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A Religious Right to Discriminate: Hobby Lobby and “Religious Freedom” as a Threat to the LGBT Community

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COMMENTS

A RELIGIOUS RIGHT TO DISCRIMINATE: *HOBBY LOBBY* AND “RELIGIOUS FREEDOM” AS A THREAT TO THE LGBT COMMUNITY

By: Travis Gasper*

ABSTRACT

The Supreme Court in its 2014 decision in Burwell v. Hobby Lobby broadly expanded so-called religious freedom protections in the Religious Freedom Restoration Act (“RFRA”) by striking down a provision of the Affordable Care Act requiring employers to provide health insurance coverage for certain methods of contraception. In doing so, the Court opened the flood-gates for employers to claim an exemption based upon any “sincerely held” religious belief. Without inquiry into the sincerity of that belief, businesses and corporations are free to adopt or assert beliefs that could lead to increased discrimination against employees. This is especially troublesome for marginalized groups like the LGBT community, which is already on the receiving end of discrimination under the pretext of religious exemptions. To correct any future misuse of these exemptions, Congress should amend RFRA to permit courts to assess the belief being asserted and contrast it with the potential harm if an exemption is allowed. The purpose of RFRA is to ease the burden faced by people of faith forced to go against their religious beliefs if they obey a certain statute. Easing this burden should focus on heady moral dilemmas, not mere inconveniences. Amending RFRA can ensure it maintains its initial purpose of protecting religious freedom, while not being used as a tool to perpetuate discrimination.

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I. INTRODUCTION

In 2014, the Supreme Court exempted corporations from providing “health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners.”¹ The Court’s decision of “startling breadth”² was a “perfect storm”³ of the “cultural whirlwind”⁴ that is religious freedom vis-à-vis governmental statutory and administrative mandates.

This Comment discusses the background of religious freedom protections, how the Supreme Court applied the concept in *Hobby Lobby*, and predicts that corporations will use similar arguments in the future to discriminate against lesbian, gay, bisexual, and transgender (“LGBT”) employees. It provides examples of ways that religious freedom arguments are already being used to discriminate against LGBT individuals. It argues that the majority of the Court misapplied the Religious Freedom Restoration Act (“RFRA”) and opened the door to increased discrimination. Finally, it proposes amending RFRA to protect LGBT individuals from future discrimination based on the assertion of sincerely held religious beliefs by permitting courts to examine these beliefs.

I do not arrive at this conclusion at the expense or belittlement of religious beliefs. Americans are free and should be free to practice whatever religion they want. Thus, this debate is not about what an individual believes or even what one religion prescribes. Rather, I recognize that some religious beliefs may conflict with current or future anti-discrimination laws. When the practices of private religion and

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

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

3. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 104 (2015).

4. *Id.*

public entities like corporations intersect, this confluence demands courts err toward a reading of statutory rights that safeguards the rights of vulnerable individuals protected under the law. This is in keeping with an expansive view of rights in the United States, of which Archibald Cox remarked many years ago that “[o]nce loosed, the idea of Equality is not easily cabined.”⁵

It is also important to note that while the term “religion” and the LGBT community are juxtaposed in this Comment for illustrative purposes, the two are not mutually exclusive. There are LGBT people who are just as religiously devout as their straight counterparts. For example, the Cathedral of Hope, located in Dallas, Texas, is known as the “world’s largest gay church,” reaching thousands of gay, lesbian, bisexual, and transgender individuals each week.⁶ Similarly, not all straight individuals who belong to religious faiths are *per se* pro-discrimination or anti-LGBT. In fact, people from religious backgrounds have contributed significantly to expanding rights and protecting the freedom of minority groups. In this multidimensional, complex world in which we live, everyone should question broad labels and assertions to ensure their intellectual authenticity. Where certain terms are used as shorthand to describe a group or community in general (as in “religion” and the “LGBT community” here), it is essential to acknowledge and state this prior to beginning any analysis.

II. BEFORE AND AFTER: THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

A. *The Run-Up to RFRA*

Before examining the Religious Freedom Restoration Act of 1993, it is important to look at the jurisprudence concerning religion that led to its adoption. This historical overview provides an understanding of the climate under which RFRA passed with overwhelming support from both houses of Congress and both parties, something nearly unimaginable today. The passage of RFRA was the result of several decades of Supreme Court decisions, mostly ruling in favor of religious freedom among minority groups claiming mistreatment or discrimination.

In 1963, a Seventh-day Adventist who refused to work Saturdays (the Sabbath day for that religion) was fired and subsequently denied unemployment benefits.⁷ After a state supreme court upheld the denial of benefits, the Supreme Court stepped in. In a 7–2 opinion, the

5. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

6. *World’s Largest Gay Church Joins United Church of Christ*, CATHEDRAL OF HOPE (Oct. 29, 2006), <https://www2.cathedralofhope.com/united-church-of-christ> [<http://perma.cc/UFD9-NFG9>].

7. *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963).

Court in *Sherbert v. Verner* held that this restriction of benefits was a significant burden on the employee's ability to freely exercise her faith⁸ and that there was no compelling state interest to justify this infringement.⁹ Less than a decade later, Amish parents objected to a state's compulsory school attendance law because they believed high school attendance violated their religion and way of life.¹⁰ Balancing the interest of the state with the interest of the parents, the Court granted an exemption to the Amish after the state failed "to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected."¹¹

But not all claims met the substantial burden or strict scrutiny tests used to invalidate statutory provisions that conflicted with religious liberties.¹² In 1990, the Court ruled in *Smith* that when one's religious exercise was impaired by a general law not expressly aimed at religion, no constitutional claim existed.¹³ Here, the Court said an employee did not have an employment discrimination claim against his employer based on a religious freedom claim. Writing for the majority, Justice Scalia emphasized that the *Sherbert* test was limited and inapplicable to wider criminal prohibitions of particular forms of conduct.¹⁴

Liberal civil rights organizations reacted. The American Civil Liberties Union ("ACLU"), Americans United for the Separation of Church and State, People for the American Way, and Americans for Democratic Action lobbied Congress to pass what would become RFRA.¹⁵ In 1993, the bipartisan Senate version, sponsored by Senators Ted Kennedy (D-MA) and Orrin Hatch (R-UT), passed on a 97–3 vote.¹⁶ It went on to receive unanimous support in the House of Representatives and was later signed by President Clinton. Its purpose was "to reverse *Smith* and reinstate the *Sherbert* test."¹⁷ Ironically, these same groups on the left that coalesced around the RFRA's passage are some of the leaders in opposition to the way the Supreme Court interpreted it some twenty-plus years later.

8. *See id.* at 403–06.

9. *See id.* at 406–09.

10. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

11. *Id.* at 234–36.

12. *See, e.g., Bowen v. Roy*, 476 U.S. 693 (1986) (concluding that the statutory requirement that a state agency utilize Social Security numbers in administering the programs in question does not violate the Free Exercise Clause); *United States v. Lee*, 455 U.S. 252 (1982) (declaring social security taxes were not unconstitutional after they were objected to on religious grounds, i.e., receipt of public insurance benefits and to payment of taxes to support public insurance funds).

13. *Emp't Div. v. Smith*, 494 U.S. 872, 884–85 (1990).

14. *Id.*

15. Brett McDonnell, *The Liberal Case for Hobby Lobby* 12 (Univ. Minn. Law Sch. Legal Studies, Research Paper No. 14-39, 2014), <http://ssrn.com/abstract=2513380> [<http://perma.cc/8SND-J7LU>].

16. *Id.*

17. *Id.* at 13 (citing 42 U.S.C. § 2000bb (2012)).

B. *RFRA and Beyond*

The Religious Freedom Restoration Act of 1993 prohibits the “[g]overnment [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 application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁸ As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), RFRA covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹⁹

Like all statutes, RFRA was a product of its time. The coalition assembled—resulting in widespread, bipartisan support—viewed the accommodation of religious values positively.²⁰ RFRA likely “reflect[ed] the views of a majority that at the time of enactment had the power to pass the law, and which majority did little to consider the effect on those who did not share some core belief.”²¹ Others argue that “it was hardly unforeseeable that these laws might conflict with nondiscrimination statutes”²² and that “it is easy to miss that RFRA is a ‘permissive’ accommodation—that is, a *voluntary* government accommodation of religion that is not constitutionally required by the Free Exercise Clause.”²³

Regardless, issues surrounding RFRA became apparent quickly, forcing courts to step in and Congress and the states to take action. Its broad, undefined language—“substantial burden,” “compelling interest,” and “least restrictive means”—created difficulties in interpretation: should its standards be read in a way that makes them “deferential to government decisions in order to avoid excessively broad coverage and serious problems of administrability[?]”²⁴ That these issues “have been problematic for both courts and scholars for decades” “provides somewhat chilly comfort.”²⁵ As one scholar put it, “the Court is routinely criticized for the incoherence of its Religion Clause jurisprudence.”²⁶

18. 42 U.S.C. § 2000bb-1(a)–(b) (2012).

19. § 2000cc-5(7)(A); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014).

20. McDonnell, *supra* note 15, at 12.

21. *Id.* at 47–48.

22. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 171 (2014).

23. Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 (2014) (emphasis added).

24. Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application* 9–10 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-421, 2014), <http://ssrn.com/abstract=2512906> [<http://perma.cc/W69R-KL9B>].

25. McDonnell, *supra* note 15, at 48.

26. Horwitz, *supra* note 22, at 154.

RFRA applied to federal and state statutes until 1997, when the Supreme Court held it unconstitutional as applied to states in *City of Boerne v. Flores*.²⁷ After the Supreme Court declared RFRA did not apply to the states, many states enacted their own laws exempting religious employers from compliance with public accommodation laws.²⁸ At least twenty states have RFRA statutes or state constitutional provisions.²⁹ Only twenty-one states³⁰ and the District of Columbia³¹ have laws prohibiting employment discrimination based on sexual orientation, and only eighteen states prohibit such discrimination based on gender identity.³² “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 [gay] patrons.”³³ As more courts strike down state bans on same-sex marriage, proponents of these bans see “religious liberty” as the next weapon in their arsenal against the LGBT community.

27. *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997).

28. McDonnell, *supra* note 15, at 13; *see also* Terri R. Day et al., *A Primer on Hobby Lobby: For-Profit Corporate Entities’ Challenge to the HHS Mandate, Free Exercise Rights, RFRA’s Scope, and the Nondelegation Doctrine*, 42 PEPP. L. REV. 55, 96–97 (2014).

29. ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2011); CONN. GEN. STAT. ANN. § 52-571b (2013); FLA. STAT. §§ 761.01–.05 (2010); IDAHO CODE ANN. §§ 73-401 to -404 (2006); ILL. COMP. STAT. ANN. 35/1–99 (2011 & Supp. 2015); H.B. 279, 2013 Reg. Sess. (Ky. 2013); LA. REV. STAT. ANN. §§ 13:5231–5242 (2012); MO. REV. STAT. §§ 1.302–.307 (West Supp. 2014); N.M. STAT. ANN. §§ 28-22-1 to -5 (2012 & Supp. 2014); OKLA. STAT. ANN. tit. 51, §§ 251–258 (2006); 71 PA. CONST. AND STAT. ANN. §§ 2401–2407 (West 2012); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2003); TENN. CODE ANN. § 4-1-407 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–0.12 (2014); UTAH CODE ANN. §§ 63L-5-101 to -403 (West 2015); VA. CODE ANN. §§ 57-1 to -2.02 (2007).

30. These states are: California (CAL. GOV’T CODE §§ 12900, 12940 (West 2003 & Supp. 2015)); Colorado (COLO. REV. STAT. § 24-34-401 to -402 (2014)); Connecticut (CONN. GEN. STAT. ANN. §§ 46a-51, -60 (West 2007 & Supp. 2015)); Delaware (DEL. CODE ANN. tit. 19, § 710 (2013 & Supp. 2014)); Hawaii (HAW. REV. STAT. ANN. § 378-1 (2010 & Supp. 2014)); Illinois (775 ILL. COMP. STAT. ANN. 5/1-101 to -102 (West 2011)); Iowa (IOWA CODE ANN. §§ 216.1, .6 (West 2008)); Maine (ME. REV. STAT. ANN. tit. 5, §§ 4551–4552 (2007)); Maryland (MD. CODE ANN., STATE GOV’T § 20-606 (LexisNexis 2014)); Massachusetts (MASS. GEN. LAWS ch. 151B, § 4 (2013)); Minnesota (MINN. STAT. § 363A.08 (2012)); Nevada (NEV. REV. STAT. ANN. § 613.310 (LexisNexis 2012)); New Hampshire (N.H. REV. STAT. ANN. § 354-A:7 (2015)); New Jersey (N.J. STAT. ANN. § 10:5-2, -23 (West 2013 & Supp. 2015)); New Mexico (N.M. STAT. ANN. § 28-1-1, -4 (2012)); New York (N.Y. EXEC. LAW §§ 292, 296 (Consol. 1995 & Supp. 2015)); Oregon (OR. REV. STAT. § 659A.030 (2013)); Rhode Island (R.I. GEN. LAWS §§ 28-5-1, -7 (2003)); Vermont (VT. STAT. ANN. tit. 21, § 495 (2009)); Washington (WASH. REV. CODE § 49.60.030 (2008)); and Wisconsin (WIS. STAT. § 111.31 (2002 & Supp. 2014)).

31. D.C. CODE ANN. § 2-1402.11 (West 2015).

32. The New Hampshire, New York, and Wisconsin statutes prohibiting discrimination in employment based on sexual orientation do not include explicit protections for gender identity. N.H. REV. STAT. ANN. § 354-A:7 (2015); N.Y. EXEC. LAW § 296 (McKinney 2015); WIS. STAT. ANN. § 111.31 (West 2015).

33. Day et al., *supra* note 28, at 56.

Congress arguably strengthened religious exemptions in 2000 by passing the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which added language to RFRA specifying that the exercise of religion covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”³⁴ Although this appears to be an expansion, Justice Ginsberg believed this change “did not concern *who* could bring claims but merely dealt with *what range* of claims might succeed.”³⁵ Regardless of how this change is specifically defined by jurists or scholars, the overall trend over the past two decades has been in favor of expanding claims based on religious exemption grounds.

III. BURWELL V. HOBBY LOBBY STORES, INC.

The Supreme Court further broadened the expansion of religious exemptions with its 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.* By challenging a provision of a 2010 law passed by Congress and signed by the President, the plaintiffs sought relief based on a religious exemption claim under RFRA and the Free Exercise Clause. A sharply divided Court ruled in favor of the plaintiffs in a 5–4 decision. Since that time, myriad businesses and corporations have claimed religious exemptions consistent with the *Hobby Lobby* holding.

A. *Facts and Procedural History*

In 2010, Congress passed the Patient Protection and Affordable Care Act (“ACA”).³⁶ Under the ACA, employers with fifty or more full-time employees were required to provide health insurance that met minimum coverage standards.³⁷ This included “preventive care and screenings” for female employees without “any cost sharing requirements.”³⁸ Congress did not specify what types of care this would cover, leaving that up to regulations to be issued by the Department of Health and Human Services (“HHS”).³⁹

HHS promulgated regulations requiring nonexempt employers to cover twenty contraceptive methods approved by the Food and Drug Administration (“FDA”).⁴⁰ The plaintiffs in *Hobby Lobby* objected to four of these contraceptives, which inhibit a fertilized egg from attaching to the uterus, deeming them “abortifacients”—something that

34. McDonnell, *supra* note 15, at 52 (citing 42 U.S.C. § 20000cc-5(7)(A) (2012)).

35. Greenawalt, *supra* note 24, at 14–15 (emphasis added) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788–90 (Ginsburg, J., dissenting)).

36. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1025 (2010) (codified as amended in scattered sections of the U.S. Code).

37. McDonnell, *supra* note 15, at 13.

38. 42 U.S.C. § 300gg-13(a) (2012).

39. McDonnell, *supra* note 15, at 13–14.

40. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified at 29 C.F.R. § 2590.715-2713(a)(iv)).

causes an abortion.⁴¹ The FDA's description of the drugs never mentions "abortifacient" or "abortion"⁴² and many scientists objected to the drugs being described as inducing abortion.

Under HHS regulations, religious employers such as churches, as well as religious nonprofit organizations with religious objections, are exempt from this requirement.⁴³ By exempting these religious groups that have historically enjoyed special treatment under the law, HHS and the Obama administration understood the religious liberty fears of such groups. This exemption addressed those concerns while requiring non-religious groups, such as for-profit corporations, to adhere to the ACA.⁴⁴

Thus, this would not be an issue if the group at issue was the "Church of Hobby Lobby" or "Hobby Lobby Charities." Then, the insurance company would have to exclude contraceptive coverage while providing employees access to services without imposing any cost-sharing requirements. But Hobby Lobby Stores, *Incorporated* is a closely held corporation controlled by the Green family.⁴⁵

The Greens brought suit, along with two other similar corporate entities, in what was consolidated by the Supreme Court into *Burwell v. Hobby Lobby Stores, Inc.*, claiming it was their sincere Christian belief that life begins at conception and that to comply with the ACA's contraceptive mandate would violate their religion. They sued HHS (and other federal officials and agencies, which were all consolidated) under RFRA and the Free Exercise Clause. They sought to enjoin the portion of the mandate requiring coverage for the four contraceptives to which they objected.

Assessing the scope of the claim during oral arguments, Justice Sotomayor asked whether the Greens' religious objection applied only to contraceptives, or if it included other "items like blood transfusion[s], vaccines[] . . . [or] products made of pork."⁴⁶ There were

41. Cathy Lynn Grossman, *What's Abortifacient? Disputes over Birth Control Fuel Obama Care Fight*, WASH. POST (Jan. 28, 2014), http://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacare-fight/2014/01/28/61f080be-886a-11e3-a760-a86415d0944d_story.html [<http://perma.cc/URB8-Y6S5>].

42. *Id.*

43. Day et al., *supra* note 28; *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) ("Any religious nonprofit is also exempt [from the HHS Mandate] 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.").

44. The Supreme Court has had two opportunities to invalidate part of the ACA. Both times it has upheld the law. *King v. Burwell*, 135 S. Ct. 2480 (2015); *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

45. *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).

46. Transcript of Oral Argument at 4, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 12-345, 13-356), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf [<http://perma.cc/MJ8X-HYNG>].

additional concerns: could “any claim . . . that has a religious basis [allow] an employer [to] preclude the use of those items as well?”⁴⁷ “Does the creation of the exemption relieve me from paying taxes when I have a sincere religious belief that taxes are immoral?”⁴⁸

Of the twenty FDA-approved contraceptives, the *Hobby Lobby* plaintiffs objected to only four.⁴⁹ Nevertheless, “[o]ver 100 lawsuits have been filed in federal court challenging the ACA’s birth control coverage benefit.”⁵⁰ For example, the Hahn family, owners of for-profit Conestoga Wood Specialties, brought a claim similar to the Greens.⁵¹ That claim was rejected by the district court and the Third Circuit Court of Appeals.⁵² Both courts held that a for-profit corporation could not “engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA” and that the mandate did not impose any requirements on the Hahns in their personal capacity.⁵³

The Greens also lost in district court, but the Tenth Circuit Court of Appeals reversed that decision.⁵⁴ The court held that the Greens’ businesses are “persons” under RFRA, that the Greens “established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement,”⁵⁵ and that HHS “has not shown a narrowly tailored compelling interest to justify this burden.”⁵⁶ Alternatively, the court held that HHS had not proved that the mandate was the “least restrictive means” of furthering a compelling governmental interest.⁵⁷

B. *Holdings*

A 5–4 majority of the Court agreed with the Greens. It held that RFRA applies to regulations for closely held for-profits and that the ACA’s contraceptive mandate substantially burdens the exercise of religion.⁵⁸

47. *Id.* at 4.

48. *Id.* at 85.

49. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1124–25.

50. *Challenges to the Birth Control Coverage Benefit*, NAT’L WOMEN’S L. CTR., <http://www.nwlc.org/challenges-birth-control-coverage-benefit> [<http://perma.cc/QG V2-BLQ8>].

51. *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 380 (3d Cir. 2013), *rev’d and remanded sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

52. *Id.* at 381.

53. *Id.*

54. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1114.

55. *Id.* at 1121, 1129.

56. *Id.* at 1128.

57. *Id.* at 1144.

58. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2775 (2014).

1. RFRA Applies to Regulations of Closely Held For-Profits

To extend RFRA to corporations, the majority employed the Dictionary Act, which defines “person” as generally used in federal statutes. Under the Act, “the wor[d] ‘person’ . . . include[s] corporations, companies, association[s], firms, partnerships, society, and joint stock companies, as well as individuals.”⁵⁹

In a strong dissent, Justice Ginsberg argued in part that one of the primary benefits of incorporation is that “shareholders are not responsible for the liabilities of the corporation.”⁶⁰ This is “one of the key benefits of the corporate form.”⁶¹ Hobby Lobby was trying to have it both ways—relying on its incorporation to shield itself from liability while invoking its corporate personhood to exempt itself from a provision of the health care law.⁶² The majority rejected an assertion by Justice Ginsberg that, by rejecting an amendment to the 2012 Women’s Health Amendment (which expanded the ACA) that would have “broadly exempt[ed] claims of conscience,” Congress “showed an intention to limit what entities could bring claims.”⁶³

2. The Contraceptive Mandate Substantially Burdens Exercise of Religion

The majority accepted the sincerely held belief of the Greens against providing contraceptive coverage for employees. To answer whether the contraceptive mandate substantially burdens the exercise of Hobby Lobby’s religion in the affirmative, the majority relied on what they considered “a better alternative accommodation.”⁶⁴ HHS has already created an alternative accommodation for genuinely religious employers like churches and religious nonprofits: an employer required to provide contraceptive coverage under the ACA can object and exclude coverage of contraceptives.⁶⁵ Insurance companies would then pick up the cost because the cost of contraceptives is less than the

59. McDonnell, *supra* note 15, at 17 (third alteration added) (internal quotations omitted) (quoting 1 U.S.C. § 1 (2012)) (discussing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2768).

60. *Id.* at 22 (citing Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 6–8, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356)); *see also* *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) (“By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations.”).

61. *Id.*

62. *Id.* (citing Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 13–16, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356)).

63. Greenawalt, *supra* note 24, at 15 (discussing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2788–90 (Ginsburg, J., dissenting) and *id.* at 2775 n.30 (majority opinion)).

64. McDonnell, *supra* note 15, at 56 (discussing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780–82).

65. *Id.* at 57 (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782).

“expected savings in reduced services for pregnant women” realized by the insurance company.⁶⁶

Justice Kennedy, the deciding vote in striking down the contraceptive mandate, wrote a concurrence centered on the better alternative accommodation approach,⁶⁷ which “works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it.”⁶⁸ His focus was “on how well this accommodation balances all competing interests, and on how narrow it is and how much tougher the questions become where insurers are not willing to step into the gap.”⁶⁹ For Kennedy, accommodating the government’s interest in ensuring women have access to contraceptives was not difficult:

[T]his is not a case where it can be established that it is difficult to accommodate the government’s interest, and in fact the mechanism for doing so is already in place. . . .
 . . . [T]his existing model, designed precisely for this problem, might well suffice to distinguish the instant case from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.⁷⁰

C. *Implications*

Most people do not think of “corporations as persons exercising religion.”⁷¹ It would be hard to find a church large enough to hold 600-plus Hobby Lobby stores.⁷² After the Court’s 2010 decision in *Citizens United*⁷³—allowing unlimited funds to flow to candidates from corporations—perhaps *Hobby Lobby* should not have come as a shock. The Roberts Court has consistently ruled on the side of increased rights for corporations.⁷⁴ While the majority can point to the text of its opinion to make the claim that the decision was limited, subsequent action by the Court reveals that to be false.⁷⁵ Instead, some hypothetical expansive scenarios posited by the dissenting justices are already taking place.

66. *Id.*

67. See McDonnell, *supra* note 15, at 56–57 (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring)).

68. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

69. McDonnell, *supra* note 15, at 58 (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786–87).

70. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786–87.

71. Greenawalt, *supra* note 24, at 17.

72. *Our Company*, HOBBY LOBBY STORES, <http://www.hobbylobby.com/stores/stores.cfm> [<http://perma.cc/P3Z5-RN5L>].

73. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

74. See McDonnell, *supra* note 15, at 3 (“[*Hobby Lobby*] is seen as part of an ongoing movement by the Court’s conservative majority to tilt the playing field towards corporations.”).

75. See *infra* Section III.C.3.

1. Majority

The majority claimed the “decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs.”⁷⁶ Responding to questions asked by some members of the Court at oral arguments, the majority stated that “[o]ther coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.”⁷⁷ Justice Kennedy’s concurrence emphasizes that this accommodation is limited and that the issue would be more difficult if insurers were not willing to pay for the expense caused by the exemption.⁷⁸ Given the challenges being brought by religious employers, Justice Kennedy and his colleagues may be answering this question sooner than later.

2. Dissent

The dissent favored taking an objective approach, finding the link between the religious belief and the ACA requirement “too attenuated to rank as substantial.”⁷⁹ It treated the question of attenuation as an objective matter of law⁸⁰: the further disconnected the link between religious belief and statutory requirement, the more likely it is to be found too attenuated and not substantial. The gap between the owners of Hobby Lobby and the employee’s actual use of the contraception required by the ACA was simply too disconnected to be a substantial burden.⁸¹

Justice Ginsberg also questioned whether RFRA would exempt commercial businesses that wanted to discriminate based on race, religion, sex, or sexual orientation on religious grounds.⁸² The majority’s

76. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

77. *Id.*

78. McDonnell, *supra* note 15, at 58 (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring)).

79. *Id.* at 51 (internal quotations omitted) (quoting *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting)).

80. *Id.*

81. Greenawalt, *supra* note 24, at 24.

82. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 93 (2015); see also Berg, *supra* note 3, at 128–29 (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2804–05 (Ginsburg, J., dissenting) (citing *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff’d in relevant part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individua[l] living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonis-

response to this question only mentioned discrimination based on race: “The Government has a compelling interest in providing an equal opportunity to participate in the work–force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”⁸³ By not addressing other grounds for discrimination, the possibility remains that the majority may consider such grounds appropriate for exemption under RFRA.⁸⁴ If nothing else, refusing to respond to all the suggested rationales for potential exemptions sends a message to would-be challengers: proceed.

3. Subsequent Cases

Only three days after *Hobby Lobby*, the Court further expanded its reach by granting a preliminary injunction in *Wheaton College v. Burwell*.⁸⁵ Injunctive relief is an “extraordinary remedy.”⁸⁶ Granting “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.’”⁸⁷ Here, a religious, nonprofit, liberal arts college in Illinois argued that simply filing a form to opt out of the contraceptive coverage mandate would substantially burden its religious exercise. The Court agreed, despite concluding earlier in that week that the challenged accommodation “constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty.”⁸⁸ The dissenting Justices in *Hobby Lobby* denounced the majority for its disregard of precedent established just three days prior and accused it of “undermin[ing] the confidence of this institution”⁸⁹:

Those who are bound by our decisions usually believe they can take us at our word. Not so today. 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.⁹⁰

tic to the Bible,” including “fornicators and homosexuals”) (internal quotations omitted), *appeal dismissed*, 478 U.S. 1015 (1986); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2014)).

83. Lupu, *supra* note 82, at 93 & n.292 (discussing and quoting *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2783 (majority opinion)).

84. *Id.* at 93.

85. Berg, *supra* note 3, at 126 n.120; *see* *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

86. *Wheaton Coll.*, 134 S. Ct. at 2810 (Sotomayor, J., dissenting).

87. Day et al., *supra* note 28, at 104 (citing *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting)).

88. *Wheaton Coll.*, 134 S. Ct. at 2808 (quoting *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759).

89. *Id.* (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2801–02 (Ginsburg, J., dissenting)).

90. *Id.* (citation omitted) (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2801–02 (Ginsburg, J., dissenting)).

If the foundation of *Hobby Lobby* majority and concurrence was the pre-existing governmental accommodation, that the majority of the Court in *Wheaton* concluded that the accommodation likely violated RFRA reduced its previous opinion to “smoke and mirrors.”⁹¹ Indeed, *Wheaton* went even further than *Hobby Lobby*.⁹² It claimed its religious freedom was violated because a third party had to comply with the HHS mandate in its place.⁹³ As Justice Sotomayor stated, “[n]ot every sincerely felt ‘burden’ is a ‘substantial’ one, and it is for courts, not litigants, to identify which are.”⁹⁴ One should note that Justice Breyer, in the *Hobby Lobby* minority, joined in the majority in *Wheaton*.

New Mexico has both a state version of RFRA and a Human Rights Act (“NMHRA”), a nondiscrimination ordinance prohibiting discrimination in places of public accommodation. In *Elane Photography v. Willock*,⁹⁵ the plaintiff contacted a photography studio to get a photographer for her wedding to another woman. Owners objected “as a matter of conscience to creating pictures or books that will tell stories or convey messages contrary to their deeply held religious beliefs . . . [because they believed] marriage is the union of a man and a woman.”⁹⁶ After Elane Photography studio refused to photograph the wedding of a same-sex couple, the couple brought a claim under NMHRA. Elane claimed an exemption under the statute, asserting that religious organizations can decline same-sex couples as customers. It also claimed that being a commercial, for-profit entity did not diminish its First Amendment rights, and the Commission’s enforcement of the NMHRA here constituted unlawfully compelled speech in violation of those rights.⁹⁷ “[T]he New Mexico Human Rights 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”⁹⁸ The Supreme Court of New Mexico acknowledged “[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.”⁹⁹ Nevertheless, the court held that the photography studio’s reading of the statutory exception was overly broad.¹⁰⁰ The

91. Day et al., *supra* note 28, at 104.

92. *Id.*

93. *Id.*

94. *Wheaton Coll.*, 134 S. Ct. at 2812.

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

96. Petition for a Writ of Certiorari at i, 6, *Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014) (No. 13–585), 2013 WL 6002201.

97. *Elane Photography, LLC v. Willock*, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009).

98. Day et al., *supra* note 28, at 93.

99. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 75 (N.M. 2013).

100. *Id.* at 74–75.

owners of the photography studio appealed to the U.S. Supreme Court, which denied certiorari.¹⁰¹

The plaintiffs against whom Elane discriminated are hardly alone. Indeed, *Hobby Lobby* has increased litigation by would-be customers who have pushed back against businesses that refused to serve them. A gay couple in Washington sued a florist who refused to provide flowers for their commitment ceremony.¹⁰² An LGBT organization sued a Christian-owned t-shirt company that refused to print shirts because it disagreed with the organization's message.¹⁰³ And a couple sued a bakery for refusing to sell them a wedding cake because of their sexual orientation.¹⁰⁴ These are just a few examples of recent court cases.

This issue is likely to come up in the context of government contractors, particularly after the President's 2014 amendment to a long-standing executive order concerning nondiscrimination on the part of federal government contractors. Under the amendment, contractors are now prohibited from discriminating in employment on the basis of sexual orientation or gender identity.¹⁰⁵ Current or potential federal contractors could arguably refuse to hire someone who is openly LGBT or refuse to provide equal health benefits to a same-sex spouse, citing religious reasons.¹⁰⁶ The federal government has contracts with an enormous number of businesses and corporations, so the reach of this new nondiscrimination provision cannot be underestimated.

The question of recognition of same-sex marriage and religious beliefs may also come up under an amendment to the Family and Medical Leave Act ("FMLA")¹⁰⁷ if an employer objected to an employee's request for leave to take care of a same-sex spouse on religious grounds. In June 2014, the U.S. Department of Labor proposed a rule that would revise the definition of "spouse" in FMLA in light of the Supreme Court's 2013 decision on same-sex marriage in *United States v. Windsor*.¹⁰⁸ The new rule would amend the definition of spouse and provide FMLA leave for an employee in a same-sex marriage valid in the state in which it was celebrated. This requirement applies regard-

101. *Elane Photography*, 134 S. Ct. at 1787.

102. *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct. filed Feb. 18, 2015).

103. *Baker v. Hands On Originals, Inc.*, No. 03-12-3135 (Lexington-Fayette Urban Cty. Human Rights Comm'n filed Nov. 13, 2012), *rev'd sub. nom.* *Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n*, No. 14-CI-04474 (Fayette Cir. Ct., Civ. 3d Div. Apr. 27, 2015).

104. *Craig v. Masterpiece CakeShop, Inc.*, No. CR 2013-0008 (Colo. Admin. Ct. Dec. 6, 2013).

105. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

106. *Id.*

107. The Family and Medical Leave Act of 1993, 79 Fed. Reg. 36,445 (June 27, 2014) (to be codified at 29 C.F.R. 825.102).

108. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

less of whether the state of residence recognizes the validity of the marriage. So, for example, a same-sex employee legally married in California (where same-sex marriage is legal) but residing in Texas (where same-sex marriage is illegal and not recognized) could request leave under FMLA to take care of his or her spouse. FMLA provides for *unpaid* leave, so that removes one argument as to the burden faced by the employer. But as seen recently, the Court either makes no inquiry into how substantial that burden had to be (*Hobby Lobby*) or recognizes even a slight inconvenience as amounting to a burden (*Wheaton College*). Both lines of reasoning distort RFRA's purpose and the interests it was intended to protect.

IV. "SUBSTANTIAL BURDENS" ON "SINCERELY HELD BELIEFS"?

The purpose of RFRA is to ease the burden faced by people of faith forced to compromise their religious beliefs if they comply with a certain statute. Easing this burden should focus on heady moral dilemmas, not just mere inconveniences. Without courts examining the sincerity of the purported religious beliefs of the plaintiffs claiming protection under RFRA, the potential for abuse increases.¹⁰⁹

The majority takes a subjective approach to the question of substantial burdens on sincerely held beliefs: if a corporation says it is a substantial burden, it is a substantial burden. No judicial inquiry is required. Essentially, this amounts to a "grant of exemption without real examination."¹¹⁰ This approach provides complete deference to the corporation without even a passing inquiry into the alleged burden. It should be noted that Hobby Lobby's retirement plan "holds \$73 million in mutual funds with investments in companies that make abortion drugs."¹¹¹ Puzzlingly, some of the companies that Hobby Lobby invests in manufacture the same contraceptives to which the company now objects.¹¹²

The dissent suggests taking an objective approach, drawing the line where the connection between burden and belief is "too attenuated to rank as substantial."¹¹³ Of course, courts would still have to draw a line *somewhere*, but this approach would at least require more than a mere assertion by a corporation with regard to its sincerely held religious beliefs.

109. McDonnell, *supra* note 15, at 50.

110. Greenawalt, *supra* note 24, at 36.

111. Day et al., *supra* note 28, at 97 (quoting 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/> [<http://perma.cc/WHU6-4367>]).

112. *Id.*

113. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (2014).

A. *Shift over Two Decades*

The cultural and political landscapes have changed since RFRA passed in 1993. With these changes, the beneficiaries of RFRA have also shifted. More “mainstream” religious organizations objected to the contraceptive coverage provision in the ACA. Similarly, many large religious organizations may object to enacted or proposed anti-gay discrimination laws. The 1993 provisions protected religious groups outside the mainstream, but today are being used by powerful religious voices to protest laws and policies with which they disagree. This is part of an overall trend of attempting to nullify secular law by claiming attacks on religion, with some going as far as to accuse the President of waging a “war on religion.”¹¹⁴

Others see similarities in the two groups, “compar[ing] religious conservatives with gays and lesbians and argu[ing] that both groups should be protected. Because the two groups ‘are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.’”¹¹⁵ Supporters of the decision in *Hobby Lobby* should question how they would react to intolerance directed toward them under the guise of a sincerely held religious belief. Religious conservatives are not a numerical majority in this country, yet their ideology pervades American politics and policy.¹¹⁶ But religious conservatives could see a circumstance in the not-too-distant future when someone is asserting a right to discriminate against a belief they hold close. Demographics and attitudes are changing, making it possible that those in positions of control and power today will not have the same status one day.

A 2013 Pew Research Center survey found that, for the first time, a majority (51%) of Americans support same-sex marriage.¹¹⁷ Yet in the same survey, 45% of Americans were found to view homosexual-

114. Gedicks & Van Tassel, *supra* note 23, at 383 (citing PHYLLIS SCHLAFELY & GEORGE NEUMAYR, *NO HIGHER POWER: OBAMA’S WAR ON RELIGIOUS FREEDOM* (2012); Bill Donohue, *Obama’s War on Religion*, CATALYST (Oct. 2012), <http://www.catholicleague.org/obamas-war-on-religion-2/> [<http://perma.cc/XD8A-NQX5>]; and Rachel Weiner, *Romney: Obama Waging ‘War on Religion,’* WASH. POST (Aug. 9, 2012), http://www.washingtonpost.com/blogs/the-fix/post/romney-obama-waging-war-on-religion/2012/08/09/192c4e02-e213-11e1-a25e-15067bb31849_blog.html [<http://perma.cc/E5UG-6PEX>] (“During the Republican primary, when the Health and Human Services Department mandated that most insurance cover contraception without a co-pay, charges of a war on religion were commonplace.”)).

115. Berg, *supra* note 3, at 113 (quoting Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 5 (2013), <http://www.virginialawreview.org/sites/virginialawreview.org/files/LaycockBerg.pdf> [<http://perma.cc/BA6Z-GS4N>]).

116. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 15–16 (2004).

117. *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable,’* PEW RES. CTR. (June 6, 2013), <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/> [<http://perma.cc/ZYG9-TPBJ>].

ity as a sin, and roughly half (52%) cited moral objections, religious conflicts, or the Bible to justify their opposition to gay people.¹¹⁸ Among Americans who attend religious services regularly, two-thirds say homosexuality conflicts with their religion.¹¹⁹ It should come as no surprise, then, that 58% of the LGBT community report being victims of discrimination because of sexual orientation or gender identity.¹²⁰

Religion and sexual orientation are indelibly tied to one's personal identity, and no one has suggested that the Hobby Lobby owners change their religious beliefs.¹²¹ Likewise, courts should protect LGBT employees from assertions that they "change" their sexual orientation. Such thinking is already present in biased attitudes of health professionals—often rooted in religious views—that contribute to the persistent health disparities affecting the LGBT community.¹²²

B. *Contraceptive-like Method to Prevent HIV*

Pre-Exposure Prophylaxis ("PrEP") is a new scientific advancement in the prevention of human immunodeficiency virus ("HIV")¹²³ that may give rise to religious exemption claims. Recent FDA approval of tenofovir-emtricitabine for the prevention of HIV prescribes a common antiretroviral drug used to treat HIV/AIDS to individuals who are HIV-negative to prevent transmission of the virus. The medication, taken once daily, effectively protects the HIV-negative individual should he or she become exposed to HIV through sexual contact. In one study, PrEP, "used in combination with condoms and counseling reduced HIV transmission by 96.4%."¹²⁴ The public health implications of this new prevention method are significant, but there are challenges to its use and acceptance, not the least of which is the adoption by businesses or companies that may disagree with the private behavior (i.e., sex) of its employees. This should sound all too familiar . . .¹²⁵

But unlike contraception, which is relatively inexpensive and poses little financial burden to the employer, the cost of PrEP is significant

118. *Id.*

119. *A Survey of LGBT Americans*, PEW RES. CTR. (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/8> [<http://perma.cc/729F-LE3Z>].

120. *Id.*

121. Berg, *supra* note 3, at 13–14 ("Both sexual orientation and religion are important to personal identity, and consequently either impossible to change, or very difficult to change without substantial costs to one's sense of integrity.").

122. See INST. OF MED. OF THE NAT'L ACADEMIES, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* (2011).

123. *PrEP*, CENTERS FOR DISEASE CONTROL & PREVENTION (June 25, 2015), <http://www.cdc.gov/hiv/basics/prep.html> [<http://perma.cc/9W4M-SFQN>].

124. Myron S. Cohen et al., *Antiretroviral Treatment of HIV-1 Prevents Transmission of HIV-1: Where Do We Go from Here?*, 382 LANCET 1515, 1515 (2013).

125. See Julie E. Myers & Kent A. Sepkowitz, *A Pill for HIV Prevention: Déjà Vu All Over Again?*, 56 CLINICAL INFECTIOUS DISEASES 1604 (2013).

(albeit not when compared to the cost of treating someone diagnosed with HIV/AIDS, which most insurances already cover). There are also barriers to accessing PrEP, as knowledge of this newer prevention method has yet to be diffused throughout the communities that could most benefit from its use.¹²⁶

When first introduced, contraceptives were not viewed as favorably as they are today. Opponents were concerned that access to contraception would encourage promiscuity and decrease morality.¹²⁷ The same can be said of PrEP detractors today. Blind to the fact that HIV continues to spread despite existing messages concerning HIV prevention, individuals and groups opposing PrEP worry that it will decrease condom use and increase casual sex. Similar arguments against contraception faded over time, and it is likely that this will also occur as more people are educated on PrEP and its usage. Its incredible success rate, when combined with other risk reduction strategies, alone is cause for the support of PrEP, regardless of any personal feelings toward its morality. Similarly, regardless of one's views on the morality of female contraceptives, even their biggest opponents are reluctant to make claims against their efficacy.

Public opinion on contraception is overwhelmingly positive, with the vast majority of females using it at some point during their lifetime. Still, companies like Hobby Lobby were allowed to refuse to cover its use because of their religious beliefs. So when considering a medication to prevent HIV—a sexually transmitted virus, with the majority of those who become infected with it being men who have sex with men—it is not a stretch of the imagination to think an employer may raise an objection to such coverage because it sincerely believes being gay is wrong or unnatural. While approximately half of the population likely has had a personal encounter with contraception that may influence one's views on its morality,¹²⁸ half the population is certainly not gay.¹²⁹

126. See Michael Horberg & Brian Raymond, *Financial Policy Issues for HIV Pre-Exposure Prophylaxis: Cost and Access to Insurance*, 44 AM. J. PREVENTIVE MED. S125, S125 (2013).

127. See BERNARD ASBELL, *THE PILL: A BIOGRAPHY OF THE DRUG THAT CHANGED THE WORLD* (1995).

128. Females make up 50.8% of the U.S. population. U.S. CENSUS BUREAU, C2010BR-03, 2010 CENSUS BRIEFS: AGE AND SEX COMPOSITION: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> [<http://perma.cc/9REC-MA77>]. “More than 99% of women 15–44 years of age who have ever had sexual intercourse with a male . . . have used at least one contraceptive method.” Nat'l Ctr. for Health Statistics, *Use of Contraception in the United States: 1982–2008*, 23 VITAL & HEALTH STATISTICS No. 29, 1 (2010), http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf [<http://perma.cc/EZ3V-PLFC>].

129. The Williams Institute at UCLA School of Law compared four large, national, population-based surveys that estimate between 2.2% and 4.0%, or between 5.2 million and 9.5 million, of U.S. adults identify as LGB or LGBT. Gary J. Gates, *LGBT Demographics: Comparisons among Population-Based Surveys*, WILLIAMS INST.,

Regardless of whether an employer has personal experience with contraceptives because she is female, or can sympathize with the LGBT community because he is gay, businesses ultimately pick up the costs distributed across society. Unintended pregnancies and HIV infections impose financial burdens on individuals, businesses, and corporations that pay taxes. So, like it or not, employers will pay one way or another.

V. PROTECTING LGBT EMPLOYEES

The implications of the *Hobby Lobby* decision have the potential to disproportionately impact the LGBT community, which is already marginalized and faces discrimination on a daily basis. In expanding exemptions for religious beliefs, the Court left the LGBT community more vulnerable to attack by individuals, businesses, and corporations who would use religion as a weapon. The solution is to amend RFRA to better protect the rights of the LGBT community while balancing exemptions for religious beliefs.

A. *Hobby Lobby Opened the Door, Hitting the LGBT Community in the Face*

“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs”¹³⁰ The *Hobby Lobby* majority swung that door wide open without a cursory inquiry as to who was standing on the other side.

Traditionally, the Court has upheld federal laws “afford[ing] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹³¹ Indeed, the Court has held these decisions as being among “the most intimate and personal choices a person may make in a lifetime.”¹³² The judiciary has been a successful venue to not only challenge interconnected legal and social stigmas but to grow movement support for the targeted group.¹³³ Post-*Hobby Lobby*, this is no longer the case.

Instead, the majority “open[ed] the door to similar denials of equal compensation, health care access, and other equitable treatment for

UCLA SCH. L. (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf> [<http://perma.cc/5VM9-6EFX>].

130. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

131. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

132. *Id.* at 578 (quoting *Casey*, 505 U.S. at 851).

133. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422 (2001) (“[C]ourts as much as legislatures have been avenues for the [Identity-Based Social Movement] to contest its interconnected legal and social stigmas. Most surprisingly, legal forums and actors provided backdrop for many of the dramatic events that helped turn a nascent reform movement into a mass social movement.”).

LGBT people, persons with HIV, and anyone else whose family life or health need diverges from their employers' religious convictions."¹³⁴ It remains to be seen just how far denials of equitable treatment under the law will be stretched under the guise of religion. Can religious business owners who object to blood transfusions be exempted from covering such medical services for their employees?¹³⁵ What about people of faith who, for centuries, have objected to childhood vaccinations?¹³⁶ Or those who would "selectively exclude coverage for 'sinful' medications that control pain, alleviate depression, or manage HIV[?]"¹³⁷ These outstanding questions, the answers to which could affect the health and well-being of millions of Americans, necessitate a change in RFRA.

B. *Amend RFRA*

Congress should amend RFRA to reemphasize its application is permissive, not mandatory. This would empower courts to look more carefully at the sincerity of a religious belief, especially when such a belief results in cost-savings to the business. In such cases, a business may have a financial motivation more so than a religious one. While this was not the case in *Hobby Lobby*—"insurance coverage should be no cheaper if the contraceptive coverage is dropped"¹³⁸—it is not difficult to imagine a company faced with covering PrEP (at a cost of over \$1,000 per month per person) suddenly discovering a "sincerely held belief" against gay and lesbian individuals.

Congress can protect religious freedom while preserving minority rights by adopting an "inter-subjective approach" that "would look not just to sincerity, but also ask how important a particular belief is within the relevant belief system."¹³⁹ Currently, such an amendment is not possible because of RLUIPA, which specifies that the exercise of religion covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹⁴⁰ Thus, RLUIPA would need to be amended as well.

As a practical matter, given the current ideological composition of Congress, it is unlikely that any amendment would gain much momen-

134. Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. et al. in Support of the Government at 28, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) [hereinafter Brief of Amici Curiae Lambda Legal et al.].

135. J. Lowell Dixon & M. Gene Smalley, *Jehovah's Witnesses: The Surgical/Ethical Challenge*, 246 J. AM. MED. ASSOC. 2471 (1981).

136. See, e.g., Andrew Dickson White, *Theological Opposition to Inoculation, Vaccination, and the Use of Anesthetics*, in A HISTORY OF THE WARFARE OF SCIENCE WITH TECHNOLOGY IN CHRISTENDOM (1898), <http://abob.libs.uga.edu/bobk/whitem10.html> [<http://perma.cc/7XRH-MG7F>].

137. Brief of Amici Curiae Lambda Legal et al., *supra* note 134, at 30.

138. McDonnell, *supra* note 15, at 52.

139. *Id.* at 51.

140. 42 U.S.C. § 20000cc-5(7)(A) (2012).

tum or substantial support, much less come anywhere close to the near-unanimous passage of RFRA in the 1993 Congress. But current legislators could learn from history: the groups most active in pushing for passage of the 1993 RFRA were ideologically left of center. These groups' previous support for religious freedom for religious minorities backfired in the eyes of many who view *Hobby Lobby* as incorrectly decided or who are sympathetic to the dissent's approach to religious accommodations. Two decades later, the groups making the religious liberty claims are different. Two decades from now, the players may be reversed, and individuals with similar ideologies to the justices in the majority in *Hobby Lobby* may be butting up against religious freedom arguments made by *their* employers. When the proverbial shoe is on the other foot, attitudes toward amending RFRA may be different. Now is the time to amend its language so courts can better apply it in the future, regardless of who is claiming an exemption under RFRA and who is claiming harm by the purported exemption.

A proper balance is possible if people on both sides of the debate imagine their particular group or belief as being in the minority, under attack by a majority armed with religion, and with a judiciary unwilling to take even a slightly critical look at that majority's purported beliefs. When approached from this perspective, an amended RFRA would cover only substantial religious beliefs that are not too attenuated from the statute or regulation being challenged.

VI. CONCLUSION

The Supreme Court in its 2014 decision in *Hobby Lobby* broadly expanded so-called religious freedom protections in the Religious Freedom Restoration Act by striking down a requirement that employers provide health insurance coverage for certain methods of contraception—an issue that had widespread public support and use. In doing so, it opened the floodgates for employers to claim an exemption based upon *any* “sincerely held” religious belief. Without inquiry into the sincerity of that belief, businesses and corporations are free to adopt or assert beliefs that could lead to increased discrimination against employees. This is especially troublesome for marginalized groups such as the LGBT community, which is already on the receiving end of discrimination under the pretext of religion. To prevent future misuse of these exemptions, Congress should amend RFRA so that courts are permitted to assess the belief being asserted and contrast it with the potential harm if an exemption is allowed. In doing so, RFRA can return to its purpose of protecting religious freedom, while not being used as a tool to perpetuate discrimination.