

THE SUPREME COURT CRAFTS A PRO-RELIGIOUS LIBERTY DECISION IN HOBBY LOBBY

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ABSTRACT: What do the Mennonite owners of a small cabinetmaking operation in Pennsylvania's Dutch Country have in common with the Evangelical owners of a nationwide craft store chain headquartered in Oklahoma? A great deal, actually. Besides their devout Christian faith and devotion to their large and close families, at least two other things: their faith-grounded commitment not to participate in what they regard as the destruction of human life through early abortion-causing drugs and devices, and their determination to protect that conscientious commitment through legal action. Their common convictions caused their two roads to converge at the U.S. Supreme Court, resulting in a precedent-setting decision that strengthened religious liberty for all Americans.

*Senior Counsel, Alliance Defending Freedom, Washington, DC. I would like to thank Claire Rossell for her excellent work in helping prepare this draft. This article I dedicate to my son, Josiah A. Aden, who matriculates at Grove City College in Fall 2015, and to his future schoolmates and their generation, to whom will be entrusted the safekeeping of ephemeral but indispensable treasures such as rights of conscience and the rule of law. May they guard them with zeal and integrity.

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I. THE AFFORDABLE CARE ACT AND ITS INTENDED -- AND UNINTENDED -- CONSEQUENCES.

In 2010, Congress passed the Patient Protection and Affordable Care Act of 2010 (ACA).¹ The ACA mandated that

2 124 Stat. 119; see generally Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S.Ct.

preventive care and screenings be included in many health insurance plans without imposing cost sharing on plan participants.² The ACA did not specify that contraception be included among these preventive services.³ The ACA also exempted “grandfathered” health plans from the entire preventive care mandate, while still subjecting grandfathered plans to several other ACA requirements.⁴

Under regulations promulgated by the Department of Health and Human Services (HHS), the ACA preventive care rule was interpreted to require non-grandfathered, non-exempt group health plans or health insurance issuers to provide employees with contraceptives that are approved by the Food and Drug Administration (FDA).⁵ This includes FDA-approved contraceptives, sterilizations and patient education and counseling for related drugs and devices that the government concedes function by “inhibiting implantation” of an embryo after its fertilization.⁶ (This aspect of the ACA will be referred to as the “HHS Mandate.”)

Employers that violate the Mandate are subject to govern-

2566 (2012) (upholding constitutionality of the Affordable Care Act against challenges under the Anti-Injunction Act, Commerce Clause, taxing power and Spending Clause.

2 42 U.S.C. § 300gg-13(a)(4).

3 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

4 42 U.S.C. § 18011. Regulations currently exempt from the women’s preventive services requirement “churches,” their “integrated auxiliaries” and “conventions or associations of churches,” as well as the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

5 45 C.F.R. § 147.130. See 42 U.S.C. § 300gg-13(a)(4).

6 *Hobby Lobby*, Pet. Br. at 9 n.4 (conceding that Plan B (levonorgestrel), *ella* (ulipristal acetate) and copper Intrauterine Devices (“IUDs”) may act to “prevent implantation” of a fertilized egg in the uterus).

ment lawsuits under the Employee Retirement Investment Security Act (“ERISA”)⁷ and fines of up to \$100 per plan participant per day.⁸ For a large employer like Hobby Lobby, the financial penalty would amount to hundreds of millions per year; even for a smaller one like Conestoga Wood Industries, the penalty would be tens of millions, an amount a Third Circuit judge acknowledged would “rapidly destroy [Conestoga’s] business and the 950 jobs that go with it.”⁹

What followed was a landslide of federal lawsuits perhaps unprecedented in modern legal history, all alleging that the HHS Mandate violated the religious conscience of individuals, corporations and organizations by mandating that they provide, subsidize and/or counsel employees regarding certain forms of contraceptives. As of this writing, more than a hundred complaints have been filed in dozens of federal court jurisdictions challenging some aspect of the HHS Mandate. The over four hundred litigants include Roman Catholic dioceses, Catholic and Evangelical-owned for-profit businesses, faith-based ministries representing a broad range of ecclesiastical and ecumenical viewpoints, private religious colleges and individuals.¹⁰ The lawsuits alleged a variety of legal claims, but generally they plead at least

7 See generally 29 U.S.C. Chap. 18.

8 29 U.S.C. § 1132; 26 U.S.C. § 4980D.

9 *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 392 (3rd Cir. 2013) (Jordan, C.J., dissenting).

10 Although the litigation is constantly changing and hence difficult to track, two “score cards” kept by public interest law firms that have been active in it, Alliance Defending Freedom and The Becket Fund for Religious Liberty, are available at <http://www.alliancedefendingfreedom.org/News/PRDetail/8001> and <http://www.becketfund.org/hhsinformationcentral/>, respectively.

two and often three of the following: 1) the Mandate violates the right to free exercise of religion protected by the First Amendment to the U.S. Constitution;¹¹ 2) it violates the Religious Freedom Restoration Act ("RFRA")'s¹² protection against "substantial burdens" imposed on religious exercise under federal law; and 3) it was enacted or implemented without proper legal authority, and thus in violation of the Administrative Procedure Act.¹³

II. CONESTOGA WOOD INDUSTRIES AND HOBBY LOBBY.

A. MENNONITES VS. THE MANDATE.

The Hahn family are devout Mennonite Christians whose father founded Conestoga Wood Industries, a kitchen cabinet making company in East Earl, Pennsylvania, almost fifty years ago.¹⁴ Like others in their centuries-old community of faith, they are hardworking and peaceful. They possess deeply held religious beliefs cherishing the sanctity of human life in all its stages, and they practice a profound integration of their faith into their daily activities, including their work.¹⁵ The Mennonite faith teaches that taking a life, which includes causing the death of a human embryo after fertilization, is a sin against God.¹⁶ The Hahn family therefore objects to providing employees with items that can harm

11 *I.e.*, the second clause of the First Amendment, which provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST., Amend. I

12 Religious Freedom Restoration Act of 1993, 107 Stat. 1488; 42 U.S.C. § 2000bb *et seq.*

13 5 U.S.C. § 500 *et seq.*

14 *Hobby Lobby*, 134 S.Ct. at 2764.

15 *Id.*

16 *Id.* n.12 (Mennonite Church USA Statement on Abortion); *Id.* at 2765.

a human embryo.¹⁷

The Hahn family solely owns and operates Conestoga, which employs over 950 people, many of them like-minded persons of faith from their community.¹⁸ They believe that practicing business is a calling from God, in which they should integrate the gifts of their spiritual life and the virtues of Christian teaching.¹⁹ Based on this belief, Conestoga has provided generous health insurance benefits to its employees, while omitting coverage of abortion and items that may prevent the implantation of an embryo into the uterus.²⁰

The Mandate caused a crisis of conscience for the Hahns and Conestoga. It threatened massive fines of potentially \$100 per plan-participant per day if the company and its owners did not set aside its sincerely held religious convictions and include abortifacient items in its health plan.²¹ It also threatened government lawsuits requiring the religiously objectionable coverage,²² and penalties against Conestoga's insurance company.²³

17 *Hobby Lobby*, 134 S.Ct. at 2764.

18 *Id.*

19 *Id.*

20 *Hobby Lobby*, 134 S.Ct. at 2765.

21 29 U.S.C. § 1132. For Conestoga, penalties and fines for failing to cover 950 employees would equal roughly \$35 million per year. S.Ct. No. 13-256, Pet. at 7. If Conestoga attempted to avoid these fines by dropping health care coverage, it would incur a separate massive fine of 2,000 per fulltime employee per year, totaling approximately \$1.9 million. 724 F.3d at 392; 26 U.S.C. § 4980H.

22 26 U.S.C. § 4980H.

23 "In general, the private health insurance requirements of Title XXVII of the PHSA, as amended by ACA, apply to health insurance issuers and to non-federal self-funded governmental group plans. Prior to ACA, state and local governments could elect to exempt their plans from certain requirements of the PHSA, subject to certain exceptions. However, this election is not applicable

In the face of the HHS Mandate's profound violation of their religious convictions, Conestoga and the Hahns (collectively "the Hahns") filed suit in the United States District Court for the Eastern District of Pennsylvania on December 4, 2012.²⁴ The complaint alleged that the Mandate violated RFRA, the Free Exercise Clause, and other provisions.²⁵

The Hahns filed a motion for a temporary restraining order and preliminary injunction, asking for court relief from the Mandate before their health plan was renewed on January 1, 2013.²⁶ The district court granted the temporary restraining order on December 28, 2012, holding that the Hahns had "demonstrated a reasonable probability of success on the merits of their RFRA claim."²⁷

Nevertheless, the district court denied the Hahns' request for a preliminary injunction on January 11, 2013.²⁸ The court held

to the provisions added to the PHSA by ACA, and thus these plans are subject to ACA's federal health insurance standards....Health insurance issuers and governmental plans that fail to comply with the PHSA requirements may be subject to a maximum penalty of \$100 per day for each individual with respect to which such a failure occurs." Cynthia Brouger, *Religious Objections to Regulations for Coverage of Preventive Health Services 15-16* (Congressional Research Service, 2012).

24 *Conestoga Wood Specialties Corp. et al. v. Sebelius*, USDC E.Dist. Pa. No. 5:12-cv-06744-MSG.

25 Although the case ultimately did not turn on the other claims, they were the Administrative Procedure Act, 5 U.S.C. § 706 et seq., and the Establishment Clause, Due Process Clause and Equal Protection Clause of the U.S. Constitution.

26 *Conestoga Wood Specialties Corp. et al. v. Sebelius*, 917 F.2d 394, 400 (E. D. Pa. 2013).

27 *Conestoga Wood Specialties Corp. et al. v. Sebelius*, No. 5:12-cv-06744-MSG (USDC E. D. Pa. Dec. 28, 2012) (order granting temporary restraining order).

28 *Conestoga*, 917 F.2d at 419.

that Conestoga did not possess the ability to exercise religion under RFRA and the First Amendment because of its status as a for-profit corporation.²⁹ The district court also held that the Mandate did not substantially burden the religious exercise of the Hahn family members.³⁰ Lacking a preliminary injunction, Conestoga's health insurance plan issuer inserted coverage of the religiously objectionable items into its plan over the Hahns' protests.³¹

The Hahns appealed to the United States Court of Appeals for the Third Circuit on January 17, 2013, and also filed a motion for an injunction pending appeal.³² A divided court of appeals panel denied their request for an injunction pending appeal on February 8, 2013.³³ On July 26, 2013, another divided Third Circuit panel affirmed the district court's denial of Petitioners' preliminary injunction motion, holding that for-profit corporations cannot engage in religious exercise and therefore are not entitled to protection under either RFRA or the First Amendment.³⁴ The panel also held that the Hahn family faced no "substantial burden" from the massive fines and lawsuit penalties the government threatened to impose on their family business unless they renounced their faith and complied with the Mandate.³⁵ The Third Circuit denied review by the full *en banc* court on August 14, 2013, over the dis-

29 *Id.* at 411.

30 *Id.* at 413.

31 S.Ct. No. 13-256, Pet. at 8.

32 724 F.3d at 381.

33 *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *3 (3d Cir. Feb. 8, 2013).

34 724 F.3d at 381.

35 *Id.* at 389.

sent of five of the circuit's twelve judges.³⁶

B. HOBBY LOBBY AND HOBSON'S CHOICES.

David Green founded Hobby Lobby in his family's garage in 1970, and grew the business from a local craft store in Oklahoma City into a national chain of over 500 stores with more than 13,000 full-time employees.³⁷ Today, it is still owned by David Green with his wife Barbara Green and their three adult children. One of them, Mart Green, later founded Mardel, a chain of Christian booksellers with 35 stores and about 400 full-time employees, which joined Hobby Lobby in the litigation.³⁸

The Greens organized their businesses "with express religious principles in mind."³⁹ Hobby Lobby's statement of purpose commits it to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."⁴⁰ The Greens signed a statement of faith and a commitment as trustees of the company to conduct the business according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries."⁴¹ Hobby Lobby sells no liquor or liquor-related products, it closes on Sundays, and on Christmas and Easter, it purchases hundreds of news-

36 *Conestoga*, No. 13-1144 (3d Cir. Aug. 14, 2013) (order denying review en banc).

37 S.Ct. No. 13-354, Pet. for Writ of Cert. at 7; 134 S.Ct. at 2765.

38 *Hobby Lobby*, 134 S.Ct. at 2765; S.Ct. No. 13-354, Pet. for Writ of Cert. at 7.

39 S.Ct. No. 13-354, Pet. at 8, quoting *Hobby Lobby Store, Inc. v. Burwell*, 723 F.3d 1114, 1122 (10th Cir. 2013).

40 134 S.Ct. at 2766.

41 *Id.*

paper advertisements inviting readers to “know Jesus as their Lord and Savior.”⁴²

The Greens’ faith also impacts the insurance the company offers in its self-funded employee health plan.⁴³ The Greens believe that life begins at conception, it is worthy of protection, and that providing insurance coverage for items that put human embryos at risk makes them complicit in abortion.⁴⁴ Accordingly, the company’s health plan excludes coverage for drugs that terminate pregnancy, like RU-486, and for drugs or devices that can prevent an embryo from implanting in the womb, namely, *ella*, Plan B drugs and two types of intrauterine devices.⁴⁵

The HHS Mandate thus placed Hobby Lobby, like Conestoga, on the horns of a dilemma: either risk fines of \$100 per day per employee, amounting to over \$1.3 million per day, as well as Labor Department and private employee lawsuits, or capitulate and abandon the family’s religious convictions.⁴⁶ Dropping insurance coverage would place the company at a severe competitive disadvantage and harm their employees – again at the cost of the Greens’ religious convictions.⁴⁷

Facing a Hobson’s choice, the Greens, Hobby Lobby, and Mardel sued in the United States District Court for the Western District of Oklahoma.⁴⁸ They moved for a preliminary injunction,

42 *Id.*

43 S.Ct. No. 13-354, Pet. at 9.

44 *Id.*

45 *Id.*

46 S.Ct. No. 13-354, Pet. at 10.

47 *Id.*

48 134 S.Ct. at 2766.

which the district court denied, holding that Hobby Lobby and Mardel, as for-profit corporations, had no free exercise rights and thus were not “persons” under RFRA.⁴⁹ The court also concluded that the Greens individually could not show a “substantial burden” on their religious exercise, because the mandate’s burden on them was only “indirect and attenuated.”⁵⁰ The Tenth Circuit Court of Appeals granted review and ordered an initial en banc hearing.⁵¹ The full Tenth Circuit reversed the district court in a 5-3 decision, holding that Hobby Lobby and Mardel were in fact “persons” capable of religious exercise and could therefore sue under RFRA.⁵² The en banc court also rejected the government’s argument that RFRA excludes religious exercise by for-profit corporations. Four judges also found the Greens could sue individually under RFRA.⁵³ These four judges rejected the government’s argument based on the prudential “shareholder standing rule,” as that rule “does not bar corporate owners from bringing suit if they have ‘a direct and personal interest in a cause of action.’”⁵⁴

The en banc court next held that Hobby Lobby and Mardel were likely to succeed on their RFRA claim.⁵⁵ The court first rec-

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

50 870 F. Supp. 2d at 1294.

51 23 F.3d 1111, at 1125 (10th Cir. 2013).

52 *Id.* at 1140-47 (interpreting 42 U.S.C. § 2000bb-1(a)).

53 *Id.* at 1152-1157 (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); 1184-1189 (op. of Matheson, J.).

54 *Id.* at 1156 (quoting *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)). The government later abandoned its shareholder standing argument.

55 *Id.* at 1140-47.

ognized Respondents' sincere religious belief (which the government did not dispute) that providing the mandated coverage would make them morally complicit in abortion.⁵⁶ The court then held that the mandate imposed a "substantial burden" on Respondents' exercise of religion because it pressured them to violate that belief.⁵⁷ Because the mandate forced Respondents to either "compromise their religious beliefs," "pay close to \$475 million more in taxes every year, or pay roughly \$26 million more in annual taxes and drop health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial."⁵⁸

The court rejected the government's argument that the burden on Respondents was too attenuated.⁵⁹ The government argued the burden was insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer.⁶⁰ The court found this reasoning "fundamentally flawed," because it "requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs."⁶¹

The court then concluded that the mandate failed strict scrutiny review.⁶² The government's asserted interests in "public health and gender equality" were not compelling "because

56 723 F.3d at 1142.

57 723 F.3d at 1141.

58 *Id.* at 1140-1141.

59 *Id.* at 1141-1142.

60 *Id.*

61 *Id.*

62 *Id.* at 1143.

they are ‘broadly formulated,’” because the government offered “almost no justification for not ‘granting specific exemptions to particular religious claimants,’” and because “the contraceptive-coverage requirement presently does not apply to tens of millions of people.”⁶³ The court also held that the mandate was not the least restrictive means of achieving those over-broad interests because the government did “not articulate why accommodating [Respondents’] limited request fundamentally frustrates its goals.”⁶⁴

C. CONSCIENCE COMES TO THE HIGH COURT.

The Hahns and Conestoga Wood filed a petition for writ of certiorari in the Supreme Court, asking it to review the decisions of the Third Circuit.⁶⁵ The Hahns presented the Court with this issue: “Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA.”⁶⁶ The federal defendants in *Hobby Lobby* filed a petition for writ of certiorari asking for a review of the Tenth Circuit’s decision against it.⁶⁷ The government’s statement of the issue presented to the Court was cast as a clash between religious freedom and the rights of third persons: “[W]hether RFRA allows a for-profit corporation to deny its employees the health coverage

63 723 F.3d at 1143-44 (quoting *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 546 U.S. 418, 431 (2006)).

64 723 F.3d at 1144.

65 S.Ct. No. 13-356 (Sep. 19, 2013).

66 *Id.* at 1.

67 S.Ct. No. 13-354 (Sep. 19, 2013).

of contraceptives to which the employees are otherwise-entitled federal law, based on the religious objections of the corporation's owners."⁶⁸ On November 26, 2013, the Supreme Court granted review and consolidated the two cases.⁶⁹

The Supreme Court held oral argument in the cases on March 25, 2014. The issue of the scope of legal protections for conscience was raised immediately, with Justices Elena Kagan and Sonia Sotomayor questioning the petitioners' attorney, Paul D. Clement, on the limits the law might impose on a religious employer's objection:

Justice Sotomayor: Is your claim limited to sensitive materials like contraceptives or does it include items like blood transfusion, vaccines? For some religions, products made of pork? Is any claim under your theory that has a religious basis, could an employer preclude the use of those items as well?⁷⁰

Justice Kagan: Well, I mean, just take one of the things that Justice Sotomayor asked about, which is vaccinations, because there are many people who have religious objections to vaccinations. So suppose an employer does and -- and refuses to fund or wants not to fund vaccinations

68 *Id.* at 1.

69 134 S.Ct. 678 (2013).

70 *Sebelius v. Hobby Lobby*, S.Ct. No. 13-354 and *Conestoga Wood Specialties Corp. v. Sebelius*, S.Ct. No. 13-356, Transcript of Proceedings, Mar. 25, 2014 at 4.

for her employees, what -- what happens then?⁷¹

Clement relied on the RFRA statute itself, arguing that in any case, “the first step in the analysis would be to ask whether or not there’s a substantial burden on religious exercise.”⁷² “[I]f we assume we get past the substantial burden step of the analysis, then the next step of the analysis is the compelling interest and least restrictive alternatives analysis. And every case would have to be analyzed on its own.”⁷³ He noted that particularly compelling cases may exist, which drew a two-word question from Justice Kagan: “Blood transfusions?”⁷⁴ Clement’s reflexive answer, “Blood transfusions,”⁷⁵ appeared to confirm that he viewed such a case as potentially presenting an overriding government interest in mandating coverage. Yet he reiterated that “[E]ach one of these cases... would have to be evaluated on its own and apply the compelling interest-least restrictive alternative test and the substantial burdens part of the test.”⁷⁶

Arguing for HHS, Solicitor General Donald B. Verrilli, Jr. opened by citing the concern that informed the government’s peti-

71 Tr. at 5. This argumentum ad absurdum was taken up by other Justices later in the argument, as Justices Breyer and Kennedy raised questions about mandated participation in abortion. Tr. at 63-64 (J. Breyer); 75-76 (J. Kennedy). Verrilli denied that any present law would impose that mandate. Tr. at 75. but Chief Justice Roberts rejoined that for the families before the Court, that was their view – that the four contraceptives objected to caused abortion. Tr. at 76.

72 Tr. at 5, 111-3.

73 Tr. at 5.

74 Tr. at 6.

75 *Id.*

76 *Id.* at 7.

tion in Hobby Lobby, that of the impact of conscientious objections on the interests of third parties.⁷⁷

General Verrilli: The touchstone for resolving this case is the principle Justice Jackson articulated in *Prince v. Massachusetts*. As he said, "Limitations which of necessity bound religious freedom begin to operate whenever activities begin to affect or collide with the liberties of others or of the public. Adherence to that principle is what makes possible the harmonious functioning of a society like ours, in which people of every faith live and work side by side."⁷⁸

Chief Justice John Roberts rejoined, "That's a statement that is inconsistent with RFRA, isn't it? The whole point of RFRA is that Congress wanted to provide exceptions for the religious views of particular – including proprietors, individuals."⁷⁹ Verrilli responded that the point Justice Jackson was making in *Prince* was akin to the point the Court made in unanimity in *Cutter v. Wilkinson*⁸⁰ – "[W]hen you are analyzing what is required under RFRA, the court must take account of the way in which the requested accommodation will affect the rights and interests of third parties."⁸¹ Finally, Justice Sotomayor asked Clement about the possible

77 *Id.* at 41.

78 *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944)).

79 *Id.* at 41.

80 *Tr.* at 42 (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)).

81 *Tr.* at 42-43.

application of the accommodation HHS offered nonprofit religious employers, that of certifying their religious objection to contraception and directing their insurer or third-party administrator to provide cost-free coverage to their employees:

Justice Sotomayor: Will your clients claim that filling out the form, if you're saying they would claim an exemption like the churches have already?

Mr. Clement: We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that. But it's important to recognize that as I understand that litigation, the objection is not to the fact that the insurance or the provider pays for the contraception coverage. The whole debate is about how much complicity there has to be from the employer in order to trigger that coverage. And whatever the answer is for Little Sisters of the Poor, presumably you can extend the same thing to my clients and there wouldn't be a problem with that.⁸²

III. THE DECISION IN *BURWELL V. HOBBY LOBBY*.

On June 30, 2014, the Court issued a narrowly split decision upholding the right of conscience of the Hahn and Green

82 Tr. at 86-87.

families and their businesses.⁸³ Five Justices held that RFRA protects the religious exercise of for-profit businesses, and that in this case, the HHS Mandate had imposed a substantial burden on the Hahns' and Greens' faith.⁸⁴ The majority also concluded that while the government's interest in providing contraceptive coverage to employees of all businesses, including faith-based ones, could be presumed to be "compelling" under RFRA, it had failed to prove that there were no means available to further that interest than by a direct imposition on the free exercise of religious adherents.⁸⁵

The Court ruled as a preliminary matter that RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel.⁸⁶ The majority rejected HHS's argument that the companies could not sue because they were for-profit⁸⁷ and that the owners could not sue because the regulations applied only to the companies.⁸⁸ The Justices noted that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations.⁸⁹

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

84 *Id.* at 2755-56 (Syllabus of the Court setting forth holding concerning for-profit businesses under RFRA); *Id.* at 2757 (substantial burden analysis).

85 *Id.* at 2757-58 (Syllabus of the Court).

86 *Id.* at 2768-75, 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

87 *Id.* at 2769 ("According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.").

88 134 S.Ct. at 2767.

89 *Id.* at 2767.

RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice, according to the Court.⁹⁰ While Congress employed the legal fiction of including corporations within RFRA's definition of "persons," the purpose of extending rights to corporations is to protect the rights of those individuals who associated with the corporation, such as shareholders, officers, and employees.⁹¹ "[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga and Mardel protects the religious liberty of the humans who own and control those companies," the majority concluded.⁹²

The Court stated that HHS and the dissenting Justices offered "no persuasive explanation" for their conclusion that corporations cannot "exercise . . . religion."⁹³ The corporate form alone cannot explain it because the government admitted RFRA protects nonprofit corporations.⁹⁴ Nor can the profit motive of businesses, because the Court has entertained free exercise claims of merchants.⁹⁵ Moreover, modern corporate law of the states,

90 *Id.*

91 *Id.* at 2768.

92 *Id.* The Court also noted that it has entertained RFRA and free-exercise claims brought by nonprofit corporations. *Id.* at 2768-69. Moreover, the majority stated, "HHS's concession that a nonprofit corporation can be a 'person' under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of 'person' includes natural persons and nonprofit corporations, but not for-profit corporations." *Id.* at 2769.

93 *Id.* at 2769.

94 *Id.*

95 *Id.*, citing *Braunfeld v. Brown*, 366 U. S. 599 (1961) (acknowledging free exercise rights of Orthodox Jewish merchants); see *United States v. Lee*, 455 U.S. 252, 257 (1982) (recognizing that "compulsory participation in the social

including those of Pennsylvania and Oklahoma, authorizes corporations to pursue any lawful purpose or business, necessarily including the pursuit of profit in conformity with the owners' religious principles.⁹⁶ Finally, the Court rejected HHS' contention that the difficulty of ascertaining the "beliefs" of large, publicly traded corporations indicates that Congress could not have intended to protect them, noting that HHS had not pointed to any example of a publicly traded corporation asserting RFRA rights, and that numerous practical restraints would likely prevent that from occurring.⁹⁷

The majority went on to conclude that as applied to closely held corporations like Conestoga, Hobby Lobby and Mardel, the HHS Mandate violated RFRA.⁹⁸ The Mandate required the Hahns and Greens to engage in conduct that seriously violated their sincere religious belief that life begins at conception, on the pain of severe economic consequences if they refused or dropped coverage altogether.⁹⁹ Nor could the connection between what Hobby Lobby and Conestoga had to provide and the end they found to be morally wrong be said to be too attenuated because the employee chooses the coverage and contraceptive method she uses.¹⁰⁰ RFRA's question – which the majority accused HHS of "dodg[ing]"¹⁰¹ is whether the mandate imposes a substantial

security system interferes with [Amish employers'] free exercise rights").

96 *Id.* at 2771-72.

97 *Id.* at 2774-75.

98 *Id.* at 2775.

99 *Id.* at 2775-76.

100 *Id.* at 2777.

101 *Id.* at 2778.

burden on the objecting parties' ability to conduct business in accordance with their religious beliefs.¹⁰² The Hahns' and Greens' beliefs implicated a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another.¹⁰³ It is not the Court's province to say that religious beliefs are mistaken or unreasonable, but only whether they are "honest," the Court observed.¹⁰⁴

Finally, the Court assumed that the government's interest in guaranteeing cost-free access to the four challenged contraceptive methods was "compelling,"¹⁰⁵ but found it had failed to demonstrate that the Mandate was the least restrictive means of furthering that interest as RFRA requires.¹⁰⁶ HHS had other means of achieving its desired goal without burdening religious freedom, the Court held, such as assuming the cost of directly providing contraceptives to women unable to obtain coverage due to their employers' religious objections, or extending the accommodation HHS already offered certain religious nonprofit organizations to nonprofit employers.¹⁰⁷

The four dissenting Justices, while not united on the

102 *Id.*

103 *Id.*

104 *Id.* at 2779, citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981).

105 *Id.* at 2780.

106 *Id.* at 2780 ("Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement.").

107 *Id.* at 2759.

question whether RFRA protects the free exercise of for-profit corporations,¹⁰⁸ maintained that the HHS Mandate did not impose a “substantial burden” on the parties’ religious beliefs,¹⁰⁹ that any burden was overridden by the comparative interest in ensuring cost-free access to contraceptives,¹¹⁰ and that no lesser restrictive means were available to further the government’s interest.¹¹¹

In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.¹¹²

108 Op. of JJ. Ginsburg and Sotomayor, *Id.* at 2795 (“Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.”). Justices Breyer and Kagan wrote a separate dissent, agreeing with Justice Ginsburg that the plaintiffs’ case failed on the merits, but stating their position that they “need not and do not decide whether either for-profit corporations or their owners may bring claims under [RFRA].” 134 S.Ct. at 2806.

109 134 S.Ct. at 2798-99.

110 *Id.* at 2787-806.

111 *Id.* at 2801-02.

112 *Id.* at 2787. On this basis, Justice Ginsburg, joined by Justice Sotomayor, distinguished the Court’s subsequent decision of the same term affirming RFRA’s application to a Muslim prisoner’s claim that a grooming policy violated his religious beliefs. *Holt v. Hobbs*, 135 S.Ct. 853 (2015) (“Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores...* accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief. On that understanding, I join the Court’s opinion.”) (citations omitted).

Writing the dissent, Justice Ginsburg invoked *Planned Parenthood v. Casey*, the Supreme Court's 1992 decision affirming the fundamental right to abortion found in *Roe v. Wade*,¹¹³ as the foundation for the ACA's preventive care mandate:

The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA).¹¹⁴

Acknowledging that the Hahn and Green families' religious convictions were sincere,¹¹⁵ the dissent nonetheless maintained that the majority "elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the bur-

113 *Roe v. Wade*, 410 U.S. 113, 122 (1973).

114 *Id.* at 2787-88.

115 *Id.* at 2798.

den placed on the challenger.”¹¹⁶ In this case, the dissent opined, the burden could not be described as “substantial” because “the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers.”¹¹⁷ The dissent seems to declaim that the act of funding the decisions of third parties could amount to a substantial burden on religious exercise:

Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.”¹¹⁸

The majority reversed the decision of the Third Circuit, ordering the lower court to reconsider its decisions to deny Conestoga pre-

116 *Id.* at 2799.

117 *Id.* at 2799.

118 *Id.* (quoting *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)). See also *Id.* (“Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women’s well being.... the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening.”) (citation omitted).

liminary injunctive relief against the HHS Mandate, and affirmed the Tenth Circuit's injunction in favor of Hobby Lobby.¹¹⁹ By the end of 2014, the district courts of Oklahoma and Pennsylvania had both entered permanent injunctions against the federal agencies that implement the ACA, ordering them not to apply the Mandate against these businesses or their owners or to impose the penalties for non-compliance the ACA provides through the Internal Revenue Code.¹²⁰

IV. THE POSSIBLE CONSEQUENCES OF HOBBY LOBBY.

Burwell v. Hobby Lobby bodes well for claims of religious conscience against federal statutory and regulatory impositions. The majority opinion's analysis amounts to a broad affirmation of the right of religious exercise in the context of impositions on both corporate and individual consciences, without excluding categories of exercise such as business activity. The full Court (including the dissent) reaffirmed the First Amendment principle that courts will not ordinarily inquire into the sincerity and centrality of claimants' religious beliefs.¹²¹ The majority focused its "sub-

119 *Id.* at 2785.

120 See *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744, Order filed Oct. 9, 2014 ("Defendants are permanently enjoined from enforcing against Plaintiffs, their group health plan, and the group health insurance coverage provided in connection with that plan, the statute and regulations that require Plaintiffs to provide their employees coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity[.]"); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000, Judgment filed Nov. 19, 2014 ("[D]efendants are permanently enjoined from enforcing against the corporate plaintiffs the regulations identified as the 'contraceptive mandate' in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).").

121 134 S.Ct. at 2778-2779, 2798.

stantial burden” analysis on the coercive effects of the government’s penalties for non-compliance,¹²² in contrast to the dissent, which reasoned that the plaintiffs were not substantially burdened by the requirement that they fund the independent choices of third-party employees.¹²³ Assuming for the sake of argument that the Mandate satisfied the “compelling interest” prong of the test, while noting that the proper application of the standard requires an assessment of the strength of the government’s interests viz. the particular burden on the particular claimants,¹²⁴ the Court went on to hold that the Mandate was not a “narrowly tailored” means of advancing the government’s interest in increasing access to contraceptives.¹²⁵ The Mandate was underinclusive, according to the majority, because it exempted potentially tens of millions of individuals through grandfathering existing plans and by providing statutory and regulatory exceptions to the employer Mandate and to the individual mandate and its penalties.¹²⁶

Obviously, the *Hobby Lobby* decision has direct precedential application to the dozens of lawsuits involving for-profit religiously-owned businesses, and the perhaps thousands of sim-

122 *Id.* at 2775-2779.

123 *Id.* at 2797-2799. The dissent seemed to completely miss the point in this regard. The claim of religious accommodation was against having to directly fund what the plaintiffs regarded as immoral acts of employees. Unlike the funds in a pay check, which are fungible and may be directed by recipients to any licit or immoral purpose without attributing moral blame to the employer, the ACA mandates that employers pay for “preventive care” including pharmaceuticals that are inimical to human life. This involves a direct participation in the act and imbues moral culpability to the entity or person that knows the coverage will be used this way.

124 134 S.Ct. at 2779.

125 *Id.* at 2780-2783.

126 *Id.* at 2764.

ilarly-situated businesses. At this writing, the Justice Department is negotiating judgments with plaintiffs' counsel and entering dismissals of these lawsuits across the country.¹²⁷ Generally, Justice's position is that it will accept an entry of final injunctive relief and an award of reasonable fees and costs in all these cases.¹²⁸ Beyond the ACA context, *Hobby Lobby* augurs at least for legal recognition of the First Amendment right of free exercise and conscience of closely-held corporations and other forms of ownership such

127 See, e.g., *Briscoe, et al. v. Burwell*, 1:13-cv-00285 (USDC Dist. Colo.); *Newland v. Burwell*, 1:12-cv-01123 (USDC Dist. Colo.); *Sioux Chief MFG. Co, Inc. et al v. Burwell et al*, 4:13-cv-00036 (USDC W.Dist. MO); *Seneca Lumber Co. v. Burwell*, 12-cv-00207 (USDC W.Dist. Pa.).

128 Generally, the form of judgment has sought to codify the legal relationship between the parties based upon the state of the ACA regulations at the time of settlement, without anticipating the impact of potential future applications. For example, the judgment entered on behalf of *Conestoga Wood* provides:

Defendants are permanently ENJOINED from enforcing against Plaintiffs, their group health plan, and the group health insurance coverage provided in connection with that plan, the statute and regulations that require Plaintiffs to provide their employees coverage for “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity[.]” See, e.g., 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725 (Feb. 15, 2012).¹ This Order applies only to requirements regarding the provision of coverage for the contraceptive services to which Plaintiffs object on religious grounds. It should not be construed as applying to any other healthcare coverage required by law, including coverage of the other services required by the regulations regarding Women’s Preventive Healthcare.

No. 5:12-cv-06744 (Docket No. 82, filed Oct. 2, 2014). The court further stated, “At the urging of the Government, and in an overabundance of caution, we note that should any future legislation or regulation come into effect providing for-profit entities a religious accommodation to the contraceptive coverage mandate, the Government reserves its right to enforce such legislation or regulation against Plaintiffs.” *Id.*, n.1.

as Limited Liability Corporations (“LLCs”) and partnerships, although the Supreme Court’s limitation of its holding to this context suggests that it will balance the litigants’ interests differently in a case involving public ownership.

It would appear at first blush that a decision for corporate free exercise by for-profit businesses would naturally sweep in nonprofit religious organizations such as ministries, ecclesiastical organizations and schools. If a commercial enterprise can exercise faith in the workplace, surely all the more so for a faith-based nonprofit organization. In the ACA context, however, an HHS rule creating an “accommodation” for many nonprofit corporations has perpetuated the litigation.¹²⁹ The rule permits nonprofits to inform HHS by notification that it is a religious nonprofit that objects to providing preventive services to its employees, and HHS will require the nonprofit’s carrier or third-party administrator to provide coverage to the nonprofit’s employees. Most of the claimants that fell within the scope of the “accommodation” have refused it and chosen to continue to press the issue in court, asserting that the notification is a form of providing for coverage for objectionable drugs in which they cannot participate.¹³⁰

Finally, there is at least one lawsuit on behalf of a non-

129 Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pt. 147); see also 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

130 Just before this article went to print, the U.S. Supreme Court appears to have given renewed vitality to these cases by granting, vacating and remanding the petition for writ of certiorari of Notre Dame University for further consideration in light of *Hobby Lobby*. *Univ. of Notre Dame v. Burwell*, Sup. Ct. No. 14-392 (Mar. 9, 2015). Notre Dame had argued that Hobby Lobby did not require a holding that the accommodation cured the RFRA violation.

profit non-religious association and its employees, which argues that providing coverage for abortion-causing drugs violates its corporate right of equal protection, its right to non-arbitrary rules under the Administrative Procedure Act, and, in the case of the individual employees, their rights under RFRA.¹³¹ Additionally, persons subject to the Individual Mandate allege that their right to conscientious objection to purchasing coverage for elective abortion on the ACA-created state exchange system violates their right to free exercise and RFRA.¹³²

Whether within the context of the ACA and its mandates, or beyond it in other situations involving federal statutory and regulatory impositions on corporate and individual conscience, *Burwell v. Hobby Lobby* will continue to impress upon federal courts the need to show deference to claims of burden on religious exercise even in the business context, as well as the importance of a searching analysis of the means government chooses to further its chosen ends that trammel religious conscience.

131 *March for Life, et al. v. Burwell*, No. 14-cv-1149 (USDC D.C.).

132 *Bracy v. Burwell*, No. 3:14-c-00593 (D. Conn. Filed May 1, 2014); *Howe v. Burwell*, No. 2:15-cv-6 (D. Vt. Filed Jan. 14, 2015); *Doe v. Burwell* (D.R.I. Filed Jan. 1, 2015).

