

90. *Id.* at 52–56 (arguing that the Mandate's requirement that employers provide group health insurance that covers contraceptives constitutes unconstitutional compelled speech).

91. *Id.* at 55–56 (arguing that the Mandate's requirement that employers not instruct third-party benefit administrators to refrain from providing health coverage for contraceptives unconstitutionally silences them).

92. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

claim.[93] First, however, is the foundational question regarding the scope of RFRA. In 1993, reacting with disapproval to the Supreme Court's decision in *Employment Division v. Smith*, a free exercise case, Congress enacted RFRA.[94]

In *Smith*, two workers were denied unemployment benefits after losing their jobs due to "religiously inspired peyote use."[95] The use of peyote, even for religious purposes, violated the general criminal drug laws of Oregon.[96] The Court considered whether the Free Exercise Clause required Oregon to pay unemployment benefits when workers lost their job for "religiously inspired peyote use," an act illegal under the general criminal laws.[97] Despite previous precedents holding that claimants could not be denied benefits when they left their job for religious reasons,[98] the Court ruled against the workers.[99]

The *Smith* Court established the rule that a neutral law of general applicability that burdens the exercise of religion is not subject to strict scrutiny.[100] After *Smith*, exceptions or accommodations from general laws not targeting religion were not automatically required absent compelling government interests.[101] RFRA reinstated strict scrutiny standard of review, even when the government action that burdens "a person's exercise of religion . . . results from a rule of general applicability."[102]

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93. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014).

94. H.R. REP. NO. 103-88, at 1 (1993) ("H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.").

95. *Smith*, 494 U.S. at 874.

96. *Id.*

97. *Id.*

98. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (denying unemployment benefits to a Jehovah's Witness who quit his job in a munitions factory for religious reasons violated the Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398 (1963) (denying unemployment benefits based on refusal to work on the Sabbath for religious reasons violated the Free Exercise Clause).

99. *Smith*, 494 U.S. at 890.

100. *Id.* at 888–89.

101. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008) ("Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.").

102. 42 U.S.C. § 2000bb-1. When enacted, Congress relied on its power under section 5 of the Fourteenth Amendment to make RFRA applicable to the states. *See* City of Boerne v. Flores, 521

As applied to the *Hobby Lobby* case, the history of RFRA is important in defining its scope. The Government's argument was that RFRA reinstates pre-*Smith* free exercise jurisprudence;[103] and prior to RFRA, there had never been a case in which a for-profit commercial business brought a free exercise claim.[104] In fact, the Government contended that a for-profit corporation is incapable of having religious beliefs that could be "impermissibly burdened under the First Amendment by general corporate regulation."[105]

Contrary to the Government's position, Hobby Lobby contended that RFRA provides broad protection to any religious exercise and is not limited to "a right to religious exercise clearly established by a pre-*Smith* holding."[106] Despite its position that RFRA expanded the pre-*Smith* notion of free exercise rights, Hobby Lobby found precedent, predating *Smith*, supporting its claim that "religious exercise may legitimately occur in the sphere of for-profit business."[107]

Whatever the scope of RFRA, this issue bleeds into the standing question. Whether pre-*Smith* cases define the scope of RFRA or whether RFRA expands free exercise jurisprudence to a broader post-*Smith* scope

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U.S. 507, 229 (1997). In *City of Boerne v. Flores*, the Court held that application of RFRA to the states exceeded Congress' section 5 power, by redefining the substantive meaning of the Free Exercise Clause. *Id*. However, RFRA continues to be applicable to the federal government. *See* Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (under RFRA, the federal government lacked a compelling government interest to ban hoasca, a tea with hallucinogens, used by a religious group for sacramental rites).

Relying on its spending and commerce powers, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies to any government programs that receive federal funds and mirrors RFRA's language applying strict scrutiny to government imposed land use regulations that substantially burden a person's exercise of religion. 42 U.S.C. §§ 2000cc to 2000cc-5; 42 U.S.C. § 2000bb-1(a), (b); Korte v. Sebelius, 528 F. App'x 583, 586 (7th Cir. 2012).

103. Brief for Petitioners at 12–16, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354).

104. *Id*. at 7 (citing Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987)).

105. *Id*. at 17. The Government points to legislative findings and RFRA's purpose statement, which mentions pre-*Smith* cases and specifically states the purpose of the statute is "to restore the compelling interest test" set for in those pre-*Smith* case. *Id*. at 15; *see* 42 § U.S.C. 2000bb(b)(1).

106. Brief for Respondents, *supra* note 42, at 18–19.

107. *Id*. at 19 (citing United States v. Lee, 455 U.S. 252 (1982) (although holding against the Amish employer, the Court addressed a claim brought by a for-profit Amish business owner to be exempt from Social Security taxes based on religious grounds), *and* Braunfeld v. Brown, 366 U.S. 599 (1961) (holding against the merchants, the Court addressed Jewish merchants' challenge to the Sunday closing laws as a burden on their religious beliefs)).

will necessarily inform the answer to one of the central issues in this case.

B. Religious Freedom Restoration Act (RFRA)

1. For-Profit Corporate Standing

The standing issues in the *Hobby Lobby* case are two-fold. First, the parties dispute whether the statutory term "person" in RFRA applies to a for-profit commercial business, such as Hobby Lobby.[108] Second, a disputed legal issue is whether the Greens, as the owners and trustees of Hobby Lobby, may bring a RFRA claim in their individual right, when the "injury" falls on the corporation.[109] Although the pre- or post-*Smith* understanding of RFRA and its scope is the backdrop for the first standing issue, the following discussion will artificially set that aside for the moment.

When isolated from the pre-/post-*Smith* consideration, the arguments on the statutory interpretation of "person" are fairly straightforward. The relevant RFRA language, subject to differing interpretations, is "a person's exercise of religion."[110] Hobby Lobby contended that "unless the context indicates otherwise,"[111] the Dictionary Act provides RFRA's definition of "person."[112] The Dictionary Act's definition of "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[113]

Not surprisingly, the Government disagreed.[114] The Government's argument hinged on the limiting language—"unless 'the context indicates otherwise'"[115]—to the use of the Dictionary Act's definition as a default.[116] According to the Government's argument, RFRA's term "person" is defined

108. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1126 (2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

109. *Id*. at 1135.

110. 42 U.S.C. § 2000bb-1 (2012).

111. Brief for Respondents, *supra* note 42, at 16 (citing United States v. U.S. Mine Workers of Am., 330 U.S. 258, 275 (1947) (holding that when a statute does not specifically define a term, the Dictionary Act provides the definition of the term)).

112. Dictionary Act, 1 U.S.C. § 1 (2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise," the definition provided in the Act controls).

113. *Id*.

114. Brief for Petitioners, *supra* note 103, at 21–22.

115. *Id*. at 22 (citing Dictionary Act, 1 U.S.C. § 1 (2012)).

116. *Id*.

by the context in which the word is used; therefore, the Dictionary Act's definition does not control.[117] The term "person" must be read in the context of the term's surrounding statutory language "a person's exercise of religion," which by definition and legal precedent excludes a for-profit corporation.[118]

Leaving the analytic vacuum, which ignored the pre-/post-*Smith* consideration, defining the scope of RFRA based on Congress' intent to reinstate pre-*Smith* jurisprudence or expand free exercise rights is relevant to the definitional question of person. Far from being straightforward, one issue necessarily informs the other issue.

Another layer of analysis relevant to the standing issue is whether there is a legal justification for treating for-profit and non-profit corporations differently.[119] No one doubts that non-profit, religious corporate entities, such as churches and religious schools, enjoy free exercise rights and would have standing under RFRA.[120] The Government, in particular, must find legal justification for limiting RFRA standing to individuals and non-profit religious organizations.[121] Once again, justification can be found in the pre-*Smith* free exercise jurisprudence,[122] which circles back to "[t]he scope of RFRA" issue.[123]

The Government found further support for limiting RFRA's standing, excluding for-profit corporations, in other federal statutes.[124] For instance, Title VII and the ADA have language that excludes "an employer that is 'a religious corporation, association, educational institution, or society' from

117. *Id*.

118. *Id*.

119. *See* Brief for Respondents, *supra* note 42, at 18 ("The government offers no contrary analysis of RFRA's text and context. Instead, it asserts that RFRA protects only 'individuals and religious non-profit institutions' because no pre-Smith case held 'that for-profit corporations have religious beliefs.'").

120. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch., 132 S. Ct. 694, 706 (2012) (recognizing a long history of the "special solicitude to the rights of religious organizations," which comports with First Amendment principles).

121. *See* Brief for Respondents, *supra* note 42, at 14, 16.

122. *See supra* Part IV.A.

123. Brief for Respondents, *supra* note 42, at 22.

124. *Id*. at 19–20. Both Title VII and the ADA have statutory language that excludes religious entities from the application of the prohibition on discrimination on the basis of religion in those statutes. *See* Hobby Lobby, Inc. v. Sebelius, 723 F.3d 1114, 1130 (10th Cir. 2013) (citing 42 U.S.C. §§ 2000e-1(a) and 12113(d)(1)–(2)).

'the prohibition on discrimination on the basis of religion.'"[125] The inference to be drawn from the lack of similar language in RFRA (on congressional intent and RFRA's application to for-profit corporations) depends on familiar statutory construction arguments.[126]

Because Congress enacted RFRA in the backdrop of Title VII and ADA, the Government argued that it intended the distinction between "non-profit, religious organizations and for-profit, secular companies to apply in RFRA" and that Congress used the term "person" as a "shorthand" for "natural person or religious organization."[127] In contrast, Hobby Lobby argued that Congress' failure to include limiting language similar to that in Title VII and ADA, coupled with its intent to broaden the scope of religious rights, means that the Dictionary Act's broad definition of "person"[128] applies to RFRA.[129] Accordingly, for-profit corporations, like Hobby Lobby, would have standing under RFRA.

Alternatively, if Hobby Lobby lacks statutory standing in its corporate capacity, the Greens, as individuals, also brought claims under RFRA.[130] The Greens made the common sense argument that because they would have free exercise protections if they operated their business as a sole proprietor or partnership, they should not lose those protections simply because they chose to incorporate.[131] Further, because the corporation is under the sole direction of the Green family, the choice to comply or not to comply with the Mandate is the Greens'.[132] Accordingly, the Greens and the corporation "are indistinguishable for purposes of [their] case."[133] The usual "shareholder standing rule," according to Respondents, has little application

125. Hobby Lobby, Inc. v. Sebelius, 723 F.3d at 1130.

126. *See* Brief for Respondents, *supra* note 42, at 17–18.

127. Hobby Lobby, Inc. v. Sebelius, 723 F.3d at 1130 (internal quotation marks omitted).

128. 1 U.S.C.A. § 1.

129. Brief for Respondents, *supra* note 42, at 25–26.

130. Brief for Petitioners, *supra* note 103.

131. Brief for Respondents, *supra* note 42, at 31. In their brief, Respondents cite *M'Culloch v. Maryland*, 17 U.S. 316, 411 (1819) ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."), for the "creative" proposition that the mere fact of incorporating should not defeat their individual religious claims. *McCulloch* concerned the federal government's authority to incorporate a national bank in the state of Maryland and established that congressional powers extended to activities that were "Necessary and Proper" to exercise its enumerated powers. *Id.* at 30.

132. *Id.* at 30–31.

133. *Id.* at 32.

to the Greens and Hobby Lobby, because they are one and the same.[134]

The Government, however, relied upon the "longstanding shareholder standing rule," which recognizes a legal distinction between shareholders and a corporation, even a closely held corporation.[135] Under this rule, shareholders lack standing to bring claims "'intended to redress injuries to a corporation.'"[136] According to the Government's argument, the Greens face no personal liability and have no personal responsibility for administering the group health plan.[137] To the contrary, the Government maintained that Hobby Lobby's "conflation problem" (the assertion that Greens and the corporate entity are indistinguishable) creates another problem.[138] As managers, the Greens may also be fiduciaries of the ERISA plan sponsored by the corporation.[139] Fiduciaries owe duties to the participants and beneficiaries of the plan and must follow its terms as required by ERISA—not according to their own personal religious views.[140] Finally, the remedy the Greens sought, injunctive relief, exempts the corporation "from the contraceptive-coverage provision [and] does not follow from the injury [the Greens] allege[d]."[141]

The standing issue is, of course, the key to the rest of the RFRA claim.[142] If Hobby Lobby has standing to bring a RFRA claim, then it must show that the Mandate substantially burdens its exercise of religion.[143] Next, the burden shifts to the Government to demonstrate that the Mandate serves a compelling government interest and that there is no less restrictive way to meet that interest.[144]

Because this Article is intended as a primer, not a legal treatise, the elements of a RFRA claim are discussed independently and sequentially. In reality, they often blend together.[145] Like the standing issue, the substantial

134. *Id*.
135. Brief for Petitioners, *supra* note 103, at 28.
136. *Id*. (quoting Autocam Corp. v. Sebelius, 730 F.3d 618, 622 (6th Cir. 2013), *vacated sub nom*. Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014)).
137. *Id*. at 29.
138. *Id*.
139. *Id*.
140. *Id*. (citing 29 U.S.C. 1104(a)).
141. *Id*. at 26–27.
142. *See* 42 U.S.C. § 2000bb-1(c).
143. 42 U.S.C. § 2000bb(b)(1)–(2).
144. 42 U.S.C. § 2000bb-1(b).
145. *See infra* Part IV.B.2.

burden inquiry requires an analysis of who bears the liability and responsibility for compliance and who suffers if the Court requires an exemption or accommodation for Hobby Lobby and other similarly situated for-profit corporations.[146]

2. Substantial Burden

The parties' sincerely held religious beliefs were not at issue in the case.[147] Although the sincerity and centrality issues are distinct, neither was in dispute in this case.[148] Under RFRA, courts do not evaluate the centrality of a religious tenet to a plaintiff's "system of religious belief."[149] Consistent with free exercise jurisprudence, courts accept the line-drawing plaintiffs make in defining the contours of their own religious beliefs.[150] There is no dispute on this longstanding principle.[151] However, the parties differed dramatically on the factors that should be considered in determining whether or not the Mandate burdens Hobby Lobby's free exercise of religion.

Hobby Lobby argued to apply the simplicity of the *Yoder*[152] standard "where a mandate and penalty were the quintessential substantial burden even when the fine was a mere $5."[153] Defining the burden in terms of the monetary cost of compliance drew a lot of questions from the Court during oral argument.[154] For instance, Hobby Lobby's counsel estimated the cost of compliance based on the number of employees and the amount of the fine at $475 million a year.[155] Justices Kagan and Sotomayor challenged Hobby Lobby's counsel on this issue.[156] They suggested that Hobby Lobby could

146. *See infra* Part IV.B.2.

147. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014). See *supra* Part III for a discussion regarding Hobby Lobby's and Conestoga's religious beliefs about life beginning "[at] moment of conception" and why they object to certain contraceptives required under the Mandate.

148. Brief for Petitioners, *supra* note 103, at 12.

149. 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4).

150. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

151. Brief for Petitioners, *supra* note 103, at 32.

152. Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving Amish parents who refused to comply with Wisconsin's compulsory education law for children up to the age of 16 and who faced a $5.00 penalty as a result).

153. Brief for Respondents, *supra* note 42, at 39–40.

154. *See* Transcript of Oral Argument, *supra* note 21.

155. *Id.* at 22.

156. *Id.* at 22–23.

provide no health insurance at all and pay the $2,000 per employee tax, resulting in $26 million in taxes per year.[157] Justice Kagan posited that this tax would be less than the cost of providing health insurance for the employees.[158] Considering this choice, Justice Kagan asked, "[W]hy is there a substantial burden at all?"[159]

Chief Justice Roberts and Justice Scalia aided Hobby Lobby's counsel in this colloquy. Chief Justice Roberts refocused the burden from the cost of noncompliance to the religious commitment of the owners to provide health insurance to their employees.[160] Justice Scalia rebuked the idea that Hobby Lobby's burden would be negligible if it chose to pay the tax instead of providing insurance.[161] There was even some levity during oral argument. After Hobby Lobby's counsel referred to the $2,000 per employee payment as a penalty, Justice Sotomayor corrected him that it is a tax, not a penalty, to which Chief Justice Roberts quipped: "She's right about that."[162]

Moving from the simplicity of a mandate and a penalty, the Government's substantial burden standard requires more factors to be considered, such as attenuation and third parties.[163] The Government characterized Hobby Lobby's substantial burden claim as similar to a taxpayer claim.[164] Like a taxpayer, Hobby Lobby's payment for health insurance goes "into an undifferentiated fund to finance covered benefits."[165] Hobby Lobby's financial contribution is too attenuated from the decisions made by employees and their healthcare providers to use contraceptives or any other treatment.[166] Consequently, where the connection between the claimed injury and the government action is too attenuated, and the actual use of the objectionable contraceptives is dependent on third party decisions, there is no substantial burden.[167] Finally, in the substantial burden analysis,

157. *Id*.
158. *Id*. at 22.
159. *Id*.
160. *Id*. at 23.
161. *Id*. at 25–26.
162. *Id*. at 23–24.
163. Brief for Petitioners, *supra* note 103, at 33.
164. *Id*. at 34.
165. *Id*. at 33.
166. *Id*. at 33–34.
167. *Id*. at 32–34 (citing to RFRA's legislative history, Senate Report 12, which expressly states that the statute was not intended to "change the law" in Tilton v Richardson, 403 U.S. 672, 689 (1971) (denying taxpayer's free exercise claim based on federal grants given to religiously-affiliated

the Government would consider the injury to Hobby Lobby employees, who do not necessarily share their employer's religious beliefs and who would be denied a government benefit.[168]

Criticizing the Government's substantial burden standard as "newfound principles" and a "masterpiece of obfuscation," Hobby Lobby identified the relevant inquiry as the "*intensity of the coercion* applied by the government to act contrary to those beliefs," rather than attenuation or third party decision-making.[169] The effect on third parties, according to Hobby Lobby, is irrelevant to the substantial burden analysis; it is part of the strict scrutiny analysis.[170] Additionally, Hobby Lobby asserted that HHS's exemption to certain non-profit entities and accommodation to others is proof that the Mandate is a substantial burden and one that the Government recognizes.[171]

As with the other elements of the RFRA claim, the substantial burden and strict scrutiny analyses overlap. The issues of exemptions or accommodations and burdens on third parties are considered in the compelling interests[172] and least-restrictive-means[173] discussions.

3. Strict Scrutiny

a. Compelling Interests: Public Health, Gender Equality, Uniform Regulatory Scheme

Concerns about the interests of third parties, specifically Hobby Lobby's

colleges and universities because there was no coercion "directed at the practice or exercise of their religious beliefs")); *see also* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 249 (1968) (finding indirect financial support does not constitute coercion of plaintiffs "as individuals in the practice of their religion").

168. Brief for Petitioners, *supra* note 103, at 33.

169. Brief for Respondents, *supra* note 42, at 41 (citations omitted) (internal quotation marks omitted).

170. *Id.* at 43–44.

> The effect on others of allowing the religious objectors to opt out of a program is properly considered in evaluating whether the government has carried its burden under strict scrutiny, but it does not affect whether there is a substantial burden. Thus, folding concerns about "affected third parties" into the substantial burden inquiry is a category mistake that improperly shifts the government's burden to the believer.

Id. (citations omitted).

171. *Id.* at 39.

172. *See infra* Part IV.B.3.a.

173. *See infra* Part IV.B.3.b.

employees, loom large throughout the strict scrutiny analysis.[174] Relief to Hobby Lobby, through an accommodation,[175] deprives Hobby Lobby employees of a government-mandated benefit and imposes religious beliefs on them that may be contrary to their own.[176] In making accommodations, the First Amendment requires a consideration of the rights of third parties who may be burdened by an accommodation[177] and an obligation to be "religion-neutral" in granting accommodations.[178] While the Government interjected the notion of third party rights in considering the substantial burden on Hobby Lobby,[179] it is certainly a factor in the strict scrutiny analysis.

It is the Government's burden to establish that the Mandate serves a compelling government interest and the Mandate is the least restrictive means to achieve its interest.[180] The Government asserted three interests: (1) protecting the rights of employees entitled to the benefits of a comprehensive employer-sponsored health insurance plan; (2) promoting public health; and (3) providing equal access for women to healthcare

174. *See, e.g.*, Brief for Respondents, *supra* note 42, at 44–56.

175. The relief sought by Hobby Lobby could come in the form of an exemption or accommodation. *See* 45 C.F.R. § 147.131. HHS had already created an exemption from the contraceptive for small religious employers, which primarily promote religious doctrine, hire and serve people of a similar faith, and are tax exempt nonprofit organizations. 45 C.F.R. § 147.130(a)(1)(iv)(A) (2011) (current version at 45 C.F.R. § 147.131(b) (2014)). *See generally*, Day & Diaz, *supra* note 75, at 96 (discussing the Mandate and exemptions carved out for religious, nonprofit entities such as churches). Subsequent to the exemption that was carved out for small, religious, nonprofit entities, HHS has accommodated other nonprofit, religious entities such as hospitals and universities. *See id*. The authors take the position that if Hobby Lobby is entitled to any relief under RFRA, an accommodation is the appropriate relief, not an exemption. *Id*.

176. *See* Brief for Petitioners, *supra* note 103, at 39 n.9.

177. *See* Sherbert v. Verner, 374 U.S. 398, 409 (1963) (finding that an employee refusing to work on the Sabbath for religious reasons could not be denied unemployment benefits but employer's obligation to accommodate the employee's religious exercise was limited by the employer's obligation not to burden other employees' rights).

178. The Establishment Clause forbids the government from favoring one religion over another or a "believer" over a non-believer. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."); *see also* Day & Diaz, *supra* note 75, at 93–95.

179. *See* Brief for Petitioners, *supra* note 103, at 14 ("Those decisions by independent third parties are not attributable to the employer that finances the plan or to the individuals who own the company, and the connection is too indirect as a matter of law to impose a substantial burden.").

180. 42 U.S.C. § 2000bb(b)(1).

services.[181]

As to the first asserted interest, Hobby Lobby argued that providing "a comprehensive insurance system" is "newly-identified," because this interest was not discussed in the lower courts.[182] However, raising novel points—even inconsistent positions—is nothing new to litigation involving the ACA.[183] Newly-identified or not, recognizing the protection of employee benefits under a comprehensive insurance system as a compelling government interest makes this case more analogous to *United States v. Lee*.[184] In *Lee*, the Court required Amish employers and employees to pay Social Security taxes, despite their religious beliefs and no future claim to such benefits.[185] Further, the Court viewed an accommodation as a threat to the comprehensive nature of the system, causing harm to third parties who would rely on the Social Security system.[186]

In fact, the narrowly crafted, religion-based exemption Congress provided to self-employed individuals did not change the Court's holding or analysis.[187] Therefore, based on the rationale of *Lee*, the exemption and accommodations already made to religious, non-profit entities do not undermine the Government's contention that the Mandate serves a compelling interest in ensuring employees' benefits under a comprehensive insurance plan.[188]

On this asserted interest, Hobby Lobby argued that it cannot be

181. *See* Brief for Petitioners, *supra* note 103, at 38–52.

182. *See* Brief for Respondents, *supra* note 42, at 44.

183. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (determining that the individual mandate is a penalty for purposes of the Anti-Injunction Act and a tax for purposes of congressional authority to enact ACA under its Taxing and Spending power where the government argued inconsistent theories concerning the power of Congress to pass the ACA and whether the must carry provision—a.k.a. the "individual mandate"—is a tax or penalty).

184. *See* United States v. Lee, 455 U.S. 252 (1982).

185. *Id*. at 260–61 (recognizing a narrow exemption for self-employed Amish under 26 U.S.C. § 1402(g) but not those who willingly enter commercial activity because "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs").

186. *Id*.

187. *Id*. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

188. Granting an exemption to the contraception mandate of the ACA would not only infringe upon the rights of employees by imposing religious faith, but would also diminish the benefits that would be otherwise gained from the contraceptive portion of a health insurance plan. *See supra* notes 155, 168 and accompanying text; *see also* Brief for Petitioner, *supra* note 103, at 38.

compelling based on the grandfathering provision provided for in the ACA, which exempts millions of employees covered by grandfathered plans.[189] The grandfather provision allows for a transition or phase-in period for the Mandate and other provisions of the Act.[190] The Government maintains that a phase-in period for a comprehensive, uniform federal statute does not diminish the compelling interest served by the statute.[191]

At oral argument, Chief Justice Roberts tried to "pin down" the Government on how long the grandfathering period would last.[192] Unable to answer with a precise time period, Chief Justice Roberts opined that the Court's analysis should recognize that the afforded exemptions under the grandfathered plans are current and are not going to end.[193] An interest that "'leaves appreciable damage to that supposedly vital interest unprohibited'" is not one of the "'highest order'" and does not satisfy strict scrutiny.[194]

In reviewing a government regulation subject to strict scrutiny review, courts have required that the interests asserted by the government "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[195] Courts do not defer to legislative judgments on these points.[196] Rather, the government must provide sufficient evidence to establish that the harms exist and that the challenged regulation will, in fact, remedy those harms.[197] The parties disputed both these points.

The Government's asserted interests of public health and gender

189. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124 (10th Cir. 2013); *see also* 42 U.S.C. § 18011 (2012); 45 C.F.R. § 147.140(g).

190. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d at 1124; *see also* 42 U.S.C. § 18011(a)(2) (2012). United States Code Section 18011(e) defines "grandfathered health plan" as "any group health plan or health insurance coverage" which an individual was enrolled in on March 23, 2010 and is not subject to this subtitle. This section allows for the preservation of existing coverage. 42 U.S.C. § 18011(a)(2) (2012).

191. *See* Brief for Petitioners, *supra* note 103, at 54.

192. *See* Transcript of Oral Argument, *supra* note 21, at 59.

193. *Id*.

194. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (quoting Florida Star v. B.J.F., 491 U.S. 524, 541–43 (1989)).

195. Turner Broad. Sys., Inc. v. FCC, 512 U.S 622, 664 (1994).

196. *Id*. at 666 ("On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'").

197. *Id*. at 664.

equality in healthcare are supported by experts and authoritative reports.[198] In promulgating the Mandate, HHS relied on a report by the Institute of Medicine that documents the health risks to women due to unintended pregnancies.[199] Further, the Government relied on the legislative history of the ACA[200] and reports from the Centers for Medicare & Medicaid Services for the proposition that "women of child-bearing age spend [substantially more] in out-of-pocket health care costs than men."[201]

Hobby Lobby argued that the Government's asserted interests are much too abstract as applied to its objections to the Mandate. Hobby Lobby only objects to four of the twenty required drugs—the drugs that prevent the implantation of a fertilized egg.[202] Furthermore, Hobby Lobby contends that the existing "bevy of exemptions" to the Mandate undercut the Government's contention that the interests asserted are compelling.[203] Hobby Lobby focused on the Government's obligation to "prove" the existence of the harm.[204] Hobby Lobby made a rather literal and far-fetched argument that the only potential "harm" to Hobby Lobby employees is the loss of free insurance coverage for four of the twenty mandated FDA-approved drugs required under the Mandate.[205] Defining the harm so narrowly, Hobby Lobby then argued that the Government could not show that the interests asserted would be affected at all by denying its employees these four drugs.[206]

Relying on the Court's recent decision striking down California's

198. *See, e.g.*, Brief for the Appellees at 34, Contestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 13-1144).

199. *See* Reply Brief for the Petitioners at 17–18, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354); *see also* 26 C.F.R. § 54 (2012) ("As documented in a report of the Institute of Medicine, 'Clinical Preventive Services for Women, Closing the Gaps,' women experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may not be as motivated to discontinue behaviors that pose pregnancy-related risks (e.g., smoking, consumption of alcohol). Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned.").

200. *See* Reply Brief for the Petitioners, *supra* note 199, at 17–18.

201. Brief for Petitioners, *supra* note 103, at 50 (internal quotation marks omitted).

202. Brief for Respondents, *supra* note 42, at 4–5.

203. *Id.* at 5, 50.

204. *Id.* at 45 ("[T]he government 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.' Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 664 (1994).")

205. *See id.* at 30–31, 47–48.

206. *Id.* at 45–51.

restrictions on violent video games, Hobby Lobby applied that Court's demand for actual proof of harm to the Government's burden in this case.[207] However, in the violent video game case, the Court did not demand the level of exacting proof that Hobby Lobby claimed.[208] The *Brown* Court did not require the State of California to prove that specific video games denied to specific children would reduce violence in that targeted group.[209] Therefore, reliance on *Brown* for the proposition that the Government must prove that "exclusion of these four contraceptives threatens public health or gender equality"[210] to satisfy strict scrutiny is ill-placed.

Another problem with defining the harm posed by Hobby Lobby's objection to the Mandate so narrowly is that it creates a slippery slope. As will be discussed below, if each claimant's objection is individually considered from the narrow perspective of which medical drugs or services are objected to and which third parties are burdened, the ACA's goal to expand comprehensive health care insurance to vast numbers of uninsured Americans will be eviscerated.[211] This point goes to the heart of the controversy generally and to the strict scrutiny analysis specifically. Before turning to the "big picture," the Government's burden to satisfy the least restrictive means test will be discussed.[212]

b. Least Restrictive Means Test

The Government's burden of meeting the least restrictive means test required under RFRA's strict scrutiny standard raises the issue of accommodation once more.[213] The accommodation HHS already made for religious, nonprofit entities, such as hospitals and universities, suggests the same could be done for Hobby Lobby.[214] At the very least, the existence of

207. *Id*. at 48 (citing Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011) (questioning the Government's proof of a compelling interest—harm to children caused by playing violent video games which would be alleviated by restricting sales to children under eighteen—the Court placed the "risk of uncertainty" on the Government and concluded that "ambiguous proof will not suffice")).

208. *Cf*. *Brown*, 131 S. Ct. at 2738–39.

209. *Id*.

210. Brief for Respondents, *supra* note 42, at 48.

211. *See infra* Part VI.

212. *See infra* Part IV.B.3.b.

213. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2801 (2014).

214. Qualifying organizations self-certify by claiming eligibility and providing a copy of the self-

an accommodation already granted casts a shadow of doubt on the Government's argument that there are no less restrictive ways for the government to ensure Hobby Lobby employees receive the full benefits of the Mandate.[215]

The Government contended that Hobby Lobby's least restrictive alternative is no alternative at all, as it requires Congress to create a program or expand an already existing federal program.[216] However, the Institute of Medicine and the other experts that HHS relied upon in adopting the Mandate suggested that providing coverage for contraceptive services would provide cost-savings because contraceptives are less expensive than the costs associated with unwanted pregnancies.[217] Even if costs are marginal, the question of who should bear those costs remains. Hobby Lobby posed the question as follows: "[T]he ultimate question here is not whether there will be an exception to an otherwise uniform mandate, but who will pay for a third-party's religiously-sensitive abortifacients."[218]

In contrast, the Government relied on the rationale of *Lee*.[219] Analogizing the ACA and its mandates to Social Security, the Government found authority in *Lee* for the proposition that directly financing Hobby Lobby employees' contraceptives is not an accommodation required under RFRA's strict scrutiny standard.[220] Because the Court did not require the Government to subsidize Lee's employees as a less restrictive alternative to requiring him to pay Social Security taxes, government subsidization of Hobby Lobby employees' contraceptive needs is not a less restrictive alternative.[221]

The existence of already established exemptions and accommodations to the Mandate has been both a shield and a sword for Hobby Lobby's case. In

certification to the issuer or a third-party administrator. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39879–80 (July 2, 2013) (outlining accommodation for self-insured religious non-profits).

215. Brief for Respondents, *supra* note 42, at 57–58.

216. Brief for Petitioners, *supra* note 103, at 57–58.

217. Reply Brief for the Petitioners, *supra* note 199, at 15–16.

218. Brief for Respondents, *supra* note 42, at 59.

219. United States v. Lee, 455 U.S. 252 (1981); Brief for Petitioners, *supra* note 103, at 57–58.

220. Brief for Petitioners, *supra* note 103, at 52–53, 57–58.

221. *Id*. at 58 ("On [Respondents'] theory, the government itself should have financed Social Security benefits directly to Lee's employees, as a less restrictive alternative to requiring that Lee pay Social Security taxes. The Court did not find such a government-funded scheme to be a less restrictive alternative in Lee, and it should not do so here.").

fact, the existing exemptions and accommodations bolster Hobby Lobby's burden of proof on the standing and substantial burden elements and weaken the Government's burden of proof on the prongs of strict scrutiny.

Hobby Lobby's brief begins with the following statement: "On the merits, this is one of the most straight-forward violations of the Religious Freedom Restoration Act this Court is likely to see."[222] Although it may be a good opening line for its "shock value," for legal minds, it is a non sequitur. For the millions of people who will be affected by the Supreme Court's decision, however, the *Hobby Lobby* case might be cast in simple "either-ors": individual liberty versus social responsibility; religious rights versus women's reproductive rights; business versus government regulation; and private health care versus government mandated health care.[223]

Before turning the discussion from the legal issues as specifically raised in *Hobby Lobby* to a big picture discussion of their potential ramifications, there is a not-so-insignificant constitutional concern regarding the Mandate that looms in the shadow of the RFRA question. Justice Kennedy raised this issue in oral argument: "[W]hat kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?"[224] Justice Kennedy was,

222. Brief for Respondents, *supra* note 42, at 59.

223. In keeping with the "primer" theme, the following questions might be similar to those posed by a hypothetical "man-on-the-street."

Standing: Should the non-profit/for-profit distinction make a difference? If an individual has free exercise rights, should his choice to incorporate change those rights? Should religion be infused into secular for-profit business and excuse obligations to comply with general business regulations? Do corporations exercise religious beliefs? Whose religious beliefs are ascribed to the corporation—the officers', the shareholders', the employees'?

Substantial Burden: Whose burden counts—the employer's or the employee's? Do the rights and obligations of third parties count? If a third party administers the health-benefit plan, and decisions to use contraceptives are made by third parties, what direct burden does that place on the employer? How is an employer harmed by a third party's use of contraceptives paid for by an employer-sponsored benefit plan to which an employer contributed undifferentiated funds?

Compelling Interest: Does exempting some insurance plans make the government's interests less compelling? Should an employer's personal religious beliefs excuse compliance with a national, comprehensive benefits program that promotes public health and equalizes health care access and costs for women?

Less Restrictive Means: Does the government have to directly subsidize benefits that employers object to on religious grounds? Do the ACA and its mandates create a national, comprehensive benefits program for which, as with Social Security, no accommodations are required for general taxpayers, including for-profit corporations?

224. Transcript of Oral Argument, *supra* note 21, at 56.

of course, referring to the nondelegation doctrine, which forces "a politically accountable Congress to make . . . policy choices, rather than leave [these choices] to unelected administrative officials."[225]

V. THE NONDELEGATION DOCTRINE: CONSTITUTIONAL LIMITS ON AGENCY DECISION-MAKING

Although it has been over eighty years since the Court has invalidated a federal law based on impermissible delegation of legislative power,[226] the nondelegation doctrine is not dead.[227] While this doctrine has not served as the basis for striking down any federal legislation since 1935,[228] in more recent times, two Justices have rekindled the nondelegation doctrine—at least in principle.[229] "When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . . ."[230]

The massive network of administrative agencies, which exercises vast quasi-legislative powers, has spawned the familiar term: the "headless fourth branch of government."[231] Although the Constitution does not expressly address administrative agencies or their authority, the immense amount of federal regulation necessitates the creation of federal agencies with broad

225. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 328 (3d ed. 2006).

226. *See id*. (discussing Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) and A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 557 (1935), cases in which the Court found legislation to be unconstitutional based, in part, on impermissible delegation of legislative authority).

227. *See* CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 440 (4th ed. 2013) ("Whatever its benefits, the nondelegation doctrine is on the constitutional critical list.").

228. *See, e.g*., *Panama Ref. Co*., 293 U.S. at 414–19 (finding the National Industrial Recovery Act unconstitutional based on an impermissible delegation of legislative power to the executive branch without sufficiently articulated standards); *Schechter Poultry*, 295 U.S. at 541–42 (finding a regulation promulgated under the National Industrial Recovery Act unconstitutional as both exceeding Congress' commerce powers and as an impermissible delegation of legislative authority). However, neither case has been overruled.

229. *See* Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (finding Congress' creation of the United States Sentencing Commission to promulgate sentencing guidelines for federal crimes was an unconstitutional delegation of legislative power to the judicial branch); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (concluding that provisions of the Occupational Safety and Health Act authorizing the Secretary of Labor to adopt safety standards was an excessive delegation of legislative power).

230. *Indus. Union Dep't*, 488 U.S. at 687 (Rehnquist, J., concurring).

231. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1878 (2013).

rule-making powers.[232] Congress lacks the expertise and time to enact the plethora of regulatory rules governing every aspect of Americans' lives; therefore, broad delegation is both efficient and necessary.[233] However, agency promulgated rules have the force of law.[234] Further, many administrative agencies are empowered not only with legislative authority, but also with enforcement and adjudicatory powers.[235] Such an accretion of multiple powers in non-elected administrative agencies threatens the principles of separation of powers and insulates Congress from political accountability.[236]

For nearly eight decades, the impermissible delegation argument has been lost to "intelligible principle[s]."[237] To avoid an excessive delegation challenge, Congress must state "an intelligible principle to which the person or body authorized to [take action] is directed to conform."[238] In deciding that Congress' creation of the U.S. Sentencing Commission to promulgate sentencing guidelines did not violate the nondelegation doctrine, the Court discussed what type of directives Congress must provide to avoid impermissible delegation to a nonlegislative body.[239]

The Court identified three factors that Congress must clearly delineate for its delegation of legislative authority to pass constitutional muster: "[(1)] the general policy, [(2)] the public agency which is to apply it, and [(3)] the boundaries of this delegated authority."[240] Although the *Mistretta* Court identified three goals, four purposes, and eighteen factors that Congress

232. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406–07 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.").

233. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695–97 (1975) (defending broad delegation powers due to complexity of regulation and the politicization of the legislative process).

234. *See* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1303 n.15 (2003).

235. *See J.W. Hampton Jr. & Co.*, 276 U.S. at 406.

236. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332, 374–75 (2002).

237. *See J.W. Hampton Jr. & Co.*, 276 U.S. at 409.

238. *Id.*

239. Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

240. *Id.* at 372–73 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

defined for the U.S. Sentencing Commission, the minimal threshold to satisfy the amount and sufficiency of detail remains unclear.[241] "'Only if . . . there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible . . . to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose."[242]

Proponents of Hobby Lobby's claim have argued that the Mandate violates the nondelegation doctrine.[243] In support of their argument, the proponents point to the fact that the ACA "provides no intelligible principle in 42 U.S.C. §300gg-13(a)(4) to guide the Administration's expansion from 'preventive care and screening' to contraceptives and abortifacients."[244] In essence, Congress identified a broad policy to provide "preventive care and screenings" for women without cost-sharing and identified HHS and its Human Resources and Services Administration to promulgate guidelines for implementation of that policy.[245] However, Congress did not provide specific, defined factors that would have guided HRSA to recommend, and HHS to adopt, a requirement that qualified insurance plans must cover all FDA-approved contraceptive methods at no cost to female beneficiaries.[246]

Justice Kennedy raised another impermissible delegation concern in oral argument.[247] He questioned the constitutional basis on which Congress could delegate to HHS "the power to grant or not grant a religious exemption."[248] Justice Kennedy articulated his concern as follows:

> I recognize delegation of powers rules are somewhat more abundant insofar as their enforcement in this Court. But when we have a First Amendment issue of—of this consequence, shouldn't we indicate

241. *See id*. at 374–75, 379.

242. *Id*. at 379 (quoting Yakus v. United States, 321 U.S. 414, 425–26 (1944)).

243. *See, e.g.*, Brief Amicus Curiae of Eagle Forum Educ. & Legal Defense Fund, Inc., in Support of the Conestoga Wood Specialties et al. Petitioners and the Hobby Lobby et al. Respondents at 20–21, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354), *and* Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) (No. 13-356) [*hereinafter* Brief Amicus Curiae].

244. *Id*. at 20.

245. *See* 42 U.S.C. § 300gg-13(a)(4); Michael Barone, Jr., *Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate*, 29 TOURO L. REV. 795, 825, 827–28 (2013).

246. Barone, Jr., *supra* note 245, at 827–28.

247. Transcript of Oral Argument, *supra* note 21, at 56.

248. *Id*. at 56.

> that it's for the Congress, not the agency to determine . . . exemption[s] . . . and not even for RFRA purposes, for other purposes.[249]

Closely related to the nondelegation doctrine is the issue of judicial deference to agency decision-making. Although not presently before the Supreme Court, Hobby Lobby and many other plaintiffs in the cases circulating through the federal courts have raised claims under the APA.[250] It is almost certain that if the Court rules against Hobby Lobby on the RFRA claim, the APA claim will be the next litigated issue.[251]

Normally, courts defer to an agency's interpretation of a statute that it administers.[252] The reason for administrative deference is similar to the rationale underlying the nondelegation doctrine and the intelligible principle. If Congress' delegation is clear and supported by standards for the agency to follow, the Court will give deference to the decisions of the agency tasked with implementing Congress' policy choices.[253] Therefore, under the APA, courts will not set aside an administrative action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[254]

Indeed, Hobby Lobby and other plaintiffs will argue that the Mandate is "an abuse of discretion [and] not in accordance with law."[255] If RFRA does not require the Government to accommodate or exempt Hobby Lobby, Hobby Lobby and other nonexempt objectors will argue that the Mandate is unconstitutional, not just as applied to Hobby Lobby and other religious objectors, but on its face.[256] It follows that if the Mandate is based on an

249. *Id.* at 56–57.

250. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013); FCC v. Fox Television Stations, 556 U.S. 502, 513 (2009); *see also* John Lyle, *Contraception and Corporate Personhood: Does the Free Exercise Clause of the First Amendment Protect For-Profit Corporations That Oppose the Employer Mandate?*, 39 U. DAYTON L. REV. 137, 144–46 (2013).

251. *Cf.* Lyle, *supra* note 250, at 165 (applying the "appropriate analyses to the Employer Mandate to show that although the ACA likely holds up under the *Smith* standard established for the Free Exercise Clause of the First Amendment, it likely will not withstand the heightened scrutiny of RFRA").

252. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S 837, 842–43 (1984).

253. *Id.*

254. 5 U.S.C. § 706(2)(A) (2012).

255. *Id.*

256. Brief Amicus Curiae, *supra* note 243, at 34 ("[T]he Contraceptive Mandate is *ultra vires* as applied to any employer (*i.e.*, not merely to religious employers).").

"ultra vires" delegation of legislative power, the Mandate is unconstitutional.[257] Therefore, under the APA, the administrative deference standard will not apply. Perhaps this is what Justice Kennedy had in mind when he questioned the appropriateness of an agency, rather than Congress, deciding religious exemptions, not just under RFRA, but also "for other purposes."[258]

In a recent challenge to the rule-making authority of the Federal Communications Commission (FCC), the Court separated the issue of whether a rule violated the APA from the constitutional issue.[259] When the FCC's regulation of broadcast indecency changed dramatically, the Court applied the APA's deferential standard finding the change of policy was not arbitrary and capricious.[260] However, the case came back to the Supreme Court a second time on the constitutional issue.[261]

Unlike the FCC's indecency policy, the Mandate does not involve a change of policy, but the creation of one;[262] however, the *Fox* case may nevertheless be instructive.[263] Despite the APA, when constitutional issues are at stake, courts will not apply the deferential standard to administrative rulemaking.[264] Like the nondelegation doctrine, the deferential agency standard allows Congress to escape voter dissatisfaction in implementing controversial policies and offends the principle of separation of powers.[265] First, Congress delegates to HHS the task of defining what services satisfy

257. *Id*.

258. Transcript of Oral Argument, *supra* note 21, at 56.

259. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) (finding the FCC's changed indecency policy was not arbitrary and capricious, but declining to address whether it violated the First Amendment). *See generally* Day & Weatherby, *supra* note 12.

260. *Fox,* 556 U.S. at 517 (finding that the change in policy that previously excluded fleeting expletives from the FCC indecency policy to one that levied substantial fines for an isolated expletive was not arbitrary and capricious under the APA).

261. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2311 (2012).

262. *See Fox*, 556 U.S. at 507 (2009).

263. *But cf*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 (2014) ("HHS contends that RFRA does not permit us to take this option into account because RFRA cannot be used to require creation of entirely new programs . . . [b]ut we see nothing in RFRA that supports this argument, and drawing the line between the creation of an entirely new program and the modification of an existing program (which RFRA surely allows) would be fraught with problems." (citations omitted) (internal quotation marks omitted)).

264. *See Fox*, 556 U.S. at 513–16.

265. *Cf*. *id*. at 536 ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.").

"preventive care and screening;"[266] then, under the APA, courts must give deference to the Mandate.[267]

Thus, in addition to the statutory RFRA claim, the Mandate presents constitutional structural concerns regarding the nondelegation doctrine and the APA's agency deference standard. Regardless of a win or loss on the RFRA claim, these two issues will continue to be litigated in the federal courts. Whether or not the Supreme Court will hear *Hobby Lobby* for a second time or other plaintiffs' cases make their way to the Supreme Court, RFRA is just the first battle in these newly framed religious freedom cases.

VI. SLIPPERY SLOPE – *ELANE PHOTOGRAPHY, LLC V. WILLOCK*

Whatever the resolutions are to the above-posed questions, there will be practical ramifications from the *Hobby Lobby* decision. The most obvious one is how far-reaching the Court's decision will be and what impact it will have on the future of our free exercise jurisprudence. This Court's decision will undoubtedly affect the trajectory of the law governing exemptions from public accommodation laws for secular employers with deeply held religious beliefs, potentially resulting in a new wave of law that essentially condones and safeguards discrimination.

At oral argument, Justices Sotomayor and Kagan asked Hobby Lobby to clarify the scope of its claims.[268] Justice Sotomayor asked whether its claim was limited to contraceptives, or whether it includes other "items like blood transfusion[s], vaccines . . . [or] products made of pork?"[269] Could "any claim . . . that has a religious basis . . . [allow] an employer [to] preclude the use of those items as well?"[270] "Does the creation of the exemption relieve me from paying taxes when I have a sincere religious belief that taxes are immoral?"[271] In response to Justices Sotomayor and Kagans' hypotheticals about the limits of Hobby Lobby's theory, counsel refocused the Court's analysis to the strict scrutiny test, arguing that in every factual instance (vaccines, blood transfusions, pork products, and even taxes) the central analysis is whether the Mandate is the least restrictive means of achieving a

266. 42 U.S.C. § 300gg-13(a)(4).
267. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
268. Transcript of Oral Argument, *supra* note 21, at 4–5.
269. *Id.* at 4.
270. *Id.*
271. *Id.* at 85.

compelling government interest.[272] Justice Kagan pointed out that this highly fact-intensive, case-by-case approach could yield inconsistent holdings, allowing "one religious group [to] opt out of this and another religious group [to] opt out of that and everything would be piecemeal . . . ."[273]

In fact, while the *Hobby Lobby* plaintiffs objected to only four of the twenty FDA-approved contraceptives covered by the Mandate,[274] and the *Conestoga Woods* plaintiffs objected to only two of the twenty,[275] the 300-plus plaintiffs in the other 102 lawsuits take issue with a hodgepodge of drugs and treatments covered by the Mandate that are not presently at issue before the Court.[276] While the slippery slope concerns raised by Justices Sotomayor and Kagan are real and present imminent factual and legal dilemmas, a larger legal quagmire looms in the background.

In September 2006, Vanessa Willock e-mailed the Albuquerque, New Mexico photo studio, Elane Photography, indicating that she was researching potential photographers to capture her same-sex commitment ceremony.[277] Elaine Huguenin responded with the following statement: "As a company, we photograph traditional weddings, engagements, seniors, and several other things such as political photographs and singer portfolios."[278] In response, Ms. Willock asked for clarification, inquiring whether the company "does not offer [its] photography services to same-sex couples[.]"[279] In their final e-mail exchange, Elane Photography wrote, "Yes, you are correct in saying we do not photograph same-sex

272. *Id*. at 5–6, 21.

273. *Id*. at 6.

274. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144 (10th Cir. 2013).

275. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Servs., 724 F.3d 377, 382 (3d Cir. 2013).

276. *See* BECKET FUND, HHS MANDATE INFORMATION CENTRAL, *supra* note 28; *e.g*., Little Sisters of the Poor Home for the Aged v. Sebelius, 13-CV-2611-WJM-BNB, 2013 WL 6839900, at *4 (D. Colo. 2013) (objecting to contraceptives including abortifacient contraceptives, sterilization procedures, and related education and counseling); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012) (objecting to all of the FDA-approved contraceptives covered by the Mandate); Roman Catholic Archdiocese v. Sebelius, 907 F. Supp. 2d 310, 316 (E.D.N.Y. 2012) (same).

277. Defendant Vanessa Willock's Memorandum Brief in Support of her Motion for Summary Judgment at 2, Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009) (No. CV 08 6632), *aff'd*, 284 P.3d 428 (N.M. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

278. *Id*.

279. *Id*.

weddings . . . ."[280]

Co-owners of Elane Photography, Elaine and her husband John Huguenin, "object as a matter of conscience to creating pictures or books that will tell stories or convey messages contrary to their deeply held religious beliefs."[281] Among their convictions is the premise that marriage "is the union of a man and a woman."[282]

Following Ms. Willock's charge of discrimination, the New Mexico Human Rights Commission (Commission) held that Elane Photography had engaged in an illegal act of sexual orientation discrimination by a public accommodation in violation of the New Mexico Human Rights Act (NMHRA).[283] After multiple appeals in state court, in which Elane Photography advanced a variety of arguments premised upon alleged violations of the company's free speech and free exercise rights,[284] the New Mexico Supreme Court affirmed the lower courts' rulings that Elane Photography had violated the NMHRA by unlawfully discriminating against Ms. Willock on the basis of her sexual orientation.[285]

During the course of the litigation, Elane Photography advanced three basic constitutional arguments.[286] First, Elane Photography argued that a proper interpretation of the NMHRA prohibited discrimination only on the basis of a protected status (here, Ms. Willock's sexual orientation), as opposed to "conduct closely correlated with that status."[287] The New Mexico Supreme Court rejected Elane Photography's theory that the participation in a same-sex commitment ceremony was unprotected "conduct" because it was "inextricably tied" to Ms. Willock's sexual orientation and thus protected by the NMHRA.[288]

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280. *Id*.

281. Petition for a Writ of Certiorari at i, Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014) (No. 13-585).

282. *Id*. at 6.

283. *Id*. at i.

284. *See, e.g*., Elane Photography, LLC v. Willock, 284 P.3d 428, 433 (N.M. Ct. App. 2012).

285. Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013).

286. *See id*. at 60.

287. *Id*. at 61.

288. *Id*. at 62 (citing Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2980 (2010), *and* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphases added in *Elane Photography*))). *See generally Lawrence*, 539 U.S. at 575.

Next, Elane Photography argued that its status as a commercial, for-profit entity did not diminish its First Amendment rights, and the Commission's enforcement of the NMHRA here constituted unlawful compelled speech in violation of those rights.[289] Specifically, relying on the premise that photography is inherently expression laden and deserving of First Amendment protection, Elane Photography argued:

> The Commission's actions forcing Elane Photography either to photograph . . . same-sex commitment ceremonies or to suffer punishment compels the Company to express messages with which it vehemently disagrees, namely, that marriage can exist between anyone other than one man and one woman, and that same-sex romantic relationships are morally acceptable.[290]

Arguing that the Supreme Court's precedent in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*[291] controlled, they contended that this constituted impermissible compelled speech, which could not survive the highly burdensome strict scrutiny test.[292]

Finally, Elane Photography argued that the NMHRA violated its First Amendment right to freely exercise its religion.[293] Because public accommodation laws apply to "nearly all [businesses and] forms of 'business activity'" and protect a "broadened . . . scope" of covered classifications,[294] Elane Photography recognized an inherent tension between secular business owners' political and religious views and public accommodation laws that, from its perspective, forces business owners to express or endorse ideas that are contrary to their deeply held religious beliefs.[295] Relying on these principles, Elane Photography invoked a

289. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 25–26, Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009) (No. CV 08 6632).

290. *Id.* at 25.

291. 515 U.S. 557, 568–81 (1995) (holding that state public accommodation law's requirement that organizers of parade be required to allow gay, lesbian, and bisexual descendants of Irish immigrants to march altered the expressive content of the parade and thus violated the organizers' First Amendment rights).

292. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 289, at 27–28.

293. *Id.* at 29–35.

294. Petition for a Writ of Certiorari, *supra* note 281, at 21.

295. *Id.* at 21–22.

statutory exemption to the NMHRA,[296] which it maintained allowed certain "religious organizations" to essentially "decline same-sex couples as customers."[297]

Although the New Mexico Supreme Court acknowledged that "[e]xemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion," it ultimately held that Elane Photography's reading of the NMHRA's statutory exemptions was overly broad.[298] The court clarified that the sections relied upon by Elane Photography merely grant religious organizations an exemption from providing faith-based services to certain individuals and allow them to refuse to hire or engage in real estate transactions with certain individuals based on their deeply held religious beliefs.[299] However, as the court explained, the exemptions do not generally allow religious organizations "to turn away same-sex couples while catering to opposite-sex couples of all faiths," and thus they do not excuse Elane Photography's refusal to serve Ms. Willock.[300]

Although the Supreme Court did not grant certiorari,[301] the arguments in *Elane Photography* foreshadow a potential risky slippery slope. In fact, since *Elane Photography*, scorned patrons of several other wedding-related businesses have filed similar lawsuits, claiming that the businesses' refusal to serve them violated state anti-discrimination laws.[302] For example, in *Ingersoll v. Arlene Flowers*,[303] a same-sex couple sued a florist for refusing to provide flowers for their commitment ceremony, claiming a violation of

296. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 289, at 32–33 (citing NEW MEX. STAT. § 28-1-9(B), (C) (2013) (providing that the NMHRA shall not "bar any religious . . . organization . . . from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained . . . or . . . from imposing discriminatory employment or renting practices that are based upon sexual orientation or gender identity")).

297. Elane Photography, LLC v. Willock, 309 P.3d 53, 74 (N.M. 2013).

298. *Id*. at 74–75.

299. *Id*. at 74.

300. *Id*.

301. Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014).

302. *See infra* notes 303–07 and accompanying text.

303. Ingersoll v. Arlene Flowers, Inc., No. 13-2-00943-3 (Wash. Super. Ct. filed Apr. 18, 2013).

Washington State's Law Against Discrimination.[304] Similarly, in *Baker v. Hands On Originals, Inc.*,[305] a gay and lesbian organization sued a Christian t-shirt company for refusing to print t-shirts for the organization because Hands On disagreed with the organization's message.[306] These cases and others suggest a growing trend in which for-profit businesses are invoking their deeply held religious beliefs to excuse themselves from serving gay and lesbian customers.[307]

Even more concerning is the fact that numerous states have proposed or passed their own RFRA laws that essentially grant religious employers a waiver from complying with state public accommodations laws.[308] Indeed, in Alabama, Rhode Island, Illinois, Tennessee, and several other states, lawmakers have provided an easy statutory out for those employers that

304. Complaint at 4, Ingersoll v. Arlene Flowers, Inc., No. 13-2-00943-3 (Wash. Super. Ct. filed Apr. 18, 2013), *available at* https://www.aclu.org/sites/default/files/assets/complaint_-_intersoll_v_arlenes_flowers_21.pdf.

305. Baker v. Hands On Originals, Inc., HRC No. 03-12-3135 (Lexington-Fayette Urban County Human Rights Comm'n, Oct. 6, 2014), *available at* http://www.adfmedia.org/files/HOOrecommendation.pdf.

306. *See ADF: KY. T-shirt Company Not Required to Promote Message It Disagrees With*, ALLIANCE DEFENDING FREEDOM (Apr. 20, 2012), http://www.adfmedia.org/news/prdetail/5454. Hands On instead referred the organization to a different vendor that would produce the shirts for the same price. *Id.* The organization filed a complaint with the Lexington-Fayette Urban Human Rights Commission claiming discrimination based on "sexual orientation." *Id.*

307. *See, e.g.*, Craig v. Masterpiece Cakeshop, CR 2013-0008 (Colo. Civil Rights Comm'n, May 30, 2014), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_--_commissions_final_order.pdf. A summary of the case is available at the ACLU's website: https://www.aclu.org/lgbt-rights/charlie-craig-and-david-mullins-v-masterpiece-cakeshop. Craig and Mullins sued Jack C. Phillips, owner of the Masterpiece Cakeshop, Inc., for refusing to sell them a wedding cake because of their sexual orientation, which violated a longstanding Colorado state law. *Id.*; *see also, e.g.*, Sasha Aslanian, *Same-Sex Couple Settles in Rice Creek Lodge Wedding Dispute*, MPR NEWS (Aug. 22, 2014), http://www.mprnews.org/story/2014/08/22/gay-marriage-lodge-dispute (discussing the settlement of a discrimination claim brought by a same-sex couple against a wedding venue in Minnesota for refusing to host the wedding).

308. *See, e.g.*, ALA. CONST. art. I § 3.01 (guaranteeing that "freedom of religion is not burdened by state and local law"); R.I. GEN. LAWS § 42-80.1-3(b) (1997) (stating that a governmental authority may restrict a person's free exercise of religion only if: "(1) the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions; and (2) the governmental authority proves that application of the restriction to the person is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest"); OKLA. STAT. tit. 51, § 253 (2000) (providing that "no government entity shall substantially burden a person's free exercise of religion *even if the burden results from a rule of general applicability*" (emphasis added)); TENN. CODE ANN. § 4-1-407 (West 2013) ("[N]o government entity shall substantially burden a person's free exercise of religion *even if the burden results from a rule of general applicability*." (emphasis added)).

object to providing accommodations on religious grounds.[309] These laws, although well intentioned, effectively condone a new wave of discrimination.

VII. CONCLUSION

Days after the *Hobby Lobby* oral argument, the media reported that Hobby Lobby's retirement plan "holds $73 million in mutual funds with investments in companies that make abortion drugs."[310] Ironically, some of those companies manufacture the very contraceptives to which Hobby Lobby objects on religious grounds.[311] The disclosure of Hobby Lobby investments almost "proves" the Government's case. Like contributions to its employer-provided health insurance plan, Hobby Lobby's contribution to its retirement plan involves an undifferentiated payment for investments in mutual funds managed by third parties.[312] Hobby Lobby has no more personal knowledge or connection to its employees' use of insurance benefits for the offensive contraceptives than it has to its retirement plan investments.[313]

The attenuation between Hobby Lobby's asserted harm and the government mandate should matter. With most injury claims, there must be a connection between the injury suffered and the alleged wrongful act.[314] As to Hobby Lobby's RFRA claim, the harm suffered is an infringement on its religious beliefs; this is akin to dignitary harm.[315] But even for claims

309. *See supra* note 308 and accompanying text.

310. Gail Sullivan, *Antiabortion Company Hobby Lobby Reportedly Invests Retirement Funds in Abortion Drugs*, WASH. POST, Apr. 2, 2014, http://www.washingtonpost.com/news/morning-mix/wp/2014/04/02/anti-abortion-company-hobby-lobby-reportedly-invests-retirement-funds-in-abortion-drugs/.

311. *Id*. The pharmaceutical companies include those that manufacture Plan B, a copper IUD, and other drugs commonly used in abortions or to induce abortions. *Id*. Further, Hobby Lobby's retirement fund invests in two health insurance companies that cover surgical abortions. *Id*.

312. *See supra* notes 163–68 and accompanying text.

313. *See supra* notes 163–68 and accompanying text; *see also* Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1986) (explaining that indirect financial support is not coercion).

314. *See, e.g*., Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992) ("[A] plaintiff [must] allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief" (internal quotation marks omitted)).

315. Dignitary harm is "the affront to [a person's] dignity as a human being, the damage to his self-image, and the resulting mental distress." FAA v. Cooper, 132 S. Ct. 1441, 1463 (2012) (quoting Dan B. Dobbs, *Law of Remedies: Damages Equity, Restitution* § 7.1(1) (1973)) (internal

seeking redress for dignitary harms like defamation, a plaintiff must prove that the defamatory statements caused a loss in business, reputation, or good will.[316]

Hobby Lobby contends that the Mandate compels endorsement or support of the use of certain contraceptives that violate deeply held religious views. In actuality, however, the harm is the "possibility" of such endorsement or support, much like a taxpayer who objects to his portion of taxes funding certain government programs.[317] Due to privacy laws, Hobby Lobby would never know if one of its 13,000 employees actually purchased the objected-to contraceptives with her insurance benefits.[318] Like the mutual fund investments, the potential support of contraceptives is too attenuated from the compelled contribution of undifferentiated funds to an employer-provided insurance plan.[319]

Granting an exemption to Hobby Lobby would deprive its employees who do not share the same religious beliefs as its owners from the benefits of a general regulatory scheme governing employer-sponsored health insurance plans.[320] While Congress passed RFRA to reinstate strict scrutiny review to general laws that substantially burden free exercise rights,[321] laws intended to provide uniform regulation of benefits to a vast group of Americans should not be subject to piecemeal application on the "idea" or "possibility" that compliance might cause third persons to act contrary to a religious claimant's beliefs.

Despite the battle cry for religious freedom, Hobby Lobby, like the vast

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quotation marks omitted).

316. *See* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 65 (1966) ("[A] complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental harm, alienation of associates, specific items of pecuniary loss or whatever form of harm would be recognized by state tort law.").

317. *See* Jenkins v. Comm'r, 483 F.3d 90, 92 (2d Cir. 2007) (holding that RFRA did not afford disgruntled taxpayer, who objected to the government's spending taxpayer dollars for certain military activities, the right to avoid payment of taxes for religious reasons).

318. Brief for Petitioners, *supra* note 103, at 33; *see also* 45 C.F.R. § 164.502; DEPARTMENT OF HEALTH AND HUMAN SERVICES, OCR PRIVACY BRIEF: SUMMARY OF THE HIPAA PRIVACY RULE, *available at* http://www.hhs.ogv/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf (providing information on the privacy rule, including who is covered and what is individually identifiable health information).

319. *See* Sullivan, *supra* note 310.

320. *See generally* 26 U.S.C. § 5000 (2012) (imposing a tax on employers that contribute to nonconforming group health plans).

321. 42 U.S.C. § 2000bb(b)(2) (2012).

majority of employers subject to the Mandate, is far removed from the actual payment for, distribution of, or decision to use contraceptives.[322] If Hobby Lobby can be distanced from contributions to mutual funds that invest in the companies that manufacture the contraceptives to which it objects to on religious grounds, why is its RFRA claim not cured by the same distance between payments to an insurance plan and decisions by third parties to use benefits for the purchase of contraceptives? Attenuation cannot be a shield for investment funds while at the same time failing to act as a buffer for contributions to an insurance plan that covers contraceptives.

On the merits of its RFRA claim, Hobby Lobby should not prevail. Standing, however, should not be the decisional issue. Because for-profit corporations enjoy many other constitutional rights, it is purely formalistic to draw a line between for-profit and nonprofit entities for purposes of free exercise rights, especially in this case.[323] RFRA standing would not be questioned if the Greens operated their business as sole proprietors or a partnership; the fact of incorporation in and of itself should not affect standing.[324] Further, many states have passed their own RFRA laws, expressly including for-profit corporations as "persons" who can bring claims under those state statutes.[325] Therefore, the notion of for-profit corporations enjoying religious rights is apparently not novel.

Hobby Lobby, however, has failed to show that the forced contribution to an insurance plan covering contraceptives for use by third parties causes a substantial burden on its free exercise rights.[326] Despite exemptions and

322. *See* Uses and Disclosures of Protected Health Information, 45 C.F.R. § 164.502 (2013); *see also* Brief for Petitioners, *supra* note 103, at 33–34 (explaining that Hobby Lobby and the Greens are far removed from their employees' decisions to purchase contraception).

323. *See* Brief for Petitioners, *supra* note 103, at 18–19 ("There is no reason to think that Congress intended RFRA to grant for-profit corporations rights that previously had been reserved to individuals and religious non-profit institutions. For-profit companies are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission." (citations omitted) (internal quotation marks omitted)).

324. *But cf.* Brief for Petitioners, *supra* note 103, at 27–28 ("RFRA grants the Greens as individuals no right to challenge an obligation that applies only to the corporate respondents [because they] conduct business through corporations, thereby obtaining both the advantages and disadvantages of the corporate form." (citations omitted) (internal quotation marks omitted)).

325. *Compare supra* note 308 (outling different states' RFRA laws), *with* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .").

326. *Contra* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) (holding that, for

accommodations for other religious objectors and grandfathered plans, Hobby Lobby cannot satisfy the substantial burden element based on the recognition that others may be substantially burdened by the Mandate.[327] Religious exercise cases are individualized; they are not governed by the rule that a "duty to accommodate one" is a "duty to accommodate all."

Although the Mandate may not violate Hobby Lobby's rights under RFRA,[328] it is still problematic. Hobby Lobby's case and the 102 others[329] circulating in the federal courts may revive the nondelegation doctrine from its "dormant" status over the last eight decades. When Congress insulates itself from voter retaliation by delegating its power to legislate to an administrative agency on controversial issues such as mandatory health insurance benefits for contraceptives,[330] the issue is greater than the First Amendment. Impermissible delegation of legislative authority, coupled with deference to administrative decision-making, threatens the constitutional structure, which guarantees separation of powers.[331] An accretion of power in the "headless fourth branch of government"[332] threatens all of our rights, not just religious freedom.

Whether framed as a violation of RFRA or the First Amendment, free exercise claims are the latest attack on politically unpopular government laws.[333] Politics and religion have clashed and *Hobby Lobby* will not be the last word on general laws—whether they involve mandated insurance coverage for contraceptives or the legalization of same-sex marriage—that offend the religious sensibilities of the "losing" side on these controversial issues.

RFRA purposes, the HHS contraceptives mandate substantially burdened the for-profit, closely held corporation's exercise of religion).

327. *Contra id*. at 2787 (Ginsburg, J., dissenting) ("In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.").

328. *Contra id*. at 2775.

329. *See* BECKET FUND, HHS MANDATE INFORMATION CENTRAL, *supra* note 28.

330. *See supra* Part V.

331. *See supra* Part V.

332. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1878 (2013).

333. *See supra* Part VI.

VIII. ADDENDUM[334]

On June 30, 2014, in a five-to-four decision, the Court held that, as to a closely held corporation like Hobby Lobby and Conestoga Woods, the Mandate violates RFRA.[335] Justice Alito, writing for the majority, had little trouble concluding that a for-profit closely held corporation has standing under RFRA.[336] The Court reached its conclusion by applying the Dictionary Act definition of "person," which clearly includes artificial entities, and determining that Congress intended RFRA to have broad application.[337] Because the government already conceded that nonprofit religious entities would have standing under RFRA,[338] the Court saw little distinction between that type of artificial entity and the closely held corporations of Hobby Lobby and Conestoga Woods, both created and operated with a religious mission.[339]

The majority and dissenting opinions disagreed about the scope of RFRA.[340] In her dissent, Justice Ginsburg opined that Congress' intent in passing RFRA was to reinstate pre-*Smith* free exercise jurisprudence.[341] Finding no pre-*Smith* precedent recognizing a for-profit corporation's free exercise right, Justice Ginsburg held that Hobby Lobby was not a "person" under RFRA.[342] Further, she articulated a clear distinction between a nonprofit religious organization and a for-profit corporation: the former "exist[s] to serve a community of believers," while the latter does not.[343]

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334. The authors do not intend this addendum to be an exhaustive analysis of the Court's opinions.

335. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014), *aff'g* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 114 (10th Cir. 2013), *and rev'g* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013). Note the change in party names due to Kathleen Sebelius's resignation as Secretary of the Department of Health and Human Services and her succession by Sylvia Burwell on April 11, 2014. *See* Pace & Alonso-Zaldivar, *supra* note 1.

336. 134 S. Ct. at 2768.

337. *Id*. at 2768–69.

338. *Id*. at 2769 (citing Brief for Petitioners, *supra* note 103, at 17).

339. *Id*. at 2771.

340. *Compare id*. at 2768 (majority opinion), *with id*. at 2771 (dissenting opinion).

341. *Id*. at 2791–92 (Ginsburg, J., dissenting).

342. *Id*. at 2793 ("The Dictionary Act's definition . . . controls only where context does not indicate otherwise. Here, context does so indicate." (citations omitted) (internal quotation marks omitted)).

343. *Id*. at 2796. Justices Breyer and Kagan joined in the dissent except as to the standing issue. *See id*. at 2806. They conclude that the question of whether for-profit corporations have standing

It was undisputed that Hobby Lobby's objection to the contraceptives at issue was based on a sincerely held religious belief; thus, the Court's analysis turned to the substantial burden prong of RFRA.[344] Recognizing that Hobby Lobby faced a "Hobson's choice" of either paying hefty fines or violating its religious beliefs, the Court concluded that the Mandate imposed a substantial burden on Hobby Lobby's exercise of religion.[345] The Court gave no credence to the argument that Hobby Lobby had the option to forego employee health insurance and, instead, pay the $2,000 per employee penalty, if applicable.[346] Because it was not briefed and argued, the Court ignored the possibility that such an option might have a net zero financial consequence, thus alleviating any substantial burden to Hobby Lobby.[347] Finally, the Court refused to consider the factors of attenuation and the denial of benefits to third parties[348] in its substantial burden analysis.[349] In fact, the Court concluded that a consideration of such factors would be akin to the Court questioning the reasonableness of Hobby Lobby's religious beliefs.[350]

To the contrary, Justice Ginsburg criticized the majority's conclusory analysis that any neutral regulation impacting a sincerely held religious belief automatically satisfies the substantial burden prong of RFRA.[351] According to the dissent, the majority collapsed the two inquiries required to establish that a religious belief is substantially burdened into one flawed,

under RFRA need not be decided because the RFRA claim is invalid on the merits. *Id*.

344. *Id*. at 2775–79.

345. *Id*. at 2775–76.

346. *Id*. at 2776.

347. *Id*.

348. *See supra* Part IV.B.2. (discussing the attenuation and imposition on third-party beneficiary arguments).

349. 134 S. Ct. at 2777–78.

350. *Id*. at 2778 ("[The Government's attenuation] argument dodges the question that RFRA presents (whether the Mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).").

351. *Id*. at 2798 (Ginsburg, J., dissenting) (explaining that the Court failed to engage in a legal analysis of whether Hobby Lobby's religious exercise is substantially burdened; instead, it "rests on the [plaintiffs'] belief that providing the coverage . . . is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." (internal quotation marks omitted)).

broad-sweeping analysis.[352] First, there are the "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature."[353] Justice Ginsburg agreed with the majority that the Court "must accept [these] as true."[354] Second, is the "'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry which the court must undertake."[355]

This difference of opinion regarding the rigor with which the substantial burden prong must be analyzed resurfaced three days later in the Court's *Wheaton College v. Burwell*[356] decision.[357] As a prelude to understanding the impact of *Wheaton College*, however, it is necessary to discuss the clash between the majority and dissenting opinions in *Hobby Lobby* on the least restrictive means test.

Once Hobby Lobby cleared the standing and substantial burden hurdles, the burden shifted to the Government to demonstrate that the Mandate served a compelling government interest, which the Court assumed without deciding,[358] and that the Mandate was the least restrictive way to meet that interest.[359] The majority easily concluded that, because there was already a less restrictive alternative accommodating nonprofit religious entities available,[360] the government could apply this accommodation to Hobby Lobby or, alternatively, the government could pay for the contraceptives itself.[361] Despite the fact that the parties did not brief or argue whether this accommodation would be available to or acceptable to Hobby Lobby,[362] this

352. *Id*.

353. *Id*. (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)) (internal quotation marks omitted).

354. *Id*.

355. *Id*. (quoting *Kaemmerling*, 553 F.3d at 679) (alteration in original).

356. 134 S. Ct. 2806 (2014).

357. *Id*. at 2807 (indicating that *Wheaton College* was decided on June 30, 2014).

358. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2780 ("We find it unnecessary to adjudicate this issue . . . [and] will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . .").

359. *Id*.; *see also supra* Part IV.B.3 (discussing the strict scrutiny analysis and the arguments raised by the parties).

360. *Cf*. *Wheaton College*, 134 S. Ct. at 2807 (Sotomayor, J., dissenting) ("Any religious nonprofit is also exempt [from the HHS Mandate requiring insurance coverage to employees, without cost-sharing, for contraceptives], as long as it signs a form certifying that it is a religious nonprofit that objects to the provision of contraceptive services, and provides a copy of that form to its insurance issuer or third-party administrator.").

361. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2780–82.

362. *See id*. at 2776, 2780–81. The majority was unwilling to entertain the argument that Hobby

accommodation served as the lynchpin of the Court's conclusion that the Mandate was not the least restrictive alternative and, therefore, violated RFRA.[363]

Three days after its decision in *Hobby Lobby*, the Court granted injunctive relief to Wheaton College's claim that the self-certification procedure for opting out of the Mandate—the very accommodation that the majority relied upon in *Hobby Lobby*[364]—violates RFRA.[365] The Court has deemed injunctive relief an extraordinary remedy.[366] To grant injunctive relief before deciding the merits of a petitioner's claim requires a showing that the right to relief, on the merits, is "indisputably clear."[367] A majority of the Court apparently agreed that, on the merits, the accommodation requiring self-certification to opt out of the Mandate violates RFRA.[368] The keystone of the *Hobby Lobby* decision was that the government already had an accommodation in place.[369] If the majority of the Court now concludes that the accommodation likely violates RFRA, then its opinion in *Hobby Lobby* was smoke and mirrors.[370]

In a scathing dissent, Justice Sotomayor criticized the majority's decision to grant injunctive relief as "undermin[ing] confidence in this institution."[371]

> After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position. That action evinces disregard for even the

Lobby could alleviate any burden the Mandate imposed with a potentially cost-neutral option (forego insurance and pay a penalty) because the parties had not briefed and argued the issue. *Id*. at 2776. But the absence of briefing and arguing regarding whether the accommodation to nonprofit religious entities would be available and acceptable to Hobby Lobby as a less restrictive alternative did not give pause to the Court. *Id*.

363. *Id*. at 2780–83.
364. *Id*. at 2782.
365. *Wheaton Coll*., 134 S. Ct. at 2808 (Sotomayor, J., dissenting).
366. *Id*. at 2808; *see also* Munaf v. Geren, 128 S. Ct. 2201, 2219 (2008).
367. *Wheaton Coll*., 134 S. Ct. at 2808 (Sotomayor, J., dissenting).
368. *See id*.
369. *See id*. at 2813 (discussing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2782).
370. *See id*.
371. *Id*. at 2808.

newest of this Court's precedents . . . .[372]

The *Wheaton College* decision continues *Hobby Lobby's* evisceration of any rigor required to sustain a RFRA claim. The government granted Wheaton College an accommodation to opt out of the Mandate, but Wheaton College alleged that filling out the form enabling its insurance carrier or third party administrator to provide coverage for the objected to contraceptives substantially burdens its free exercise of religion.[373] Essentially, Wheaton College "believes that authorizing its [third-party administrator] to provide these drugs in [its] place makes it complicit in grave moral evil."[374]

In *Wheaton College*, once again, the Court elided a RFRA claimant's allegations that it sincerely holds a religious belief with the legal conclusion that the claimant's religious belief is substantially burdened by a neutral government regulation.[375] However, Wheaton College's argument goes one step further than Hobby Lobby's: it claims that RFRA is violated by someone else having to fulfill the Mandate in its stead.[376] If this is likely to satisfy a RFRA claim, it is hard to imagine what would not.

To illustrate how attenuated Wheaton College's claim is, Justice Sotomayor quotes an analogy from the Seventh Circuit.[377] In short, the analogy poses a hypothetical conscientious objector to the draft opposing the drafting of another person to go to war in his place.[378] Obviously, a conscientious objector would have no legal basis to question the draft as it applied to another young person. Similarly, RFRA provides no legal basis to establish that the procedure accommodating Wheaton College substantially burdens its religious beliefs simply because a third party must now provide the objected-to coverage.[379]

Like in *Hobby Lobby*, the dissent in *Wheaton College* considered a less restrictive means for the government to achieve its objective—"let the

372. *Id*. (citations omitted).
373. *Id*. at 2812.
374. *Id*. (alteration in original) (internal quotation marks omitted).
375. *Id*.
376. *Id*. at 2808 (majority opinion).
377. *Id*. at 2812–13 (Sotomayor, J., dissenting) (quoting analogy from Univ. of Notre Dame v. Sebelius, 734 F.3d 547, 556 (2014)).
378. *Id.* (discussing *Notre Dame*, 734 F.3d at 556).
379. *Id*. at 2813–14.

government pay."[380] As a result of *Hobby Lobby* and *Wheaton College*, the accommodation crafted for nonprofit religious entities—once thought to be a viable accommodation for closely held corporations—likely no longer exists. The alternative, as suggested in *Hobby Lobby*, is for the government to pay for the cost of the contraceptives that employers do not want to include in their insurance plans.[381] In *Wheaton College*, the Court suggested that a less restrictive alternative to the self-certification procedure is to send a letter to HHS.[382] In her dissent, Justice Sotomayor explained why the "let the government pay" approach is not a viable alternative.[383]

The Court's newly crafted government solutions to the *Hobby Lobby* and *Wheaton College* RFRA claims raise an issue of separation of powers.[384] It is not the Court's role to devise government plans to implement and enforce policy.[385] As the Mandate unravels under the force of *Hobby Lobby* and *Wheaton College*, congressional action may be the only salvation. Although the President is considering executive authority to provide the contraceptives to women denied those benefits based on their employers' religious beliefs,[386] such a government plan would likely entail expenditures that Congress would have to approve.[387]

The Mandate and any accommodations or exemptions to it would have greater force if Congress speaks directly.[388] Although HHS has the expertise

380. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting).

381. *Id*. at 2781 (majority opinion) ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections.").

382. *Wheaton Coll*., 134 S. Ct. at 2807.

383. *Id*. at 2814–15 (Sotomayor, J., dissenting).

384. *See supra* Part V.

385. *See Wheaton Coll*., 134 S. Ct. at 2814–15 (Sotomayor, J., dissenting) ("It is unclear why the Court goes to the lengths it does to rewrite HHS's regulations.").

386. Benjamin Goad & Ferdous Al-Faruque, *Obama Weighs Executive Hammer*, THE HILL (July 1, 2014, 6:01 AM), http://thehill.com/business-a-lobbying/211022-obama-weighs-executive-hammer; *see also* Robert Pear, *Democrats Push Bill to Reverse Supreme Court Ruling on Contraceptives*, N.Y. TIMES, July 8, 2014, http://www.nytimes.com/2014/07/09/us/politics/democrats-draft-bill-to-override-contraception-ruling.html?emc=edit_tnt_20140708&nlid=48778543&tntemail0=y&_r=1 (discussing potential legislative action to override the impact of the *Hobby Lobby* decision).

387. *See* 31 U.S.C. § 1341 (2012) (limiting federal government employees from making expenditures without congressional authorization).

388. *See supra* Part V.

to decide healthcare priorities, when it comes to contraceptives, which are intrinsically linked to abortion and religion, Congress should speak explicitly and not insulate itself from controversial policy decisions by administrative delegation.[389]

Finally, these cases intensify the slippery slope concerns discussed above.[390] Although *Elane Photography* was unsuccessful at discriminating against a same-sex married couple based on religious freedom and free speech grounds, it will not be long before a similar claim will succeed.[391] Both *Hobby Lobby* and *Wheaton College* have opened the floodgates for RFRA claims.[392] The substantial burden element of a RFRA claim is easy to establish based on the Court's deference to a claimant's sincerely held religious belief as proof positive that any impact by a neutral government regulation satisfies the substantial burden test.[393] Further, the Court's willingness to create government-sponsored programs out of whole cloth as a least restrictive alternative suggests that the RFRA strict scrutiny analysis is "strict in theory, but fatal in fact."[394]

Hobby Lobby and *Wheaton College* may signal the unraveling of the Mandate, but they are not the final word. Government mandated employer-sponsored health insurance remains controversial, and even more controversy surrounds the Mandate. Creating constitutional rules, whether framed in RFRA or the First Amendment, to dismantle a politically unpopular or divisive comprehensive insurance scheme thus thrusts the Court into the political fray. Contradicting its three-day-old *Hobby Lobby* opinion, the majority's decision in *Wheaton College* suggests that the Court itself is not immune from the politics of Obamacare and the Mandate, which, indeed, "undermines confidence in [the] institution."[395]

389. *See supra* Part V.

390. *See supra* Part VI.

391. *See supra* Part VI.

392. *See supra* Part VI.

393. *See supra* Part IV.B.2.

394. *Compare* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) (arguing that strict scrutiny is "strict in theory, but fatal in fact"), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove*, 448 U.S. at 519)).

395. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

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