

A New Era of Inequality?

Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws

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The Religious Freedom Restoration Act of 1993 (“RFRA”)¹ was passed to protect freedom of religion.² RFRA prohibits the government from substantially burdening religious exercise unless the government can meet a strict-scrutiny test: the government must show that it is pursuing a compelling governmental interest through the least restrictive means available.³ RFRA’s enactment was a response to the Supreme Court’s decision in *Employment Division v. Smith*, which significantly weakened constitutional protections for religious freedom.⁴ Yet, last term, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court used RFRA to curtail the religious liberty of individuals, holding that the statute grants for-profit employers a right to impose their religious beliefs on their employees by refusing to provide health-insurance coverage for procedures and medications barred by the employers’ religious tenets.⁵

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 ways. The ruling significantly expanded the reach of RFRA in three principal ways. First, the Court concluded that for-profit corporations, at least closely held ones, have “rights” under RFRA.⁶ Second, the ruling makes it much more difficult to defeat a religious objector’s assertion that governmental conduct imposes a substantial burden on his or her religious beliefs.⁷ Third, the ruling makes it

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¹ 42 U.S.C. § 2000bb–2000bb-4 (2012).

² See *infra* Part III.A.

³ 42 U.S.C. § 2000bb-1(a) (2012).

⁴ As detailed below, in *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), the Supreme Court abandoned the standard it had used in prior cases to evaluate claims of violation of the First Amendment right to free exercise of religion. See *infra* notes 70–72 and accompanying text. The earlier cases had required “governmental actions that substantially burden a religious practice [to] be justified by a compelling governmental interest.” *Smith*, 494 U.S. at 883. *Smith* held, on the other hand, “that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.” *Id.* at 886 n.3.

⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

⁶ See *infra* Part I.A.

⁷ See *infra* Part I.B.

more difficult to show that the government is pursuing the least restrictive means available in imposing such a burden.⁸

A principal concern about the impact of *Hobby Lobby* is whether the decision will open the door for religious objections to override laws that prohibit discrimination in employment and other arenas. Will the decision usher in a new era of inequality in which businesses have a right to refuse to hire or serve persons whose identities or conduct are condemned by the theological teachings of the businesses' owners?

Several factors could lessen—but not fully ameliorate—*Hobby Lobby*'s impact on anti-discrimination laws. Although RFRA applies only to the federal government and not to the states, *Hobby Lobby* could significantly influence state-court interpretations of analogous state statutes and constitutional provisions.⁹ While most courts that have considered the question have determined that RFRA is inapplicable to lawsuits between private parties, one Second Circuit panel has disagreed, and it is possible that the Supreme Court could side with that panel if presented with the issue.¹⁰ There are already various exemptions (both constitutional and statutory) that shield religious organizations from anti-discrimination laws; *Hobby Lobby*'s greatest impact will likely be on situations not covered by those exemptions.¹¹ And even though anti-discrimination laws would likely survive RFRA's strict-scrutiny test under existing case law, there is no guarantee that the Supreme Court would not reach a contrary conclusion.¹²

All told, given how much more value the *Hobby Lobby* Court gave to the religious concerns of employers than to the religious freedoms of their employees, it is not hard to imagine that a future Supreme Court decision could subordinate anti-discrimination laws to RFRA in a crippling way. To prevent this from occurring, as well as to address many other potential ways in which *Hobby Lobby* could be used to allow imposition of religious beliefs on persons who do not subscribe to them, RFRA should be amended to return the statute to what the members of Congress who voted for it thought they were approving: a measure that *truly* protects freedom of religion.

There are many options for repairing RFRA. For-profit businesses could be precluded from making claims under the statute. RFRA's "substantial burden" requirement could be reinvigorated. The "least restrictive means" analysis could be rendered more deferential to the government. Specific statutes could be excluded from RFRA's grasp. All the foregoing alternatives have drawbacks, however.¹³

The soundest way of ensuring that *Hobby Lobby* does not open the door to private discrimination or other impositions of religious beliefs on persons who do not share them would be to specifically exclude from RFRA's

⁸ See *infra* Part I.C.

⁹ See *infra* Part II.A.

¹⁰ See *infra* Part II.B.

¹¹ See *infra* Part II.C.

¹² See *infra* Part II.E.

¹³ See *infra* Part III.B.

coverage requests for exemptions that would impose nontrivial burdens on third parties.¹⁴ Such an amendment would provide the most effective protection against future court decisions that—in the name of religious freedom—abridge such freedom instead of preserving it.

I. *HOBBY LOBBY'S* EXPANSIVE READING OF RFRA

The Supreme Court's decision in *Hobby Lobby* held that RFRA grants closely held for-profit corporations an exemption from regulations requiring employers to include coverage for contraceptives in their health-insurance plans, if the corporations' owners assert a religious objection.¹⁵ *Hobby Lobby* read RFRA quite expansively with respect to three issues upon which circuit courts had disagreed. First, the Court concluded that closely held¹⁶—and apparently all—for-profit corporations are entitled to bring claims under RFRA.¹⁷ Second, the Court's ruling makes it much more difficult to defeat a RFRA plaintiff's assertion that governmental conduct substantially burdens the plaintiff's religious beliefs.¹⁸ Third, the Court gave little deference to the government on the question of whether there were less restrictive alternatives for fulfilling the interests supporting the regulations at issue.¹⁹

A. *Hobby Lobby Rendered Corporations "Persons" Under RFRA*

RFRA provides that the "[g]overnment shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability," unless the government can show that it is pursuing a compelling governmental interest through the least restrictive means of furthering it.²⁰ Before *Hobby Lobby* was decided, two circuits—the Seventh and Tenth—had held that for-profit corporations were "persons" capable of exercising religion under RFRA.²¹ Three circuits—the Third, Sixth, and D.C.—had held the opposite.²²

¹⁴ See *infra* Part III.B.

¹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹⁶ A corporation is generally considered "closely held" if only a few individuals own a majority of its stock. See Internal Revenue Service, *Help and Resources: Entities*, <http://perma.cc/HMN8-45NV>.

¹⁷ See *infra* Part I.A.

¹⁸ See *infra* Part I.B.

¹⁹ See *infra* Part I.C.

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

²¹ See *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (2014); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129, 1132 (10th Cir. 2013), *aff'd*, 134 S. Ct. 2751 (2014).

²² See *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1213 (D.C. Cir. 2013), *vac'd*, 134 S. Ct. 2902 (2014); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 627 (6th Cir. 2013), *vac'd sub nom.* *Autocam Corp. v. Burwell*, 134 S. Ct. 2903 (2014); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013), *rev'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

In *Hobby Lobby*, the Supreme Court ruled “that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”²³ The Court claimed that it was not deciding whether *publicly traded* for-profit corporations may also bring claims under RFRA.²⁴ But the Court’s discussion of the applicability of RFRA to corporations left little room to argue that publicly traded corporations should be treated any differently from closely held ones. As Justice Ginsburg’s dissent recognized, the Court’s “logic extends to corporations of any size, public or private.”²⁵

First the Court cited the Dictionary Act, which governs the interpretation of the U.S. Code, and provides that “the word ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”²⁶ The Court noted that it had already entertained RFRA and Free Exercise Clause claims on behalf of non-profit corporations.²⁷ It then proclaimed that “[n]o known understanding of the term ‘person’ includes *some* but not all corporations” and that “no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.”²⁸

The Court further pointed out that laws granting exemptions limited to non-profit corporations show “that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.”²⁹ The Court went on to reject the argument that “a for-profit corporation cannot engage in the ‘exercise of religion.’”³⁰ And the Court spurned the government’s argument that it may be difficult to determine what the religious beliefs of a corporation are, asserting that “[s]tate corporate law provides a ready means for resolving any conflicts.”³¹

The Court’s real answer to the question of whether RFRA extends to publicly traded corporations was not “we don’t decide this”; it was “don’t worry about it.”³² According to the Court, “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”³³ But, after *Hobby Lobby*, it isn’t hard to imagine that corporate leaders who feel it advantageous to obtain an exemption for their company from a law they don’t like would be able to seek and obtain proxies

²³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014).

²⁴ *Id.* at 2774.

²⁵ *Id.* at 2797 (Ginsburg, J., dissenting).

²⁶ *Id.* at 2768 (majority opinion) (quoting 1 U.S.C. § 1 (2012)).

²⁷ *Id.* at 2768 (citing *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (non-profit organization prevailed on RFRA claim); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (non-profit organization prevailed on Free Exercise Clause claim); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (non-profit organization prevailed on Free Exercise Clause claim)).

²⁸ *Hobby Lobby*, 134 S. Ct. at 2769.

²⁹ *Id.* at 2774.

³⁰ *Id.* at 2772.

³¹ *Id.* at 2775.

³² *Id.* at 2774.

³³ *Id.*

from a majority of the corporation's shareholders affirming religious objections to the challenged legal requirement. Indeed, at least until recent years, it is likely that a corporation would have been able to convince a majority of its stockholders to affirm that they believe that homosexuality and any support thereof is proscribed under their religion. A corporation that is able to do so in the future could proceed, for example, to challenge under RFRA a law requiring extension of corporate benefits to same-sex partners. Other laws protecting unpopular minorities could suffer similar attacks.

B. Hobby Lobby Weakened the "Substantial" in "Substantial Burden"

Prior to *Hobby Lobby*, the circuit courts fell into two camps with respect to interpretation of RFRA's requirement that government must "*substantially* burden" the exercise of religion before strict scrutiny is triggered under the statute.³⁴ Many appellate panels interpreted the "substantial burden" provision to require that a challenged law in fact significantly obstruct important aspects of a plaintiff's religious practice. The Ninth Circuit, for instance, explained that a burden on religious exercise must be more than "damaged spiritual feelings" in order to be substantial.³⁵ As the Eleventh Circuit put it, "[i]f the word 'substantial' . . . is to retain any meaning, it must, at a minimum, be construed as requiring something more than solely [impairing conduct] that is sincere."³⁶ The D.C. Circuit concluded that "[a]n inconsequential or *de minimis* burden on religious practice does not rise to th[e] level" protected by RFRA; instead the burdened conduct must be "[important] to the adherent's religious scheme."³⁷ And one Seventh Circuit panel defined "substantial burden" as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."³⁸ The Eighth and Tenth Circuits, on the other hand, forswore any inquiry into the importance of the religious belief in question, and limited their analyses to the question of whether the

³⁴ 42 U.S.C. § 2000bb-1(a) (2012) (emphasis added).

³⁵ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 & n.12 (9th Cir. 2008) (en banc) (holding that use of recycled wastewater to make artificial snow for commercial ski resort located in national park on mountain considered sacred by Native American tribes did not impose substantial burden under RFRA even though tribes believed that such water would "spiritually desecrate" the mountain and "decrease the spiritual fulfillment they get from practicing their religion" there).

³⁶ *Smith v. Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007) (citation omitted) (concluding that denial of quartz crystal did not substantially burden prison inmate's practice of his religion of Odinism because he failed to show that the crystal was "fundamental to his practice" of that religion).

³⁷ *Kaemmerling v. Lappin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008) (explaining that government's collection and storage of prison inmate's DNA did not substantially burden his religion because it "involve[d] no action or forbearance on his part, nor d[id] it otherwise interfere with any religious act in which he engages").

³⁸ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (finding that a zoning ordinance did not substantially burden religious exercise).

government conduct at issue placed significant pressure on the claimant to act contrarily to the proffered belief.³⁹

In *Hobby Lobby*, the Supreme Court sided with the approach of the Eighth and Tenth Circuits. The United States argued that “the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.”⁴⁰ The Court rejected this argument on the grounds that so long as the objecting companies “sincerely believe that providing the insurance coverage demanded by the HHS regulations” violates their religious faiths, “it is not for us to say that their religious beliefs are mistaken or insubstantial.”⁴¹ Instead, concluded the Court, “our ‘narrow function . . . in this context is to determine’” whether a RFRA plaintiff’s assertion that the governmental action at issue violates their religious beliefs “reflects ‘an honest conviction.’”⁴²

In other words, *Hobby Lobby* makes it much more difficult to defeat a RFRA claimant’s profession that governmental pressure to engage in conduct that violates his or her religious beliefs (or to refrain from activity called for by his or her religious beliefs) places a substantial burden on his or her religion. The avenues for refuting such a claim are limited. One is to prove that the claimant does not sincerely hold the proffered belief.⁴³ Another is to show that the government’s conduct does not actually place substantial pressure on the claimant to act contrarily to the belief in question.⁴⁴

At least in the anti-discrimination context, however, it is questionable that the latter could be a viable response. If an employer has a sincere belief that associating with certain categories of people is contrary to the employer’s religion, or that the religion prohibits facilitating or supporting in any manner (such as by paying wages) conduct proscribed by the religion (such as becoming pregnant outside marriage), courts may well conclude that laws prohibiting adverse employment actions against the disfavored categories of people or conduct impose a “substantial burden” under *Hobby Lobby*.

³⁹ See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140–41 (10th Cir. 2013) (reaching the same conclusion with respect to substantial burden that the Supreme Court subsequently did in the case, as detailed *infra* at notes 40 to 44 and accompanying text), *aff’d*, 134 S. Ct. 2751 (2014); *Van Wyhe v. Reisch*, 581 F.3d 639, 645, 656 (8th Cir. 2009) (affirming that denial of prison inmate’s request to eat meals in three-sided tent during religious festival constituted substantial burden).

⁴⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777 (2014).

⁴¹ *Id.* at 2779.

⁴² *Id.* (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

⁴³ *Id.* The United States did not question the sincerity of the plaintiffs in *Hobby Lobby*. *Id.*

⁴⁴ See, e.g., *id.* at 2775–79.

C. Hobby Lobby *Made it Harder to Show that Means are “Least Restrictive”*

Once a RFRA plaintiff demonstrates a “substantial[] burden” on religious exercise, the government must demonstrate that the challenged law serves a compelling governmental interest and does so through the “least restrictive means.”⁴⁵ Federal appellate courts have taken different approaches concerning how much deference should be accorded to the government in deciding whether the government’s means are “least restrictive.” For instance, a Second Circuit panel has concluded that the U.S. border service is owed substantial deference on this prong of RFRA “due to its considered expertise”; the court added that RFRA “does not require the government to exhaust every possible means of furthering its interest” and that “the government must show only that its interest cannot be achieved through means *significantly* less restrictive.”⁴⁶ An Eighth Circuit panel has emphasized that the government is not required “to refute every conceivable option in order to satisfy the least restrictive means prong.”⁴⁷ Yet a Seventh Circuit panel has stated that the government must demonstrate “that it cannot achieve its policy goals in ways less damaging to religious-exercise rights.”⁴⁸ A Ninth Circuit panel has required the government to “set forth detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the [claimant].”⁴⁹ And a Tenth Circuit panel has called on the government to affirmatively “demonstrate how [challenged] regulations serve each of its asserted interests” by “build[ing] a record,” adding that the court will “not . . . make rulings on presumptions,” even obvious ones.⁵⁰

Though the Supreme Court did not set down categorical rules for applying RFRA’s “least restrictive means” prong in *Hobby Lobby*, the Court appeared to side with the less deferential circuits. After assuming without deciding that the governmental interest at issue was compelling, the Court went on to find that the government had not demonstrated “least restrictive

⁴⁵ 42 U.S.C. § 2000bb-1(b) (2012).

⁴⁶ *Tabbaa v. Chertoff*, 509 F.3d 89, 105–07 (2d Cir. 2007) (original emphasis omitted; emphasis added) (internal quotation marks omitted) (upholding extensive searches on re-entry to United States of individuals who attended Islamic conference despite lack of evidence that individuals had terrorist ties).

⁴⁷ *Hamilton v. Schriro*, 74 F.3d 1545, 1556–57 (8th Cir. 1996) (upholding prison’s refusal to allow Native American inmate access to a sweat lodge for religious ceremonies).

⁴⁸ *Korte v. Sebelius*, 735 F.3d 654, 686–87 (7th Cir. 2013) (striking down federal contraceptive-coverage regulations at issue in *Hobby Lobby* based on reasoning similar to that of Supreme Court in *Hobby Lobby*), *cert. denied*, 134 S. Ct. 2903 (2014).

⁴⁹ *May v. Baldwin*, 109 F.3d 557, 559, 564–65 (9th Cir. 1997) (upholding prison’s policy of requiring inmate to unbraid his dreadlocks for searches).

⁵⁰ *United States v. Hardman*, 297 F.3d 1116, 1132 (10th Cir. 2002) (emphasis omitted) (holding that federal government violated RFRA rights of practitioner of Native American religion by allowing only federally recognized Native American tribes to possess eagle feathers needed for religious ceremonies).

means.”⁵¹ The Court proclaimed, “[t]he least-restrictive means standard is exceptionally demanding.”⁵²

The opinion of the five-Justice majority suggested that an alternative means of satisfying the government’s interest of guaranteeing access to contraception was for the government to pay for the contraceptives itself.⁵³ The majority opinion emphasized that the government “has not shown . . . that this is not a viable alternative.”⁵⁴ The opinion rejected the proposition that “RFRA cannot be used to require creation of entirely new programs.”⁵⁵ It added that RFRA “may in some circumstances require the government to expend additional funds to accommodate citizens’ religious beliefs.”⁵⁶ Justice Kennedy wrote a concurrence that appeared to take a different view of this issue, however, stating that “the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the government to create an additional program.”⁵⁷ Yet, for some reason, Justice Kennedy joined the majority opinion in full.

The majority further concluded that an accommodation already offered by the United States to religious non-profits through its healthcare regulations—under which an employer’s health-insurance company or insurance-plan administrator must provide employees contraceptive coverage separate from the employer’s insurance plan—was another less-restrictive means.⁵⁸ The majority opinion relied on this option even though it refused to decide whether the accommodation itself complied with RFRA, while being well aware that numerous lawsuits challenging the accommodation were pending.⁵⁹ Justice Kennedy, on the other hand, despite joining the majority’s opinion, seemed to presume that the accommodation complied with RFRA, writing, “In these cases the means to reconcile [conflicting] priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means.”⁶⁰

⁵¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–82 (2014).

⁵² *Id.* at 2780.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2781 (quoting Brief for Petitioner-Appellant at 15, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2786 (Kennedy, J., concurring).

⁵⁸ *Id.* at 2781–82 (majority opinion). Though the “costs” of the contraceptive coverage are technically borne by the insurance companies and plan administrators, providing the coverage actually saves insurers money, as a result of reductions in pregnancy and improvements in women’s health. *Id.* at 2782 & n.38.

⁵⁹ *Id.* at 2782 n.40; *see also id.* at 2803 (Ginsburg, J., dissenting).

⁶⁰ *Id.* at 2787 (Kennedy, J., concurring).

II. POTENTIAL CLAIMS FOR RELIGIOUS EXEMPTIONS AFTER *HOBBY LOBBY*

At first glance, it seems that *Hobby Lobby* might lead to a significant expansion of claims for religious exemptions from anti-discrimination laws. A for-profit corporation can now seek such an exemption under RFRA if its owners have religious objections. To meet the “substantial burden” requirement, it appears that all a business’s owners need to do is truthfully assert that they believe that their faith calls on them not to employ persons who have certain characteristics or engage in certain conduct. Once the owners do so, the anti-discrimination prohibition at issue must meet an “exceptionally demanding” “least-restrictive means standard.”⁶¹

A number of factors may limit—but not fully ameliorate—the impact of *Hobby Lobby* in this arena. RFRA applies only to the federal government, not to state governments or laws; *Hobby Lobby*, however, may affect state-court interpretations of analogous state statutes and constitutional provisions.⁶² Most circuits to consider the question have held that RFRA does not apply to lawsuits between private parties; it is possible, nevertheless, that the Supreme Court will side with the minority view if presented with the issue.⁶³ Religious organizations already have some constitutionally grounded and statutory exemptions from various anti-discrimination laws; *Hobby Lobby*’s greatest impact will be on situations to which those exemptions do not extend.⁶⁴ And although anti-discrimination laws likely will satisfy strict scrutiny under RFRA, there is no guarantee that the Supreme Court will so conclude.⁶⁵

A. RFRA Does Not Apply to the States, but *Hobby Lobby* May Affect Interpretation of Analogous State Statutes and Constitutional Provisions

One factor that will limit *Hobby Lobby*’s impact is that RFRA applies only at the federal level, not to state and local laws. The Supreme Court held in *City of Boerne v. Flores* that RFRA is unconstitutional as applied to the states.⁶⁶

Many states have adopted their own versions of RFRA,⁶⁷ however, and some of these states look to federal precedent for guidance in interpreting

⁶¹ *Id.* at 2780 (majority opinion).

⁶² See *infra* Part II.A.

⁶³ See *infra* Part II.B.

⁶⁴ See *infra* Part II.C.

⁶⁵ See *infra* Part II.E.

⁶⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁷ See, e.g., CONN. GEN. STAT. § 52-571b (1993); FLA. STAT. § 761.01 (1998); 775 ILL. COMP. STAT. 35/1 (1998); KY. REV. STAT. § 446.350 (2013); MO. STAT. § 1.302 (2004); TEX. CIV. PRAC. & REM. CODE. § 110.001 (1999).

their state RFRAs.⁶⁸ To the extent states do so, *Hobby Lobby* may have an effect at the state level. Of course, states are not required to follow federal case law in interpreting state statutes; state courts are free to construe their own statutes independently.⁶⁹

Hobby Lobby may also have some impact on state-court interpretation of state constitutional provisions. As mentioned earlier, RFRA was intended to effectively nullify the Supreme Court's decision in *Employment Division v. Smith*.⁷⁰ In *Smith*, the Supreme Court abandoned the standard it had used in prior cases to evaluate claims alleging violation of the First Amendment right to free exercise of religion. Similarly to RFRA, the pre-*Smith* cases had required "governmental actions that substantially burden a religious practice [to] be justified by a compelling governmental interest."⁷¹ *Smith* held, on the other hand, "that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."⁷² A number of state courts interpret their state constitutions' protections for religious exercise under a standard similar to the federal pre-*Smith* standard, turning for guidance to pre-*Smith* federal jurisprudence⁷³—and in a few instances to federal cases interpreting the analogous RFRA test.⁷⁴ *Hobby Lobby* may well influence such state courts in future interpretations of their states' constitutional freedom-of-religion guarantees.

For these reasons, we should expect more claims for religious exemptions from anti-discrimination laws to be asserted in state courts after *Hobby Lobby*. Indeed, a number of such requests have been made in state cases in recent years. For example, a photography company asserted that New Mexico's RFRA exempted it from a state law prohibiting discrimination on the basis of sexual orientation (New Mexico's high court rejected this defense).⁷⁵ An inn contended that the Vermont constitution's guarantee of free exercise

⁶⁸ See, e.g., *State v. Cordingley*, 302 P.3d 730, 735 (Idaho Ct. App. 2013); *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003); *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009).

⁶⁹ See, e.g., *Cambodian Buddhist Soc. of Conn., Inc. v. Planning & Zoning Comm'n of Newtown*, 941 A.2d 868, 896 (Conn. 2008); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004); see also *State v. Bent*, 2013-NMCA-108, 2013 WL 4517161 (N.M. Ct. App. Aug. 26, 2013), *cert. denied*, 321 P.3d 126 (N.M. 2013).

⁷⁰ *Emp't Div. v. Smith*, 494 U.S. 872 (1990); see *Boerne*, 521 U.S. at 512.

⁷¹ *Smith*, 494 U.S. at 883 (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Gillette v. United States*, 401 U.S. 437 (1971); *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

⁷² *Smith*, 494 U.S. at 886 n.3; accord *Boerne*, 521 U.S. at 507.

⁷³ See, e.g., *Rupert v. City of Portland*, 605 A.2d 63, 65–66 (Me. 1992); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990); *Humphrey v. Lane*, 728 N.E.2d 1039, 1045 (Ohio 2000); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992).

⁷⁴ See *Huffman v. State*, 204 P.3d 339, 345 n.28 (Alaska 2009); *Champion v. Sec'y of State*, 761 N.W.2d 747, 758 (Mich. Ct. App. 2008).

⁷⁵ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

of religion superseded a state public-accommodations law prohibiting sexual-orientation discrimination (this case was settled).⁷⁶ Medical providers claimed that the California constitution's free-exercise clause overrode a state law that prohibited them from denying artificial insemination to a lesbian woman (the California Supreme Court ruled against them).⁷⁷ In pending litigation, a flower shop is relying on the Washington State Constitution's free-exercise guarantee to defend discrimination suits brought against it for refusing to sell a same-sex couple flowers for their upcoming wedding.⁷⁸ And in another pending case, a local diocese and its real-estate agent are citing the Massachusetts Constitution's freedom-of-religion clause as a defense against a state discrimination suit alleging that they refused to sell a parcel of property to a couple because of sexual orientation.⁷⁹

*B. RFRA Has Generally Been Held Inapplicable to Private Parties,
Though One Federal Appellate Panel Adopted
the Opposite View*

Not only is RFRA itself restricted to the federal level, but also all but one of the appellate courts to consider the question have held that RFRA does not apply to lawsuits between private parties. The one outlier is a 2-1 Second Circuit decision, *Hankins v. Lyght*.⁸⁰ This case relied on a clause in RFRA that provides, “[t]his chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].”⁸¹ Another clause in RFRA, 42 U.S.C. § 2000bb-1(c), provides, “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding *and* obtain appropriate relief against a government.”⁸² The court seemed to think “and” meant “or”—it read this clause disjunctively, arguing that it means that a RFRA claimant can rely on RFRA in a judicial proceeding *or* use RFRA against the government.⁸³ The court also argued that declaring RFRA inapplicable to private discrimination suits would render defendants in discrimination cases subject

⁷⁶ *Baker v. Wildflower Inn*, No. 183-7-11 CACV, 3 (Vt. Super. Ct. filed Sept. 11, 2012), available at <http://bit.ly/SnXGmz>.

⁷⁷ *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968 (Cal. 2008).

⁷⁸ *Ingersoll v. Arlene’s Flowers, Inc.*, No. 13-2-00953-3 (Super. Ct. Wash. filed Apr. 18, 2013); *Washington v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5 (Super. Ct. Wash. filed Apr. 9, 2013). See Compl. (*Ingersoll*), <http://perma.cc/D453-E9JR>; Answer (*Ingersoll*), <http://bit.ly/1kFHH9S>; Compl. (*Washington*), <http://bit.ly/1hD36AJ>; Answer (*Washington*), <http://bit.ly/1k5jXSe>.

⁷⁹ *Fairbanks v. House of Affirmation, Inc.*, C.A. No. 2012-01807-B (Mass. Super. Ct. filed Sept. 12, 2012). See Compl., <http://bit.ly/1osF53m>; Brief of Commonwealth, <http://1.usa.gov/1o4q7ST>.

⁸⁰ See *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006).

⁸¹ 42 U.S.C. § 2000bb-3(a) (2012); see *Hankins*, 441 F.3d at 103.

⁸² 42 U.S.C. § 2000bb-1(c) (2012) (emphasis added).

⁸³ See *Hankins*, 441 F.3d at 103.

to different legal standards, depending on whether the plaintiff was the United States or a private person.⁸⁴ Sonia Sotomayor, then a Second Circuit judge, filed a vigorous dissent.⁸⁵

Relying significantly on that dissent, the Sixth Circuit disagreed with *Hankins* in *General Conference Corp. of Seventh-Day Adventists v. McGill*.⁸⁶ In accord with its plain language, the Sixth Circuit read section 2000bb-1(c) as limiting RFRA to proceedings involving the government.⁸⁷ The Sixth Circuit pointed out that (i) RFRA requires the “government” to demonstrate that the statute’s compelling-interest test is met, (ii) the findings and purpose section of RFRA similarly and repeatedly refers to the “government,” and (iii) RFRA’s legislative history supports a conclusion that the statute should not apply to private parties.⁸⁸ The Seventh Circuit, in an opinion by Judge Posner, summarily rejected *Hankins*.⁸⁹ The Ninth Circuit concluded that it is “unlikely” that Congress intended RFRA to apply to suits involving private parties.⁹⁰ And a Second Circuit panel was not shy in stating its doubt about the court’s earlier decision in *Hankins*.⁹¹

Thus, under the clear majority view, the impact of RFRA on federal discrimination suits would be limited to cases brought by the government itself. In view of RFRA’s text, structure, and legislative history, the analysis of the majority cases appears much more sound than that of *Hankins*. Yet, given how broadly it read RFRA in *Hobby Lobby*, if the current Supreme Court has occasion to resolve this split, no one should be surprised if it sides with *Hankins*’ minority view.

*C. Federal Anti-Discrimination Laws Already Have Some Exemptions;
Hobby Lobby’s Greatest Impact Will Be on Situations
Not Covered by Those Exemptions*

Existing exemptions from anti-discrimination laws will also affect how much *Hobby Lobby* may impact discrimination suits. On the one hand, some religious exemptions are already provided under existing law, and so RFRA may make no difference in many cases. On the other hand, especially to the extent it is interpreted expansively, RFRA may have a great impact on the

⁸⁴ *Id.*

⁸⁵ *Id.* at 114–15 (Sotomayor, J., dissenting).

⁸⁶ *See* *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010).

⁸⁷ *Id.* at 410 (citing *Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting)).

⁸⁸ *Id.* at 410–11 (citing *Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting)).

⁸⁹ *See* *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (“The decision [*Hankins*] is unsound. RFRA is applicable only to suits to which the government is a party.”), *abrogated on other grounds by* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012).

⁹⁰ *See* *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1121 (9th Cir. 2000).

⁹¹ *See* *Rweyemamu v. Cote*, 520 F.3d 198, 203–04 & n.2 (2d Cir. 2008).

kinds of cases where no current exemption exists. There are two types of exemptions—constitutional and statutory—to consider.

1. *The Constitutional (“Ministerial”) Exemption*

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court unanimously adopted a principle that the circuit courts had “uniformly recognized”: under the Free Exercise and Establishment Clauses of the First Amendment, there is a “ministerial exception” that “precludes application” of employment discrimination laws “to claims concerning the employment relationship between a religious institution and its ministers.”⁹² The Court explained that “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”⁹³ Circuit courts have applied this exception not just to claims of religious discrimination, but to all types of discrimination, including race and gender.⁹⁴

The scope of the ministerial exception has been a matter of debate in the circuit courts and will undoubtedly continue to be so after *Hosanna-Tabor*. Some of the uncertainty has concerned exactly what kinds of institutions qualify for the exemption, an issue the Supreme Court discussed little in *Hosanna-Tabor*.⁹⁵ Much of the debate has centered on what kinds of employees are covered by the exemption.⁹⁶ The Supreme Court in *Hosanna-Tabor* declined to “adopt a rigid formula” for deciding this question, but looked at a number of factors, including whether a religious institution presents an employee as a minister, whether the employee receives a significant degree of religious training, whether the employee presents herself as a

⁹² *Hosanna-Tabor*, 132 S. Ct. at 705 & n.2 (citing many cases).

⁹³ *Id.* at 703.

⁹⁴ See, e.g., *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 179 (5th Cir. 2012) (disability); *Hankins v. N.Y. Annual Conference of United Methodist Church*, 351 F. App'x 489, 491 (2d Cir. 2009) (age); *Rweyemamu*, 520 F.3d at 204 (race); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) (gender).

⁹⁵ See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 476 (7th Cir. 2008) (religiously affiliated social service organization qualified for ministerial exception); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (religiously affiliated nursing home entitled to exemption); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (religiously affiliated university qualified for exemption); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (religiously affiliated hospital entitled to exemption).

⁹⁶ See, e.g., *Cannata*, 700 F.3d at 177–79 (church's music director was covered by exemption); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) (unordained minister in training was covered by exemption); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (director of Catholic Diocese's Department of Religious Formation was covered by exemption, despite substantial administrative duties); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) (press secretary for church was covered by exemption); *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1045 (8th Cir. 1994) (administrator of Jewish temple was not covered by exemption).

minister, and whether the employee performs religious duties.⁹⁷ The Court ruled that the employee plaintiff in the case was a “minister” covered by the exemption, even though the employee spent only a small portion of her time on religious duties.⁹⁸ This conclusion, as well as the expansive reading the Court gave RFRA in *Hobby Lobby*, signals that the current Court, if given the opportunity to interpret the scope of the ministerial exception again, may well interpret it broadly.

When courts hold the ministerial exception to be applicable, RFRA will make no difference for defendants, because reliance on it will be unnecessary. Indeed, in some past anti-discrimination cases where religious institutions raised RFRA as a defense, the RFRA argument did not affect the outcome because the courts concluded that the suits were barred by the ministerial exception.⁹⁹ On the other hand, in a number of other pre-*Hobby-Lobby* discrimination suits where both the ministerial exception and RFRA were invoked, the courts rejected both defenses.¹⁰⁰ It is in these kinds of cases that *Hobby Lobby*’s expansive interpretation of RFRA might make a significant impact. For example, employees who perform exclusively secular duties and clearly do not qualify as “ministers” for purposes of the ministerial exception could be at risk of losing the protections of anti-discrimination laws as a result of *Hobby Lobby*’s interpretation of RFRA.

2. Statutory Exemptions

There are a number of statutory exemptions from federal anti-discrimination laws. For example, Title VII of the Civil Rights Act of 1964 exempts “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”¹⁰¹ Title VII also allows “a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such [institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion.”¹⁰²

The circuits have utilized various tests to determine whether institutions qualify for these exemptions, considering different factors that have often

⁹⁷ See *Hosanna-Tabor*, 132 S. Ct. at 707.

⁹⁸ See *id.* at 707–08.

⁹⁹ See, e.g., *Catholic Univ.*, 83 F.3d at 467, 470; *Powell v. Stafford*, 859 F. Supp. 1343, 1347, 1349 (D. Colo. 1994).

¹⁰⁰ See, e.g., *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998); *Gallo v. Salesian Soc., Inc.*, 676 A.2d 580, 593 (N.J. Super. Ct. App. Div. 1996).

¹⁰¹ 42 U.S.C. § 2000e-1(a) (2012).

¹⁰² 42 U.S.C. § 2000e-2(e)(2) (2012).

included the following: (1) overt expression of religious purpose; (2) affiliation with or control by religious organizations; (3) integration of religion in operations; (4) whether an entity holds itself out as secular or religious; (5) whether an entity's membership is made up of co-religionists; (6) whether an entity produces a secular product; and (7) whether an entity operates for a profit.¹⁰³ Though the cases have treated whether a corporation is for-profit merely as a factor in the analysis,¹⁰⁴ our research did not reveal any case where a court had held that a for-profit corporation was entitled to a Title VII religious exemption. Indeed, our research disclosed only one published case where a for-profit corporation had even sought the exemption, a Ninth Circuit decision that rejected the defense.¹⁰⁵ Although arguments that RFRA creates an exemption from Title VII have been made in pre-*Hobby-Lobby* cases, those cases involved non-profits.¹⁰⁶ Thus *Hobby Lobby's* expansion of RFRA to for-profit corporations may lead to a significant increase in claims for religious exemptions from Title VII.

The Fair Housing Act has an exemption allowing “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society” to “limit[] the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion,” or to “giv[e] preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”¹⁰⁷ Given that this exemption does not cover for-profit rentals or for-profit corporations that are controlled by religious organizations, *Hobby Lobby's* expansion of RFRA to for-profit entities may have an important impact in the housing area too. Indeed, there have been some pre-*Hobby-Lobby* cases where defendants asserted that RFRA exempted them from the Fair Housing Act or analogous state laws, though in none of those cases was the RFRA argument successful.¹⁰⁸

Several other federal anti-discrimination laws have religious exemptions. Title I of the Americans with Disabilities Act (“ADA”), which prohibits discrimination on the basis of disability in employment, allows “a

¹⁰³ See *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011); *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624–26 (6th Cir. 2000); *Wirth v. Coll. of the Ozarks*, 208 F.3d 219 (8th Cir. 2000) (per curiam), *incorporating* 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998); *Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997); *EEOC v. Miss. Coll.*, 626 F.2d 477, 478–79 (5th Cir. 1980).

¹⁰⁴ See *LeBoon*, 503 F.3d at 226; *Hall*, 215 F.3d at 624.

¹⁰⁵ *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988).

¹⁰⁶ See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 217–218 (E.D.N.Y. 2006).

¹⁰⁷ 42 U.S.C. § 3607 (2012).

¹⁰⁸ See *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1115–16 (D. Idaho 2010), *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 929 (Cal. 1996); *Jasniewski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. Ct.), *vac'd on other grounds*, 685 N.E.2d 622 (Ill. 1997).

religious corporation, association, educational institution, or society [to] giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"; the statute further permits "a religious organization [to] require that all applicants and employees conform to the religious tenets of such organization."¹⁰⁹ Title III of the ADA, which prohibits discrimination on the basis of disability in places of public accommodation, unqualifiedly exempts "religious organizations or entities controlled by religious organizations, including places of worship."¹¹⁰ Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in any educational program or activity receiving federal financial assistance, exempts "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."¹¹¹ These statutes present similar issues as Title VII and the Fair Housing Act: where the religious exemption is not broad enough to apply, *Hobby Lobby* will encourage defendants to raise RFRA as a shield.

Hobby Lobby is even more likely to trigger a RFRA defense in cases involving federal anti-discrimination laws that provide no religious exemption at all. Such statutes include the Civil Rights Act of 1866 (which prohibits private discrimination on the basis of race or national origin with regards to contracts or property),¹¹² Title II of the Civil Rights Act of 1964 (which prohibits discrimination in places of public accommodation on the basis of race, color, religion, or national origin),¹¹³ the Age Discrimination in Employment Act ("ADEA," which prohibits employment discrimination on the basis of age),¹¹⁴ the Equal Pay Act (which prohibits wage discrimination on the basis of sex),¹¹⁵ the Immigration Reform and Control Act (which prohibits employment discrimination on the basis of national origin or the citizenship status of citizens or lawfully admitted aliens),¹¹⁶ and the Genetic Information Nondiscrimination Act (which prohibits employment discrimination on the basis of employee genetic information).¹¹⁷

There have already been several ADEA cases where defendants attempted to use RFRA to gain an exemption.¹¹⁸ One could easily imagine an employer who professes to believe on religious grounds that a woman's place is in the home—or that women should otherwise be subordinate to men—seeking an exemption under RFRA from the Equal Pay Act. An em-

¹⁰⁹ 42 U.S.C. § 12113(d) (2012).

¹¹⁰ *Id.* § 12187.

¹¹¹ 20 U.S.C. § 1681(a)(3) (2012).

¹¹² 42 U.S.C. §§ 1981–82 (2012).

¹¹³ *Id.* § 2000a.

¹¹⁴ 29 U.S.C. § 623 (2012).

¹¹⁵ *Id.* § 206(d).

¹¹⁶ 8 U.S.C. § 1324b(a)(1) (2012).

¹¹⁷ 42 U.S.C. § 2000ff-1 (2012).

¹¹⁸ See *Hankins v. Lyght*, 441 F.3d 96, 106 (2d Cir. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998); *Powell v. Stafford*, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

ployer who clothes racial supremacist beliefs in religious faith could raise a RFRA defense to the Genetic Information Nondiscrimination Act, as well as laws that directly prohibit race discrimination. Indeed, it does not take much imagination to conceive of many other kinds of requests for religious exemptions that could be made under RFRA from various federal anti-discrimination laws.

D. Hobby Lobby May Particularly Impact LGBT Rights

One area that has been particularly controversial recently is the extent to which religious exemptions should be provided from laws prohibiting discrimination based on sexual orientation or identity. As there is no federal statute expressly prohibiting such discrimination, most of the battle thus far has been fought at the state level. As noted above, religious exemptions have been sought from state laws prohibiting anti-LGBT discrimination in a number of cases, based on state RFRA or state constitutional clauses protecting the free exercise of religion.¹¹⁹

Various proposals to prohibit discrimination against LGBT people have been introduced in Congress over the last two decades.¹²⁰ If such legislation is ultimately passed, to the extent that it lacks a religious exemption, or to the extent that such an exemption is not considered to be broad enough by proponents thereof, RFRA will likely be raised as a defense to the legislation, unless the legislation includes a provision that expressly renders RFRA inapplicable to it.¹²¹

President Obama recently amended an executive order that had prohibited federal contractors from discriminating in employment based on race, color, religion, sex, or national origin to add sexual orientation and gender identity to the protected categories.¹²² The executive order does not exempt religious institutions from this requirement. The amendment to the order does leave in place a provision in the order's earlier version that (i) permits a federal contractor "that is a religious corporation, association, educational institution, or society" to employ "individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities" but (ii) emphasizes that "[s]uch contractors and subcontractors are not exempted or excused from

¹¹⁹ See, e.g., *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty.* Superior Court, 189 P.3d 959, 968 (Cal. 2008); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *Fairbanks v. House of Affirmation, Inc.*, C.A. No. 2012-01807-B (Mass. Super. Ct. filed Sept. 12, 2012); *Baker v. Wildflower Inn*, No. 183-7-11 CACV, 3 (Vt. Super. Ct. filed Sept. 11, 2012), *available at* <http://bit.ly/SnXGmz>; *Ingersoll v. Arlene's Flowers, Inc.*, No. 13-2-00953-3 (Super. Ct. Wash. filed Apr. 18, 2013); *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Super. Ct. Wash. filed Apr. 9, 2013).

¹²⁰ See *Employment Non-Discrimination Act: Legislative Timeline*, HUMAN RIGHTS CAMPAIGN, <http://perma.cc/56RV-WEXU>.

¹²¹ RFRA applies to all "[f]ederal statutory law adopted after November 16, 1993 . . . unless such law explicitly excludes such application by reference to [RFRA]." 42 U.S.C. § 2000bb-3(b) (2012).

¹²² Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014).

complying with the other requirements contained in this Order.”¹²³ It will not be surprising if religiously affiliated federal contractors rely on *Hobby Lobby* and RFRA (in addition to the language in the executive order that allows them to hire co-religionists) to argue for an exemption to the prohibition against anti-LGBT discrimination.

It is also noteworthy that in several cases where employers discriminated against gay and lesbian people for religious reasons, the victims of the discrimination argued that such decision-making violated Title VII’s prohibition against religious discrimination. The Third and Sixth Circuits have rejected such claims on the grounds that the employers did not discriminate because of the *employees’* religious beliefs.¹²⁴ On the other hand, a California federal district court allowed such a claim to proceed.¹²⁵ In addition, three other circuits have ruled or suggested that Title VII prohibits an employer from discriminating against an employee who fails to conform her conduct with the employer’s religious beliefs, regardless of whether the employee can show that her conduct was motivated by her religious beliefs or that she holds religious beliefs different from her employer’s.¹²⁶ Under such reasoning, religion-based anti-LGBT discrimination may well violate Title VII. But courts that so interpret Title VII will very likely have to deal with a RFRA defense after *Hobby Lobby*.

E. Anti-Discrimination Statutes Likely Will Survive Strict Scrutiny Under RFRA, but Arguments to the Contrary Could Be Made

Although *Hobby Lobby* may trigger a drastic uptick in RFRA claims for religious exemptions from anti-discrimination laws, and although such claims may well satisfy RFRA’s “substantial burden” requirement, the claims will likely be defeated under RFRA’s compelling interest/least restrictive means analysis. Courts have widely accepted that eliminating discrimination, including religious discrimination, is a compelling governmental interest. And there are no less restrictive means for advancing that interest than directly prohibiting the discrimination.

1. Compelling Interest

The U.S. Supreme Court and the circuit courts have repeatedly held that eliminating discrimination—in employment, public accommodations, and

¹²³ See *FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business*, THE WHITE HOUSE (Jul. 21, 2014), <http://perma.cc/CAG3-7D8F> (citing Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 16, 2002)).

¹²⁴ See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292–93 (3d Cir. 2009); *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 728 (6th Cir. 2009).

¹²⁵ See *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1165 (N.D. Cal. 2001).

¹²⁶ See *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168–69 (9th Cir. 2007); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997); *Lawrence v. Mars, Inc.*, 955 F.2d 902, 906 (4th Cir. 1992); see also *Yancey v. Nat’l Ctr. on Insts. & Alts.*, 986 F. Supp. 945, 954 (D. Md. 1997), *aff’d*, 1998 WL 196733 (4th Cir. 1998) (per curiam).

other contexts—is a “compelling state interest[] of the highest order.”¹²⁷ While it does not appear that the Supreme Court has directly spoken on the issue, federal circuit and district courts have specifically held that eliminating *religious* discrimination is a compelling governmental interest.¹²⁸ What is more, the Supreme Court has recognized that religion, like race, is a suspect classification that triggers strict scrutiny.¹²⁹ So one would think that satisfying RFRA’s compelling-interest requirement should be easy in the context of anti-discrimination laws. Indeed, in rejecting RFRA-based requests for religious exemptions from laws banning discrimination, some courts have concluded that such laws serve a compelling state interest.¹³⁰

What could lead a court to hold that there is no compelling interest in the anti-discrimination context? One cause for trepidation is that the *Hobby Lobby* majority, in response to concerns by the principal dissent that the majority’s decision could open the door to RFRA-based exemptions from anti-discrimination laws, pointed solely to laws prohibiting racial discrimination as an example of anti-discrimination laws that are justified by a compelling interest.¹³¹ Moreover, at least two courts have rejected the proposition that eradicating age discrimination is a compelling state interest in the context of suits brought by ministers against churches.¹³² In both of those cases, however, the courts ultimately found the suits to be constitutionally barred under the ministerial exception.¹³³

Courts have also held that underinclusive statutes—such as those that contain exemptions—are less likely to serve a compelling state interest.¹³⁴ But “it would be odd if the mere fact that a law contains some secular exceptions always sufficed to prove the government lacked a compelling inter-

¹²⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *accord, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

¹²⁸ *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1117 (D. Idaho 2010), *aff’d on other grounds*, 657 F.3d 988 (9th Cir. 2011); *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *9 (N.D. Cal. 2006), *aff’d*, 319 F. App’x 645 (9th Cir. 2009), *aff’d sub nom. Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002).

¹²⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹³⁰ *See, e.g.*, *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006); *Jasniewski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. Ct. 1997), *vac’d on other grounds*, 685 N.E.2d 622 (Ill. 1997).

¹³¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

¹³² *See Hankins v. N.Y. Annual Conference of United Methodist Church*, 516 F. Supp. 2d 225, 237 (E.D.N.Y. 2007), *aff’d on other grounds*, 351 F. App’x 489 (2d Cir. 2009); *Powell v. Stafford*, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

¹³³ *Hankins*, 351 F. App’x at 491; *Powell*, 859 F. Supp. at 1349.

¹³⁴ *See, e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366–67 (3d Cir. 1999); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 897 (1st Cir. 1993).

est.”¹³⁵ When he was a circuit judge, Justice Alito wrote that a law must be “*substantially* underinclusive” to fail strict scrutiny.¹³⁶

As noted above, a number of federal anti-discrimination statutes exempt religious institutions to some extent.¹³⁷ Defendants who desire a religious exemption but do not qualify for those statutory exemptions could assert that the existence of those exemptions undermines the proposition that the anti-discrimination statutes serve a compelling interest. But a court ruling accepting such arguments could lead to the result that the government must provide an exemption for all religiously motivated conduct, or for none at all. In other words, such a ruling could render Congress powerless to draw any line concerning how broad or narrow a religious exemption should be. Such a result could harm, not help, religious liberty—its ultimate consequence could be the elimination of statutory religious exemptions entirely.

In addition, some anti-discrimination laws contain non-religious exemptions. For example, several anti-discrimination laws exempt small employers;¹³⁸ Title IX’s prohibition against sex discrimination in federally funded educational programs allows scholarships to be given to winners of single-sex beauty pageants;¹³⁹ and the ADA’s requirement of disability access in transportation exempts historic trains.¹⁴⁰ Such exemptions could also be used to argue that an anti-discrimination law fails to serve a compelling interest under RFRA. The extensive case law recognizing the eradication of discrimination as a compelling interest of the highest order,¹⁴¹ the ever-increasing value modern society places on eradication of discrimination, and the narrow scope of these non-religious exemptions should all weigh against acceptance of such arguments. Yet, given its current composition and recent decisions, there are no guarantees concerning how the Supreme Court would view these issues.

¹³⁵ *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014).

¹³⁶ *Blackhawk v. Pennsylvania*, 381 F.3d 202, 214 (3d Cir. 2004) (emphasis added).

¹³⁷ See *supra* Part II.C.2.

¹³⁸ See Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(2)(A) (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2012); Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff(2)(B)(i) (2012); Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (2012).

¹³⁹ 20 U.S.C. § 1681(a)(9) (2012).

¹⁴⁰ 42 U.S.C. § 12184(c)(1) (2012).

¹⁴¹ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1117 (D. Idaho 2010), *aff’d on other grounds*, 657 F.3d 988 (9th Cir. 2011); *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *9 (N.D. Cal. 2006), *aff’d*, 319 F. App’x 645 (9th Cir. 2009), *aff’d sub nom. Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002).

2. *Least Restrictive Means*

Once a court finds that the government has established a compelling interest, the court should have no difficulty finding that an anti-discrimination law satisfies RFRA's "least restrictive means" mandate. RFRA requires the government to show that application of its compelling interest "to the person" seeking a RFRA exemption "is the least restrictive means of furthering" the interest.¹⁴² It would seem that the least restrictive means of furthering the government's interest in preventing discrimination, when applied to a particular employer, would always be prohibition of the discrimination at issue. Either the discrimination is allowed or it is not; there is no in-between. Courts rejecting RFRA-based requests for religious exemptions have accordingly concluded that anti-discrimination laws satisfy the "least restrictive means" requirement.¹⁴³

Yet, based on *Hobby Lobby's* suggestion that the option of the government itself paying for contraceptive insurance was a less restrictive means there,¹⁴⁴ could an argument be made that a less restrictive means in the anti-discrimination context would be for the government to itself provide employment to the individuals denied a job? It is extremely unlikely that even the current Supreme Court would accept such a contention. Such a view of the law would impose huge burdens and expenses on the government. Government-provided jobs would do nothing to erase the stigma that victims of discrimination experience as a result of their treatment. And, as noted earlier, Justice Kennedy—the fifth Justice in the *Hobby Lobby* majority—appeared to reject the proposition that the government paying for the contraceptive coverage qualified as a less restrictive means.¹⁴⁵

All that said, it is not inconceivable that this Supreme Court, or conservative appellate panels, might find some other ground for concluding that the "least restrictive means" requirement is not met in the anti-discrimination context.

III. POTENTIAL LEGISLATIVE SOLUTIONS

Given the uncertainty of how courts may interpret RFRA in the future, amending RFRA would be the most effective way to prevent the statute from being used to justify discrimination based on religion, sexual orienta-

¹⁴² 42 U.S.C. § 2000bb-1(b) (2012).

¹⁴³ See, e.g., *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006) (holding that Title VII is least restrictive means of furthering government's compelling interest in preventing discrimination based on pregnancy and sex); *Jasniowski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. Ct. 1997) (explaining that city's interest in prohibiting housing discrimination against unmarried, cohabiting couples was "integral to its overall interest in prohibiting all housing discrimination," and that "universal enforcement" of the city's housing-discrimination laws "is the least restrictive means available"), *vac'd on other grounds*, 685 N.E.2d 622 (Ill. 1997).

¹⁴⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

¹⁴⁵ See *id.* at 2787 (Kennedy, J., concurring).

tion, or other grounds. A legislative fix garners support not only from policy goals, but also from the fact that the interpretation the Supreme Court gave the statute in *Hobby Lobby* strays far from the meaning intended and expected by RFRA's framers.¹⁴⁶ While there are many options for amending the statute, the soundest way of ensuring that *Hobby Lobby* does not open the door to private discrimination or other unwanted impositions of religious beliefs would be to specifically bar claims for exemptions that would impose nontrivial burdens on third parties.¹⁴⁷

A. Hobby Lobby Read RFRA Much More Expansively
Than its Framers Intended

RFRA's framers intended the statute's threshold requirement that religion be "substantially" burdened to have teeth. The statute's first draft prohibited the government from imposing any "burden" whatsoever.¹⁴⁸ Congress added the adverb "substantially," however, to make clear that RFRA "would not require [a compelling governmental interest] for every government action that may have some incidental effect on religious institutions."¹⁴⁹ Senator Orrin Hatch, one of RFRA's co-sponsors, explained that RFRA "does not require the Government to justify every action that has some effect on religious exercise."¹⁵⁰ Likewise, RFRA's other Senate co-sponsor, Edward M. Kennedy, stated that strict scrutiny would not be required "for every governmental action[] that ha[s] an incidental effect on religious institutions."¹⁵¹ By effectively allowing RFRA claimants to define what a substantial burden is,¹⁵² the Supreme Court in *Hobby Lobby* interpreted RFRA in a manner directly contrary to these expressions of the intent of the statute's supporters.

Furthermore, RFRA's legislative history shows that its supporters had no inkling or desire that the statute would be used by for-profit employers to override anti-discrimination laws. Supporters of RFRA attacked many legal decisions resulting from the *Smith* ruling that RFRA was meant to undo, but cases involving employment discrimination claims were not among them.¹⁵³ Rather, the most commonly cited examples fell into three categories: (i) whether drivers of Amish buggies could be forced to display a religiously objectionable state-mandated symbol identifying slow-moving vehicles

¹⁴⁶ See *infra* Part III.A.

¹⁴⁷ See *infra* Part III.B.

¹⁴⁸ Religious Freedom Restoration Act of 1992, S. 2969, 102d Cong. (1992).

¹⁴⁹ S. REP. NO. 103-111, at 9 (1993) reprinted in 1993 U.S.C.A.N. 1892, 1898.

¹⁵⁰ 139 CONG. REC. 26, 180 (1993) (statement of Sen. Hatch).

¹⁵¹ *Id.* (statement of Sen. Kennedy).

¹⁵² See *supra* Part I.B.

¹⁵³ See *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary*, 102d Cong. (1993) [hereinafter *Senate Hearings*]; H.R. REP. NO. 103-88 (1993); S. REP. NO. 103-111; 138 CONG. REC. 18,016-18 (1992); 139 CONG. REC. 9,680-83, 26,178-97, 26,406-16 (1993).

rather than another symbol that is easily visible to other drivers;¹⁵⁴ (ii) whether governmental bodies could require the performance of autopsies over a decedent's family's religious objections;¹⁵⁵ and (iii) the use of zoning ordinances to keep houses of worship out of a neighborhood.¹⁵⁶ Other commonly cited concerns raised by RFRA's supporters included whether a municipality's ban on all consumption of alcohol could be applied to prevent the use of wine in communion services,¹⁵⁷ and whether public schools that ban headwear in class could apply such a ban to prohibit Jewish students from wearing yarmulkes.¹⁵⁸ In other words, RFRA was intended to prevent governmental interference with core religious practices where the countervailing governmental interests are questionable. *Hobby Lobby* did the exact opposite in vindicating a RFRA claim where the objection was merely to the support of conduct with which the plaintiffs disagreed, and the countervailing governmental interest was powerful. Amending RFRA to prevent the statute from curtailing protections for equality in the workplace and other arenas would simply return the statute to the meaning intended by the legislators who drafted, revised, and enacted it.

B. RFRA Should Be Amended to Prevent it from Imposing Harm on Third Parties

How can Congress best amend RFRA to prevent it from overriding anti-discrimination laws, and to foreclose other court decisions that could take the statute even further away from its original purposes than *Hobby Lobby* did? To begin with, although this article focuses on the potential impact of RFRA on anti-discrimination laws, amending RFRA more than once—if sufficient support for an amendment can be obtained at all—may well be difficult. Thus, if possible, it would be advisable to pass a comprehensive amendment that covers a broad variety of circumstances in which RFRA could be misused, such as the health-coverage area itself. The discus-

¹⁵⁴ See *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); H.R. REP. NO. 103-88, 15 n.14; S. REP. NO. 103-111, at 8 n.13, reprinted in 1993 U.S.C.C.A.N. at 1897; 139 CONG. REC. 9,681, 9,686–87 (1993) (Statements of Reps. Edwards, Hoyer, and Cardin).

¹⁵⁵ See *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *Montgomery v. Cnty. of Clinton, Mich.*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991); H.R. REP. NO. 103-88, at 15 n.14; S. REP. NO. 103-111, at 8 n.13, reprinted in 1993 U.S.C.C.A.N. at 1897; *Senate Hearings*, *supra* note 153, at 5–9 (Statement of Mr. Yang); 139 CONG. REC. 9,681, 9,684–87 (1993) (Statements of Reps. Edwards, Schumer, Hoyer, Lowey, Vento, and Cardin); *id.* at 26, 180–81 (Statement of Sen. Hatch).

¹⁵⁶ See *Cornerstone Bible Church v. City of Hastings, Minn.*, 948 F.2d 464 (8th Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 740 F. Supp. 654 (D. Minn. 1990); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); *Elsaesser v. City of Hamilton Bd. of Zoning Appeals*, 573 N.E.2d 733 (Ohio Ct. App. 1990); H.R. REP. NO. 103-88, at 15 n.14; 139 CONG. REC. 9,684–87 (1993) (Statements of Reps. Schumer, Hoyer, Lowey, Vento, and Maloney); *id.* at 26, 180–81 (Statement of Sen. Hatch).

¹⁵⁷ See, e.g., 139 CONG. REC. 9,684, 9,686 (1993) (Statements of Reps. Nadler, Schumer, and Maloney).

¹⁵⁸ See 138 CONG. REC. 18,018 (1992) (Statement of Sen. Hatch).

sion below therefore is not restricted to amendments that would address only the anti-discrimination issue.

One option for an amendment would be to limit the entities that can make a claim under RFRA. For example, a possible amendment could exclude for-profit businesses. However, this would still allow non-profit organizations controlled by religious individuals or entities to rely on RFRA for an entitlement to discriminate, even if the non-profits are engaged principally or entirely in secular activities. Moreover, there are policy arguments that for-profit businesses that exclusively or principally provide services for a particular religious community—such as a kosher butcher shop, or a bookstore that sells only Christian religious texts—should be entitled to protections similar to non-profit religious organizations.

A second option would be to add teeth back to RFRA's "substantial burden" requirement. For instance, an amendment could define "substantial" as covering only significant governmental interference with important religious activities or practices, and specifically exclude claims that are merely based on facilitation of objectionable conduct by others. Such an amendment, however, may well be ruled unconstitutional, because the Supreme Court has held that the First Amendment prohibits courts from inquiring into the centrality, importance, or validity of religious beliefs.¹⁵⁹ In addition, such an amendment may not even prevent RFRA from overriding anti-discrimination claims, as some people could profess that a central tenet of their religion bars them from associating with certain other kinds of people.

A third option could be to specifically define or enumerate what interests are compelling for purposes of RFRA. Preventing discrimination in employment and other contexts could be one such enumerated interest. Although such an approach could help address concerns about anti-discrimination laws, it may be difficult to generally describe or specifically enumerate every state interest that policymakers conclude should override RFRA claims. Furthermore, enumerating compelling interests would not prevent RFRA claims from succeeding under the statute's "least restrictive means" prong.

Is an amendment concerning the "least restrictive means" prong a viable option? Perhaps the statute could be changed to require a greater degree of deference to governmental evaluations of alternatives. However, such an amendment could be difficult to draft, and could still leave significant discretion to the courts. Conversely, it could give the government too much leeway to interfere with religious exercise when the government can easily advance its interests through means that do not burden religious practices.

Another potential amendment, which would affect both prongs of the RFRA strict-scrutiny analysis, would specifically provide that the existence of exemptions from a statute shall not be relevant to whether the statute—

¹⁵⁹ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014); *Emp't Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

when applied to the person or entity claiming RFRA protection—serves a compelling governmental interest or uses the “least restrictive means” available. Though such an approach (combined with enumerating prevention of discrimination as a compelling interest) could be sufficient to keep RFRA from overriding anti-discrimination laws, it may not be sufficient to keep RFRA from being misused in other circumstances that policymakers may wish to cover; indeed, it might not even be enough to lead to a different result under the facts of *Hobby Lobby* itself.

Yet another approach would be to specifically amend RFRA to render it inapplicable to particular laws, such as anti-discrimination laws. As with some of the other options discussed above, this option—while effective with respect to the laws that are specifically addressed—could be underinclusive. It could leave untouched plenty of situations where *Hobby Lobby* could be misused, unless policymakers can go through the entire U.S. Code and determine where RFRA should apply and where it should not.

A variation of this alternative would be to amend RFRA so that it only applies to statutes passed before its enactment, or before the date of the amendment, instead of all federal law (as it does now¹⁶⁰). Thus any law prohibiting discrimination based on sexual orientation or identity that may be passed in the future would have a religious exemption only to the extent specified in the law itself. But such an amendment to RFRA would be far from a comprehensive solution—it would simply cover some federal laws but not others. If Congress does not adopt a global amendment to RFRA, however, policymakers passing any future law that could be subject to a religious objection could consider inserting a provision specifically rendering RFRA inapplicable to the law.¹⁶¹

Given the potential flaws of the foregoing solutions, the optimal answer would be to amend RFRA to specifically exclude requests for exemptions that would impose nontrivial harms on third parties. This solution should easily prevent RFRA from being used to override anti-discrimination laws. It would also eliminate RFRA claims, such as in the health-insurance context, where the religious objection is merely to the support of conduct by others that the objector disapproves. Such a solution would be comprehensive, could be drafted with relatively few words, and is unlikely to be vulnerable to a constitutional challenge. In implementing this solution, it would be advisable to define “nontrivial harms” in detail, to specifically cover discrimination and other particular areas of concern to policymakers, and to ensure that courts do not read the term in an unduly limited way.

No matter how Congress amends RFRA, it will not be surprising if proponents of a legal regime that allows extensive religious exemptions argue that the amendment is unconstitutional. Depending on what the amendment states, arguments could be raised that the amendment has an unconstitutional effect of discriminating among different kinds of religious

¹⁶⁰ See 42 U.S.C. § 2000bb-3(a)–(b) (2012).

¹⁶¹ See 42 U.S.C. § 2000bb-3(b) (2012).

entities or practices,¹⁶² or calls for an unconstitutional inquiry into religious matters.¹⁶³ While such arguments should not succeed against most of the proposed amendments suggested above, including the carve-out for third-party harms that I favor, there is no assurance that a conservative Supreme Court would agree. Consideration should therefore also be given to adding a clause providing that no portion of RFRA, as applied to the federal government, shall be severable from the rest of the statute. In other words, if the amendment is deemed unconstitutional, RFRA as a whole would fall.

CONCLUSION

RFRA was intended to protect religious freedom, not to abridge it. When one person uses a law to impose their religious beliefs on another, religious freedom suffers. To be sure, religious congregations should be allowed to choose persons who share their beliefs as their ministers. But when religious believers enter the commercial arena, they must not be permitted to ignore the modern social norm of equality for all. Religion should not become a trump card that allows one who professes it to hire or serve whomever they want. *Hobby Lobby* represents a step in the direction of such a retrograde society, atomized and divided by corporate theocracy. Congress should amend RFRA before any more steps are taken toward such an era of inequality.

¹⁶² *Cf., e.g.,* *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257–60 (10th Cir. 2008).

¹⁶³ *Cf., e.g., Hobby Lobby*, 134 S. Ct. at 2778; *Smith*, 494 U.S. at 886–87; *Colorado Christian*, 534 F.3d at 1261–66.