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# Burwell v. Hobby Lobby Stores, Inc.: Lots of Smoke, But No Fire

W. C. Casper

Edward J. Schoen

Rowan University, schoen@rowan.edu

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**BURWELL V. HOBBY LOBBY STORES, INC.:**  
**LOTS OF SMOKE, BUT NO FIRE**

W. CAMRON CASPER\*  
EDWARD J. SCHOEN\*\*

**I. INTRODUCTION**

In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> the U.S. Supreme Court decided that the United States Department of Health and Human Services' (HHS) requirement that closely held corporations provide health-insurance coverage for methods of contraception, which were contrary to the genuine religious beliefs of the companies' owners, violated the Religious Freedom Restoration Act of 1993 (RFRA).<sup>2</sup> RFRA requires that strict scrutiny applies to any federal government action which substantially burdens the exercise of religion, *i.e.*, the government action is illegal unless it is the least restrictive means of advancing a compelling government interest.<sup>3</sup>

*Hobby Lobby* is the second case to come before the U.S. Supreme Court challenging all or part of the Patient Protection and Affordable Care Act of 2010 (ACA)<sup>4</sup>. The first case, *National Federation of Independent Businesses v. Sebelius (NFIB)*,<sup>5</sup> upheld ACA's requirement that all individuals obtain health insurance, turning back a direct and audacious challenge to ACA that,

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\*Ph.D., Assistant Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey.

\*\*J.D., Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey. The authors would like to thank Joel Rudin, Ph.D., Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey, for his insights into the human resource management implications of *Hobby Lobby*.

<sup>1</sup>134 S. Ct. 2751 (2014). Justice Alito authored the majority opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy and Thomas joined. Justices Ginsburg, Sotomayor, Kagan and Breyer dissented.

<sup>2</sup>42 U.S.C. §§ 2000bb *et seq.* (2016).

<sup>3</sup>*Hobby Lobby*, 134 S. Ct. at 2759.

<sup>4</sup>Patient Protection and Affordable Care Act, PL 111-148, 124 Stat. 119 (2010) (codified as 42 U.S.C. § 18001 (2016)); 26 U.S.C. §§ 5000A(f)(2), 4980H(a), (c)(2) (2016).

<sup>5</sup>132 S. Ct. 2566, 2608 (2012) (“The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.”).

if it were successful, would have dismantled it. *Hobby Lobby* was a more modest approach which tackled only a portion of the contraceptive requirement, but it may encourage additional challenges to other parts of ACA, which if successful may bring down ACA one piece at a time.<sup>6</sup>

The owners of Hobby Lobby and many of their employees share a common religious belief — that certain forms of birth control cause abortion. In 1978, the U.S. Congress unequivocally declared that discrimination based on pregnancy was sex discrimination.<sup>7</sup> In 2000, the Equal Employment Opportunity Commission dictated that any insurance that has a prescription drug component cannot exclude birth control. If a plan excluded birth control, it was in violation of the 1964 Civil Rights Act.<sup>8</sup> On the March, 23, 2010, President Obama signed ACA into law. Following previous legislation and court directives, the plan included the proviso that contraceptive birth control must be provided. Additionally, the ACA indicated that the contraceptive must be available without co-pay and provided a list of the contraceptives that the plans are required to offer. When the government imposed this contraceptive mandate, the religious beliefs of many seemed to be at risk. Fueled by this impression, many employees and some employers loudly expressed their concerns. The fire was lit.

## II. THE “WAR ON WOMEN” VERSUS AN “ATTACK ON RELIGIOUS LIBERTY”

To understand the fervor associated with this case, it is important to frame the issue as perceived by the public. In May of 2015, the President Obama confirmed that all covered organizations must provide at least one form of all 18 FDA-approved methods (each method may have multiple options) for female birth control. They include: sterilization surgery, surgical sterilization implant, implantable rod, copper intrauterine device, IUDs with progestin (a hormone), shot/injection, oral contraceptives (the pill), with estrogen and progestin, oral contraceptives with progestin only, oral

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<sup>6</sup> Steven D. Schwinn, *Does the Contraception Requirement in the Affordable Care Act Violate the Free Exercise Rights of Individual Owners of Family Businesses or the Rights of the Businesses Themselves?*, 41 ABA PREVIEW 247, 251 (2014).

<sup>7</sup> The Pregnancy Discrimination Act of 1978, Pub.L. 95-555, 92 Stat. 2076 (1977) (codified as 42 U.S.C. § 2000e (2016)), amended the definitions section of Title VII to add a new subsection (k) reading in part as follows: “The terms ‘because of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . .” See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE PREGNANCY DISCRIMINATION ACT (1978).

<sup>8</sup> THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMMISSION DECISION ON COVERAGE OF CONTRACEPTION (2000).

contraceptives, known as extended or continuous use that delay menstruation, the patch, vaginal contraceptive ring, diaphragm, sponge, cervical cap, female condom, spermicide, emergency contraception (Plan B/morning-after pill), and emergency contraception (a different pill called Ella)<sup>9</sup>

Originally, ACA did not actually mandate coverage of the controversial birth control items.<sup>10</sup> The U.S. Department of Health and Human Services (HHS) announced the final rules on January 20, 2012.<sup>11</sup> HHS secretary Kathleen Sebelius stated that health insurance coverage with no-cost sharing must cover the FDA-list of approved contraceptives and services for women in their reproductive age. Male contraception was not eligible. In a limited consideration of religious beliefs, ACA did not apply to churches; however, the mandate applied to all other employers (including closely-held for profit companies that had a religious ownership) and educational institutions. In this phase, it controversially covered other Christian institutions including Christian based hospitals, charities, and universities thus suggesting that the administration was unconcerned with religious based organizations with moral foundations.<sup>12</sup>

The Blunt Amendment<sup>13</sup>, which proposed exclusion of organizations with moral objections, "would have allowed employers to refuse to include contraception in health care coverage if it violated their religious or moral beliefs."<sup>14</sup> It was voted down by a narrow margin (51-48) in the Senate on March 1, 2012.<sup>15</sup> Many in the Senate believed that the broad scope coverage established by the HHS with regard to contraception coverage was morally questionable<sup>16</sup>.

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<sup>9</sup> Peter Sullivan, *HHS: Insurers must cover all birth control*, THE HILL., (May 11, 2015 12:41 PM).

<sup>10</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 8.

<sup>11</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, A STATEMENT BY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES SECRETARY KATHLEEN SEBELIUS (2012).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> S. Amdt. 1520 to S.Amdt. 1730 112<sup>th</sup> Congress (2011-2012) (April 6, 2016), <https://www.congress.gov/amendment/112th-congress/senate-amendment/1520>.

<sup>14</sup> John Parkinson, *Women's Health vs. Religious Freedom House Leaders Debate Birth Control Mandate*, ABC NEWS (March 1, 2012), <http://abcnews.go.com/blogs/politics/2012/03/womens-health-vs-religious-freedom-house-leaders-debate-birth-control-mandate/>.

<sup>15</sup> U.S. Senate Roll Call Votes 112<sup>th</sup> Congress-2<sup>nd</sup> session (March 1, 2012), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=2&vote=00024](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00024).

<sup>16</sup> Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL'Y & L. 343, 345-383 (2014).

The rhetoric continued as the GOP presidential candidates<sup>17</sup> declared the impending mandate was a direct attack on the constitutionally provided right of religious liberty. The U.S. Conference of Catholic Bishops joined the voices of dissent indicating that the required coverage was a compromise of religious liberties.<sup>18</sup> Other Christians-- especially Evangelicals-- were likewise opposed to the mandate.<sup>19</sup> Many organizations, including Planned Parenthood<sup>20</sup>, supported the law. Perhaps unnoticed by the public and media,<sup>21</sup> the arguments seemed very different than the scope of *Hobby Lobby*. The attention continued to focus on the traditional arguments framed as a “war against women” versus “religious liberties<sup>22</sup>.” The media predicted that Hobby Lobby would be a major decision with a large impact on society.<sup>23</sup>

The government proposed a compromise which narrowed the original law. The compromise allowed insurance companies to provide contraceptives directly without involvement by the religious organizations. On February 10, 2012, a compromise excluding religiously controlled organizations (especially colleges) from providing contraceptive coverage that they considered morally unacceptable was added.<sup>24</sup> Some accepted the compromise as a victory, but this opt-out excluded closely held businesses whose owners indicated strong religious beliefs that were contrary to the ACA mandate. In June of 2013, the Tenth Circuit Court of Appeals allowed a lawsuit<sup>25</sup> questioning the contraceptive coverage of the ACA to proceed; however, the scope of *Hobby Lobby* was much different and much narrower than the original polarizing arguments and publicly expressed beliefs. It was not about incursion on religious liberties; it was a case to determine if closely held for-profit companies could also be exempted from the contraceptive

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<sup>17</sup> Jonathon Capehart, *Hobby Lobby: Was Mitt Romney right?*, THE WASHINGTON POST (March 25, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/03/25/hobby-lobby-was-mitt-romney-right/>.

<sup>18</sup> Sullivan *supra* note 9.

<sup>19</sup> *Our First, Most Cherished Liberty*, U.S. CONFERENCE OF CATHOLIC BISHOPS (2012), <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm>.

<sup>20</sup> *The Affordable Care Act*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/newsroom/the-affordable-care-act>.

<sup>21</sup> Eugene Volokh, *Religious exemptions – a guide for the confused*, THE WASHINGTON POST (March 24, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/>.

<sup>22</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 159-160 (2014).

<sup>23</sup> Lyle Denniston, *Wider Impact of Hobby Lobby Ruling?*, SCOTUSBLOG, (July 1, 2014), <http://www.scotusblog.com/2014/07/wider-impact-of-hobby-lobby-ruling/>.

<sup>24</sup> Certain preventive services under the Affordable Care Act, 77 FR 16501, 16501-16508 (proposed Mar. 12, 2012).

<sup>25</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Justice Alito authored the majority opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy and Thomas joined. Justices Ginsburg, Sotomayor, Kagan and Breyer dissented.

mandate. Therefore, the final decision would not determine the government's right to impede religious freedoms, but it would determine if the RFRA would attach to Hobby Lobby. This presented a case much less generalizable to the larger population as originally perceived. To extend the metaphor, the fire was gone but the smoke was still thick, because many were still framing it as a war against women while others continued to frame it as a matter of religious freedom<sup>26</sup>.

### III. *BURWELL V. HOBBY LOBBY STORES, INC.*

In Part I of its decision, the Court scrutinizes the history of RFRA and the provisions to which the owners of the closely held corporations objected. In Part II of its decision, the Court examines the religious beliefs of the owners and family members of the closely held corporations. In Part III of its decision, the Court addresses the applicability of RFRA protections to closely held corporations. In Part IV of its decision, the Court determines whether or not ACA imposes a substantial burden on the exercise of religion rights of the owners of the closely held corporations. In Part V of its decision, the Court considers whether the ACA utilizes the least restrictive regulatory approach to achieve its objective.

#### A. *History of RFRA and Objectionable Provisions of ACA*

In reaching its decision, the Court first examined the scope of RFRA. Prior to the enactment of RFRA, the U.S. Supreme Court used a balancing test in examining whether government actions violated the Free Exercise Clause of the First Amendment. The Court determined “whether the challenged action imposed a substantial burden on the practice of religion, and, if it did, whether it was needed to serve a compelling government interest.”<sup>27</sup> This test was upended by the U.S. Supreme Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith*.<sup>28</sup> In *Smith*, two members of the Native American Church sought unemployment benefits from the State of Oregon after they were fired from their jobs for ingesting peyote for

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<sup>26</sup> Cf. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 78-80 (2015).

<sup>27</sup> *Hobby Lobby*, 134 S. Ct. at 2760. This test was used in *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that South Carolina could not constitutionally apply eligibility provisions of unemployment compensation statute so as to deny benefits to claimant who had refused employment, because her religious her religious beliefs, which would require her to work on Saturday), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16).

<sup>28</sup> 494 U.S. 872 (1990).

sacramental purposes. The State of Oregon denied the benefits, because consuming peyote was a crime; the Oregon Supreme Court, applying the balancing test, ruled the denial of benefits violated the Free Exercise Clause.<sup>29</sup> The U.S. Supreme Court reversed, ruling the balancing test “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” because every regulation of conduct as applied to a religious objector was presumed to be invalid, and the protection of religious liberty does not require such a result.<sup>30</sup>

Congress responded to *Smith* by enacting RFRA, which provides (1) laws that are neutral toward religion may impose the same burden on the exercise of religion as laws intended to burden the exercise of religion<sup>31</sup>; (2) the government is prohibited from substantially burdening a person’s exercise of religion even if it stems from a rule of general applicability<sup>32</sup>; and (3) the government is prohibited from substantially burdening the exercise of religion, unless the government demonstrates the burden furthers a compelling government interest and is the least restrictive means of attaining that interest.<sup>33</sup> Notably, however, RFRA identified the “Necessary and Proper” clause as the enumerated power for regulating federal agencies, and the exercise of free speech clause as the enumerated power for regulating the states.<sup>34</sup> The U.S. Supreme Court subsequently decided in *City of Boerne v. Flores*<sup>35</sup> that Congress exceeded its authority under the exercise of free speech clause, because the “stringent test RFRA demands” vastly exceeds “any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.”<sup>36</sup>

In response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>37</sup> RLUIPA amended RFRA’s definition of the exercise of religion to eliminate any reference to the First Amendment and to define the exercise of religion to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>38</sup> RLUIPA also mandated that the exercise of religion “be construed in favor a broad protection of religious exercise, to the maximum

<sup>29</sup> *Id.* at 875.

<sup>30</sup> *Id.* at 888. See *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (“neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest”).

<sup>31</sup> 42 U.S.C. § 2000bb(a)(2) (2016).

<sup>32</sup> *Id.* § 2000bb-1(a) (2016).

<sup>33</sup> *Id.* § 2000bb-1(b) (2016).

<sup>34</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).

<sup>35</sup> *Flores*, 521 U.S.

<sup>36</sup> *Id.* at 533-34.

<sup>37</sup> Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* (2016).

<sup>38</sup> 42 U.S.C. § 2000cc-5(7)(A) (2016).

permitted by the terms of this chapter and the Constitution.”<sup>39</sup> As amended, RFRA provides “very broad protection for religious liberty,” which goes “far beyond what this Court has held is constitutionally required.”<sup>40</sup>

Against this background, the Court examined the provisions of ACA which the owners of closely held corporations found objectionable. ACA requires all employers with 50 or more full-time employees to offer a group health plan or insurance coverage carrying minimum essential coverage. One of the required coverages is “preventive care and screenings” for women without “any cost sharing requirements.”<sup>41</sup> Included in this category were contraceptive methods, four types of which “may have the effect of preventing an already fertilized egg from developing further by inhibiting its attachment to the uterus.”<sup>42</sup> HHS exempted certain religious nonprofit organizations from the contraceptive mandate by permitting them to certify they objected to the requirement on religious grounds. Upon receipt of this notice, the group health insurance issuer excludes contraceptive coverage from the employer’s plan, and provides separate payments for contraceptive services without any charge or cost sharing to the exempt organization.<sup>43</sup>

### *B. Religious Beliefs of Owners of Closely Held Corporations*

The owners of two closely held corporations, Conestoga Wood Specialties and Hobby Lobby Stores, objected to the mandatory contraceptive medical coverage required by ADA. Conestoga Wood Specialties is owned by Norman and Elizabeth Hahn, who are devout members of the Mennonite Church, a Christian denomination, which opposes abortion. Conestoga Wood Specialties’ mission statement requires it to operate consistent with the “highest ethical, moral, and Christian principles”; and its vision and values statement commits the company to “reflect the Hahns’ Christian heritage.”<sup>44</sup> The directors of Conestoga Wood Specialties adopted a “Statement on the Sanctity of Human Life,” in which the Hahns express their beliefs that “human life begins at conception,” and that termination of human life after conception is a “sin against God to which they are held accountable.”<sup>45</sup> The Hahns and Conestoga Wood Specialties filed suit against HHS under RFRA seeking an injunction against the application of ACA’s contraceptive mandate, to which they object because

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<sup>39</sup> *Id.* § 2000cc-3(g).

<sup>40</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014).

<sup>41</sup> 42 U.S.C. § 300gg-13(a)(4) (2016).

<sup>42</sup> *Hobby Lobby*, 134 S. Ct. at 2762-2763.

<sup>43</sup> *Id.* at 2763.

<sup>44</sup> *Id.* at 2764.

<sup>45</sup> *Id.* at 2764-65.



“it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs,”<sup>46</sup> because they abort the fertilized egg.

Hobby Lobby Stores is owned and operated by David and Barbara Green and their three children. David Green serves as CEO of Hobby Lobby, and his three children serve as its president, vice president, and vice CEO. Hobby Lobby’s statement of purpose requires the Greens to honor the Lord and operate the company in accordance with Biblical principles. All of the Greens signed a pledge to operate the business consistent with their religious beliefs and to use their assets to support Christian ministries. Hobby Lobby Stores is closed on Sundays, does not engage in transactions that promote alcohol use, contributes profits to Christian missionaries and ministries, and purchases full-page newspaper ads urging readers to “know Jesus as Lord and Savior.”<sup>47</sup> The Greens too believe life starts at conception. They object to facilitating access to contraceptive devices that terminate pregnancies as contrary to their religious principles, and sued HHS to challenge the mandated contraceptive coverage under RFRA.

### *C. Applicability of RFRA Protections to Closely Held Corporations*

The Court prefaced its analysis of the applicability of RFRA to a closely held corporations by acknowledging that the corporation form of business is “simply a form of organization used by human beings to achieved desired ends,” involving shareholders, officers and employees; that employing a corporation as the vehicle to conduct business protects the rights of the corporation’s constituents<sup>48</sup>; and that corporations cannot do anything at all except for the humans who own, run, and work for them.<sup>49</sup>

The Court then advanced four arguments in favor of the proposition RFRA’s protections apply to closely held corporations and their owners. First, the Court noted, RFRA neither defines the term person nor excludes the definition of person in the Dictionary Act, which is employed to ascertain the meaning of any Act of Congress unless otherwise indicated.<sup>50</sup> The Dictionary Act defines the word person to “[include] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” There being nothing in RFRA to indicate

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<sup>46</sup> *Id.* at 2765.

<sup>47</sup> *Id.* at 2766.

<sup>48</sup> *Id.* at 2768.

<sup>49</sup> *Id.*

<sup>50</sup> 1 U.S.C. § 1 (2016).

The Dictionary Act is not applicable, the term person can include a corporation.<sup>51</sup>

Second, HHS conceded that nonprofit corporations, many of which are religious organizations, are protected by RFRA. But HHS could not advance, and the Court could find, a substantial reason the protection of religious freedom was not equally applicable to for-profit corporations. While religious nonprofit corporations further their religious autonomy and often individual religious freedom, there is no reason those justifications are inapplicable to for-profit corporations. Neither the nature of the corporate form nor the goal of making profits changes the objective of protecting religious freedom.<sup>52</sup> Indeed the incorporation law of Pennsylvania, in which Hobby Lobby is incorporated, permits for-profit corporations to pursue “any lawful purpose” or “act,” including the pursuit of profit in conformity with the owners’ religious principles,<sup>53</sup> and the incorporation law of Oklahoma, in which Conestoga Wood Specialties is incorporated, permits corporations to “conduct or promote any lawful business or purposes.”<sup>54</sup> Hence there is no inherent characteristic of Hobby Lobby or Conestoga Wood Products as for-profit corporations that precludes a RFRA claim to advance the religious liberty of the Hahns and the Greens.

Third, the Court rejected HHS’s argument that RFRA merely codified the Court’s pre-*Smith* Free Exercise Clause precedents, none of which decided for-profit corporations have free-exercise rights. Nothing in the text of RFRA suggests such a legislative purpose, and the amendment of RFRA by RLUIPA, which deleted the prior reference to the First Amendment and broadened the scope of free exercise rights beyond the constitutional requirements of the First Amendment, belie the contention RFRA simply restored pre-*Smith* free exercise rights.<sup>55</sup>

Fourth, the Court rebuffed HHS’s argument that for-profit corporations should be denied RFRA protections, because of the inherent difficulties in determining whether the religious objectives of the corporation were sincere and the risk of shareholder disputes and proxy battles over the religious identity of publically traded corporations. The passage and scope of RLUIPA, the Court noted, demonstrates Congress had abundant confidence in the ability of the courts to discern sincerely held religious beliefs. Moreover, HHS could not identify any instance in which a publically traded company asserted RFRA claims, and it was highly unlikely shareholders in publically traded companies, which include institutional investors who have

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<sup>51</sup> *Hobby Lobby*, 134 S. Ct. at 2768-2769.

<sup>52</sup> *Id.* at 2769-2770.

<sup>53</sup> *Id.* at 2771, citing 15 Pa. Cons.Stat. § 1301 (2001).

<sup>54</sup> *Id.* at 2771, citing Okla. Stat., Tit. 18, §§ 1002, 1005.

<sup>55</sup> *Id.* at 2772.

their own array of shareholders, would advocate the corporation's pursuit of a set of religious beliefs. In any event, Hobby Lobby and Conestoga Wood Products were closely held corporations, each owned and managed by members of a single family, and the sincerity of their religious beliefs was not disputed. Finally, the court stated, while shareholders in closely-held corporations may not agree on the religious principles they want the corporation to follow — *e.g.*, some may want to conduct business on Sunday and some may not — those disputes can be resolved by state corporation law. Hence the Court determined that RFRA applies to Hobby Lobby and Conestoga Wood Products.<sup>56</sup>

### *D. Whether the HHS Contraceptive mandate Substantially Burdens the Exercise of Religion*

The Court had “little trouble” concluding the HHS contraceptive mandate substantially burdens the exercise of religion.<sup>57</sup> To begin with, requiring the Hahns and Conestoga Wood Products and the Greens and Hobby Lobby to provide contraceptive coverage puts them in a difficult dilemma. If they provide the mandated contraceptive coverage, they violate their deeply held religious principles. If they follow their religious principles and do not provide the mandated contraceptive coverage, they encounter substantial tax penalties.<sup>58</sup> If they dropped their medical insurance coverage and force their full-time employees to purchase insurance on an ACA exchange and one of their employees qualifies for a subsidy, they face substantial fines.<sup>59</sup>

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<sup>56</sup> *Id.* at 2774-75.

<sup>57</sup> *Id.* at 2775-76.

<sup>58</sup> *Id.* (“If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. 26 U.S.C. § 4980D (2016). For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year.”).

<sup>59</sup> *Id.* at 2776 (“The companies could face penalties of \$2,000 per employee each year. 26 U.S.C. § 4980H (2016). These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga.”) The Court also acknowledged and rejected the suggestion advanced by *amici* supporting HHS that the \$2,000 per-employee penalty is less than the average cost of providing health insurance. The Court noted that this argument was not raised below and should not be considered. Assuming it was able to consider this argument, the Court found the argument “unpersuasive.” Rather, the Court suggested, it is doubtful the net cost to the companies of providing insurance is more than the cost of dropping their insurance and paying the ACA penalty. In order to make up for the lost benefit, the companies would be forced to increase their employees’ compensation. That increase would result in higher taxes on the employees’ income. Likewise, while the cost of providing health care insurance is deductible, the ACA penalty the companies pay for not providing insurance

Second, the Court rejected HHS's contention that providing the four methods of contraception does not in itself destroy the embryo; rather, the cause of the destruction of the embryo is the employee's use of the contraceptives. This argument, the Court insisted, "dodges the question," and instead raises an issue that the federal courts have no business addressing: whether the religious belief asserted in a RFRA case is reasonable.<sup>60</sup> The Hahns and Greens believe that providing the four methods of contraception is sufficiently connected to the destruction of embryos to make it immoral for them to provide the mandated coverage. HHS's questioning that belief triggers "a difficult and important question of religion and moral philosophy," namely, whether "it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."<sup>61</sup> Claiming authority to "provide a binding national answer to that question" in effect "[tells] the plaintiffs that their beliefs are flawed." And that is a step, which for very good reason the Court has "repeatedly refused to take" and has warned courts not to take.<sup>62</sup> That the Hahns and Greens sincerely believe providing the mandated contraceptive coverage violates their religious beliefs is undisputed. The Court's sole role, then, is to determine whether their belief reflects an "honest conviction, and there is dispute that it does." Hence the Court concluded that, because the mandated contraceptive coverages force the Hahns and Greens to pay an enormous sum of money if they provide insurance coverage consistent with their religious beliefs, "the mandate clearly imposes a substantial burden on those beliefs."<sup>63</sup>

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is not. Hence, "it is far from clear that it would be financially advantageous for an employer to drop the coverage and pay the penalty." *Id.* at 2777.

<sup>60</sup> *Id.* at 2777.

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

<sup>62</sup> *Id.* at 2778, citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969) ("[The First Amendment prohibits the] interpretation of particular church doctrines and the importance of those doctrines to the religion."); and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981) (it is not for the Court to say to that the line the employee drew between work he found to be consistent with his religious beliefs helping to manufacture steel that was used in making weapons - and work that he found morally objectionable - helping to make the weapons themselves - was a reasonable one).

<sup>63</sup> *Hobby Lobby*, 134 S. Ct. at 2779.

### E. *Whether ACA Utilizes the Least Restrictive Regulatory Approach*

After quibbling with HHS about whether it had identified a compelling government interest,<sup>64</sup> the Court assumed “the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA,” and proceeded to determine whether ACA utilizes the least restrictive regulatory approach in attaining that objective.<sup>65</sup> The Court then quickly identified two less restrictive regulatory approaches. First, the Court stated, the Government can assume the cost of “providing the four contraceptives to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”<sup>66</sup> While this solution might require the government to expend additional funds, both RFRA and RLUIPA may require the expenditure of those funds to accommodate citizens’ religious beliefs.<sup>67</sup> The second solution, the Court insisted, is the “already established” accommodation provided nonprofit organizations with religious objections through which (1) the organization self-certifies it opposes providing particular contraceptive services, and (2) the organization’s insurance carrier or third-party administrator excludes contraceptive coverage from the health plan and covers the cost for those contraceptive services without any cost-sharing imposed on the organization. While the Court refrained from deciding whether such an approach complies with RFRA for purposes of all religious claims, it was able to determine “it does not impinge on the plaintiffs’ religious belief” and “serves HHS’s stated interests equally well.”<sup>68</sup> Having determined that a less restrictive solution existed, the Court decided the “contraceptive mandate, as applied to all closely held corporations, violates RFRA.”<sup>69</sup>

Notably, three days after deciding *Hobby Lobby*, the U.S. Supreme Court issued an interim order in *Wheaton College v. Burwell*,<sup>70</sup> in which it provided religious organizations with an alternative procedure to obtain an accommodation from the contraception mandate. Prior to the *Wheaton College* order, the procedure followed by exempt religious organizations to obtain an accommodation from the contraception mandate was filing the two-page EBSA Form 700 with the Secretary of the Department of Labor. The applicant completed the EBSA Form 700 by providing the name of the objecting organization, the identity and contact information of the person

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<sup>64</sup> *Id.* at 2779-80.

<sup>65</sup> *Id.* at 2780.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2781.

<sup>68</sup> *Id.* at 2782.

<sup>69</sup> *Id.* at 2785.

<sup>70</sup> 134 S. Ct. 2806 (2014).

authorized to make the certification of eligibility, and the certification that the organization is eligible for and requests the accommodation. In *Wheaton College*, the U.S. Supreme Court stated the contraceptive method would not be enforced against them so long as that entity informed the Secretary of Health and Human Services in writing that it is a nonprofit organization which has religious objections to providing contraceptive coverage. This gives religious organizations a second procedure to obtain an exemption from the mandatory contraceptive coverage.

#### IV. LEGAL SIGNIFICANCE OF *HOBBY LOBBY*

While *Hobby Lobby* generated significant publicity both prior to and after the decision of the U.S. Supreme Court,<sup>71</sup> a review of the responses of legal scholars and ensuing federal circuit court decisions which carefully analyzed the decision indicates that the impact of *Hobby Lobby* will not be significant. This conclusion is also confirmed by Part V which assesses the impact of *Hobby Lobby* on human resource management professionals.

Legal scholars are divided in assessing the legal significance of *Hobby Lobby*. Alex J. Luchenitser, Associate Legal Director for Americans United for Separation of Church and State, stated *Hobby Lobby* “is a sweeping decision that threatens to turn RFRA into a law that — instead of protecting religious freedom — allows religious believers to force their faiths on others in a variety of way,” and “will open the door for religious objections to override laws that prohibit discrimination in employment and in other areas,” because employers may have been given the right to hire persons whose lifestyles are contrary to the religious beliefs of the business owners.<sup>72</sup> Leslie C. Griffin, William S. Boyd Professor of Law at UNLV Boyd School of Law, condemns *Hobby Lobby* as a dangerous departure from the “core concept that religious freedom is necessary to protect the rights of all Americans,” because it not only enables the owners of closely held

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<sup>71</sup> See, e.g., Mark Walsh, *OBAMACARE, THE SEQUAL: Companies Claim Contraceptive Mandate Goes against Owners' Religious Beliefs*, ABA J., March 1, 2014; Erwin Chemerinsky, *Corporations, contraception and religious freedom*, ABA J., March 24, 2014; Susan Berfield, *Hobby Lobby Case: Does God Hate Obamacare?*, BLOOMBERG BUSINESSWEEK, April 3, 2014; Christopher Shea, *Beyond Belief: the Debate Over Religious Tolerance*, THE CHRON. OF HIGHER EDUC., June 9, 2014; Debra Cassens Weiss, *Contraceptive mandate is overturned for closely held companies with religious objections*, ABA J., June 30, 2013; Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does 'Closely Held' Mean?*, THE WALL STREET JOURNAL, June 30, 2014; Debra Cassens Weiss, *Satanists assert a Hobby Lobby exemption from abortion informed-consent laws*, ABA J., July 29, 2014; and Karen E. Klein, *What the Hobby Lobby Ruling Means for Small Business*, BLOOMBERG BUSINESSWEEK, July 2, 2014.

<sup>72</sup> Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 63-64 (2015).

corporations to impose their religious faith upon others, but also permits religious believers to claim exemption from laws providing legal support for women's rights and protections for gays and lesbians.<sup>73</sup> Peter N. Swisher, Professor of Law at the University of Richmond Law School, argues that RFRA and *Hobby Lobby* provide a "very strong case for validating polygamous marriages on cultural, religious, and constitutional grounds," and overturning *Reynolds v. United States*,<sup>74</sup> the U.S. Supreme Court decision which declared polygamy to be an "odious" act that Congress had the power to prohibit.<sup>75</sup>

More sanguine predictions were provided by other scholars. Jennifer S. Taub, Professor of Law at Vermont Law School, observes that the three conditions imposed on corporations seeking religious belief protections — viewing the owners as co-extensive with the corporation, determining the owners shared the same sincere religious beliefs, and operating the corporation in accordance with those beliefs — may provide a basis for restoring "meaningful limits on the power of large publicly held business corporations to influence elections."<sup>76</sup> Michael B. Neitz, Professor of Law at Golden Gate University, argues *Hobby Lobby's* expansion of rights accorded corporations provides support for corporate social responsibilities advocates by empowering investors to influence corporations to act in a socially or environmentally beneficial way.<sup>77</sup> Finally, Eric Rassbach, Deputy General Counsel for The Becket Fund for Religious Liberty, agreed with the assessment *Hobby Lobby* was a "bore," because it was very similar to "numerous other substantial burden cases that courts have been deciding for years," and did not "herald a new world of rampant religious belief claims by for-profit corporations."<sup>78</sup>

The calmer assessments may have gotten it right. A review of ensuing federal circuit court decisions, which carefully analyzed the decision, indicates that the impact of *Hobby Lobby* will not be significant. These decisions have dealt with three major issues. The first issue is whether the accommodation provisions permitting religious organizations to avoid the contractive mandate constituted a substantial burden on their exercise. Most

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<sup>73</sup> Leslie C. Griffin, *Hobby Lobby: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L. Q. 641, 642 (2015).

<sup>74</sup> 98 U.S. 145 (1879).

<sup>75</sup> Peter Nash Swisher, *I Now Pronounce You Husband and Wives": The Case for Polygamous Marriage After United States v. Windsor and Burwell v. Hobby Stores*, 29 BYU J. PUB. L. 299 (2015).

<sup>76</sup> Jennifer S. Taub, *Is Hobby Lobby A Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403, 405, 408 (2015).

<sup>77</sup> Michele B. Neitz, *Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 SMU L. Rev. 243 (2015).

<sup>78</sup> Eric Rassbach, *Is Hobby Lobby Really a Brave New World? Litigation Truths about Religious Exercise by For-Profit Corporations*, 42 HASTINGS CONST. L.Q. 625, 626 (2015).

federal circuit courts have ruled that requiring nonprofit organizations to submit self-certification form to the Secretary of Labor or the notice to the Secretary of Health and Human Services of their religious objections to the contraceptive mandate does not constitute a substantial burden on their exercise of religion.<sup>79</sup>

The second issue is whether Bald and Golden Eagle Protection Act (the “Eagle Protection Act”),<sup>80</sup> which prohibits the possession and wearing of eagle feathers during American Indian religious ceremonies, passes muster under RFRA. In *McAllen Grace Brethren Church v. Salazar*,<sup>81</sup> Robert Soto attended an American Indian religious ceremony in which he wore eagle feathers. An agent of the U.S. Fish and Wildlife Service also attended the ceremony, observed Soto wear the eagle feathers, confiscated the feathers, and charged him with violating the Eagle Protection Act. Soto claimed he was a member of the Lipan Apache Tribe, but that tribe was not federally recognized and is not licensed by the Interior Department to possess eagle feathers. Soto petitioned for the return of his eagle feathers, but his request was denied, because he was not a member of a federally recognized Indian tribe.<sup>82</sup> Soto pursued an action in Federal district court seeking the return of his eagle feathers and claiming their confiscation violated the Free Exercise Clause of the First Amendment and RFRA. The Department of the Interior did not contest Soto’s claims that the eagle feather is sacred in the religious practices of many American Indians and that, as pastor of the McAllen Grace Brethren Church and the Native American New Life Center, he is sincerely engaged in a ministry that uses eagle feathers in its worship practice. The Department also conceded that the Eagle Protection Act was a substantial burden on the exercise of his religious beliefs.<sup>83</sup> The Fifth Circuit assumed that the interests advanced by the Eagle Protection Act — protecting eagles

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<sup>79</sup> *Michigan Catholic Conference v. Burwell*, 807 F.3d 738, 749 (6th Cir. 2015); *Grace Schools v. Burwell*, 801 F.3d 788, 807-808 (7th Cir. 2015); *Catholic Health Care System v. Burwell*, 796 F.3d 207, 219 (2d Cir. 2015); *East Texas Baptist University v. Burwell*, 793 F.3d 449, 459 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 444 (U.S. Nov. 6, 2015) (No. 15-35); *University of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015); *Priests For Life v. U.S. Dept. of Health and Human Services*, 772 F.3d 229, 249-250 (D.C. Cir. 2014), and 801 F.3d 1 (D.C. Cir. 2015), (denying petition for rehearing en banc), *cert. granted*, 136 S. Ct. 444 (U.S. Nov. 6, 2015) (No. 14-1505); and *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1199, 1203 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 446 (U.S. November 6, 2015) (No. 15-105). *Contra Sharpe Holdings, Inc. v. U.S. Dept. of Health and Human Services*, 801 F.3d 928, 945-946 (8th Cir. 2015) (an accommodation process which requires detailed information and updates substantially burden their exercise of religion in violation of RFRA and that the current accommodation process is not the least restrictive means of furthering the government’s interests), *cert. granted*, 84 U.S.L.W. 3630 (U.S. May 16, 2016).

<sup>80</sup> 16 U.S.C. §§ 668, 668a (2016).

<sup>81</sup> 764 F.3d 465 (5th Cir. 2014).

<sup>82</sup> *Id.* at 468.

<sup>83</sup> *Id.* at 474.



and furthering the relationship with federally recognized tribes were substantial, but, employing the *Hobby Lobby* and RFRS least restrictive means test, determined the government failed to establish satisfactorily that the regulatory framework employed to permit the use of eagle feathers in religious ceremonies was the least restrictive means of attaining those goals. The Court remanded the case to the district court to determine whether the current regulations were the least restrictive means to attain the goal of protecting eagles and improving relationships with American Indian tribes.<sup>84</sup>

The third issue was whether mandating the purchase of beads and shells worn during religious exercise solely through a catalogue approved by the prison violated RFRA. In *Davilla v. Gladden*,<sup>85</sup> the Eleventh Circuit ruled that requiring a prisoner, who was a practicing Santeria priest, to acquire the beads and shells worn in his religious exercise solely through a catalogue approved by the prison, rather than obtaining them from his goddaughter, did not violate his free exercise rights under the First Amendment and did not impose a substantial burden on his exercise of religious.<sup>86</sup>

The above noted circuit court decisions indicate that *Hobby Lobby* is not likely to have a significant impact in expanding free exercise rights. They upheld the opt-out and notification methods of obtaining an accommodation relieving non-profit religions organizations of the contraceptive mandate, and split on whether the Eagle Protection Act and the prison restriction on ordering beads and shells for Santeria religious exercises was a violation of RFRA. While *Hobby Lobby* may cause courts to look more closely at whether government regulations constitute a substantial burden on the exercise of religion, it would not appear to have triggered new ground in the free exercise arena.

## **V. IMPACT OF *HOBBY LOBBY* ON *HUMAN RESOURCES PROFESSIONALS***

In her dissent Justice Ginsburg stated, "In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."<sup>87</sup> The reactions from *Hobby Lobby* and *Conestoga* were equally broad. Barbara Green, co-founder of *Hobby Lobby*, said "Today, the nation's highest court has reaffirmed the vital importance of religious liberty as one of our country's founding principles. The court's decision is a victory, not just

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<sup>84</sup> *Id.* at 480-81.

<sup>85</sup> 777 F.3d 1198 (11th Cir. 2015).

<sup>86</sup> *Id.* at 1213.

<sup>87</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014).

for our family business, but for all who seek to live out their faith.”<sup>88</sup> Government reactions were equally broad. White House spokesman Josh Earnest said, “Congress needs to take action to solve this problem that’s been created and the administration stands ready to work with them to do so. President Obama believes that women should make personal health care decisions for themselves, rather than their bosses deciding for them. Today’s decision jeopardizes the health of women ...”<sup>89</sup> Senate Minority Leader Mitch McConnell said the ...”Obama administration cannot trample on the religious freedoms that Americans hold dear.”<sup>90</sup>

It is clear that the plaintiffs, the dissenting opinion, and government officials continued to disagree vehemently whether this case threatens women’s rights and religious freedom.<sup>91</sup> But for now, the results do not affect businesses nor their HR professionals. The decision did not generalize to other companies. It does not appear that the decision thwarted an attack on women nor did the decision make a statement on religious liberty. Even while the above agents still touted this decision to be of “startling breadth,”<sup>92</sup> the media no longer pursued the case as religion run amok.<sup>93</sup> The frenzy seemed to wane in the days following the decision.

In summary, a careful review of *Hobby Lobby* indicates that, while the case was previewed as landmark, it is not. Although the polarized zealous fervor could have created employee relations problems and benefit changes, they did not. The public — comprised of employees and employers — became more reserved following the decision. As the decision was better understood, most realized that it was not a broad reaching landmark case. *Hobby Lobby* simply did not change the course of business. Employees did not take their fervor to their workplace, no benefits were modified, and HR was unaffected.

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<sup>88</sup> Richard Wolf, *Justices rule for Hobby Lobby on contraception mandate*. USA TODAY, (June 30, 2014, 3:28 PM), <http://www.usatoday.com/story/news/politics/2014/06/30/supreme-court-hobby-lobby-religion-contraception-obama/11473189/>.

<sup>89</sup> Maggie Fox, *Supreme Court on Birth Control: What Hobby Lobby Ruling Means*, NBC NEWS, (June 30, 2014, 1:33 PM), <http://www.nbcnews.com/health/health-care/supreme-court-birth-control-what-hobby-lobby-ruling-means-n144526>.

<sup>90</sup> *Id.*

<sup>91</sup> See Griffin, *supra* note 62, at 641.

<sup>92</sup> *Hobby Lobby*, 134 S. Ct. at 2787.

<sup>93</sup> Robin Abcarian, *Religion run amok? Hobby Lobby's case comes to the Supreme Court*, LOS ANGELES TIMES., (March 21, 2014, 1:46 PM), <http://www.latimes.com/local/abcarian/la-me-ra-religion-case-run-amok-hobby-lobby-supreme-court-20140321-story.html#axzz2xCDkXOYk>.

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