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Nonprofit Challenges to the Contraceptive Coverage Requirement: The Meaning of *Substantial Burdens* on Religious Exercise Under the Religious Freedom Restoration Act

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June 16, 2016

Congressional Research Service
7-....
www.crs.gov
R44422

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In the spring of 2016, the U.S. Supreme Court considered a set of challenges alleging that the contraceptive coverage regulations under the Affordable Care Act (ACA) violate the federal Religious Freedom Restoration Act (RFRA). Following oral arguments in which the eight sitting Justices appeared to be evenly divided, the Court unanimously declined to declare an answer in the set of seven consolidated cases, each brought by nonprofit religious entities with objections to the provision and use of contraceptives as well as to the process by which their objections may be accommodated under ACA regulations that require employers to provide contraceptive coverage in group health plans. The question at issue is whether the accommodation process—requiring employers with religious objections to inform the government of their objection and third-party insurers to provide required coverage to the employer's employees—would impose a substantial burden on religious exercise in violation of RFRA.

The Court's consideration of these cases (consolidated under the case name *Zubik v. Burwell* and referred to collectively throughout this report as "the nonprofit challenges") followed its landmark 2014 decision, *Burwell v. Hobby Lobby Stores, Inc*., which has had ongoing implications for a number of legal and legislative issues. *Hobby Lobby* expanded the scope of entities recognized as eligible for protection under RFRA, but left open a number of other questions about how far RFRA's protection may extend, including what governmental actions might constitute a substantial burden on religious exercise prohibited under RFRA. Federal courts have been divided on the standard for recognizing a substantial burden in many cases, particularly in challenges to the ACA regulations.

Providing no decision on the merits, the Court vacated the appellate court decisions in each of the seven cases and remanded those cases to the respective federal circuit courts with instructions to reconsider the cases after giving the parties an opportunity to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women ... 'receive full and equal health coverage, including contraceptive coverage.'" The Court's action effectively means that the legal debate over RFRA's protections will continue to be litigated and could be expected to return to the Court in a later term, which could be of interest related to the Senate's consideration of a nomination to fill the current vacancy on the Court.

A decision regarding what might constitute a substantial burden could have significant implications on RFRA claims not only related to the contraceptive coverage requirement, but also for a range of other issues being litigated in courts and considered in legislatures, both on the federal and state level. RFRA applies to all federal actions, unless specifically exempted by Congress, meaning that the impacts of its interpretation may affect a broad number of legislative issues. Additionally, a number of states have enacted state versions, the interpretation of which may be influenced by the Court's decisions. For example, organizations with religious objections to same-sex relationships have sought protection under RFRA for requirements to serve same-sex couples, including service by public accommodations; participation of religious providers in social service programs; and admission programs in religious institutions of higher education.

This report examines the current parameters on governmental restrictions on religious exercise. It discusses the history of federal protection offered under the Free Exercise Clause of the First Amendment and RFRA, and notes parallel protections available at the state level. It analyzes the current interpretations of RFRA as applied to the contraceptive coverage requirement of the ACA, including discussion of *Hobby Lobby* and a review of the lower courts' interpretations of the nonprofit challenges. Finally, the report highlights a range of issue areas of interest to Congress that may be affected by the interpretation of RFRA.

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In the spring of 2016, the U.S. Supreme Court considered a set of challenges alleging that the contraceptive coverage regulations under the Affordable Care Act (ACA) violate the federal Religious Freedom Restoration Act (RFRA).[1] Following oral arguments in which the eight sitting Justices appeared to be evenly divided, the Court unanimously declined to declare an answer in the set of seven consolidated cases, each brought by nonprofit religious entities with objections to the provision and use of contraceptives as well as to the process by which their objections may be accommodated under ACA regulations that require employers to provide contraceptive coverage in group health plans.[2] The question at issue is whether the accommodation process—requiring employers with religious objections to inform the government of their objection and third-party insurers to provide required coverage to the employer's employees—would impose a substantial burden on religious exercise in violation of RFRA.[3]

The Court's consideration of these cases (consolidated under the case name *Zubik v. Burwell* and referred to collectively throughout this report as "the nonprofit challenges") followed its landmark 2014 decision, *Burwell v. Hobby Lobby Stores, Inc.*,[4] and presented the Court with an opportunity to clarify the meaning of *substantial burden* on religious exercise under RFRA. However, the Court's disposition of the case provided no decision on the merits, instead vacating and remanding each of the cases to the respective federal appellate courts for reconsideration after allowing time for the parties to reach a compromise that would accommodate the employers' religious objections and the government's interest in ensuring contraceptive coverage for female employees.[5]

This report examines the current parameters on governmental restrictions on religious exercise. It discusses the history of federal protection offered under the Free Exercise Clause of the First Amendment and RFRA, and notes parallel protections available at the state level. It analyzes the current interpretations of RFRA as applied to the contraceptive coverage requirement of the ACA, including discussion of *Hobby Lobby* and a review of the lower courts' interpretations of the nonprofit challenges. Finally, the report highlights a range of issue areas of interest to Congress that may be affected by the Court's interpretation of RFRA.

Legal Protections Against Burdens on Religious Exercise

Federal law includes several protections to prevent the government from interfering with the free exercise of religion. Both constitutional and statutory protections exist to protect the ability of individuals and groups to exercise their sincerely held religious beliefs.

[1] *See* Zubik v. Burwell, 136 S.Ct. 1557 (2016).

[2] *See id. See also* Zubik v. Burwell, No. 14-1418, 136 S. Ct. 444 (November 6, 2015); Priests for Life v. U.S. Department of Health and Human Services, No. 14-1453, 136 S.Ct. 446 (November 6, 2015); Roman Catholic Archbishop v. Burwell, 136 S.Ct. 444 (November 6, 2015); East Texas Baptist University v. Burwell, No. 15-35, 136 S.Ct. 444 (November 6, 2015); Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105, 136 S.Ct. 446 (November 6, 2015); Southern Nazarene University v. Burwell, No. 15-119, 136 S.Ct. 445 (November 6, 2015); Geneva College v. Burwell, No. 15-191, 136 S.Ct. 445 (November 6, 2015).

[3] For a brief overview of the procedural history and issues presented in these cases, see CRS In Focus IF10378, *Legal Overview of Challenges to Contraceptive Coverage Accommodation by Nonprofit Organizations*.

[4] 134 S.Ct. 2751 (2014).

[5] *Zubik*, 136 S.Ct. 1557.

Constitutional Protections: The Free Exercise Clause

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.... "[6] The latter clause, known as the Free Exercise Clause, guarantees the right to practice religious beliefs without government interference. Historically, the Court had required that the government demonstrate a compelling interest in any action that would interfere with religious exercise.[7] In 1990, however, it clarified the standard of the Free Exercise Clause in *Employment Division, Department of Human Resources of Oregon v. Smith*, effectively lowering the constitutional barrier and barring religious objection as a basis for exemption from neutral laws of general applicability.[8]

In *Smith*, the Court explained that it "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[9] The Court noted the distinction between regulation of religious belief and religious exercise, affirming a principle it had first established in 1879:

> "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices ... . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[10]

Under the Court's interpretation of the Free Exercise Clause in *Smith*, laws that do not specifically target religion or do not allow for individualized assessments are not subject to heightened review under the Constitution.[11] Rather, these laws of general applicability are required only to be rationally related to a legitimate government purpose—a baseline of constitutional protection analysis often referred to as rational basis review.

Statutory Protections: The Religious Freedom Restoration Act (RFRA)

Congress responded to the Court's decision in *Smith* by enacting RFRA, which statutorily augmented the standard of protection for government actions interfering with a person's free exercise of religion.[12] RFRA prohibits the federal government from restricting religious exercise in certain cases, stating that it "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except [...] if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[13]

This standard of review, though effective through federal statute, is typically used in constitutional analysis and is widely known as strict scrutiny analysis.

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[6] U.S. CONST. amend. I

[7] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[8] 494 U.S. 872 (1990).

[9] *Id*. at 878-79.

[10] *Id*. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

[11] *Smith*, 494 U.S. 872.

[12] P.L. 103-141, 107 Stat. 1488 (November 16, 1993), codified as amended at 42 U.S.C. §2000bb *et seq.*

[13] 42 U.S.C. §2000bb-1.

Congress explicitly provided for retroactive as well as prospective application of RFRA's protections.[14] As a statutory enactment, rather than a constitutional standard, RFRA is not necessarily absolutely binding against all post-RFRA legislation, however. Rather, it is possible that future statutes may not be required to comply with RFRA, if Congress explicitly includes language exempting the legislation from RFRA.[15] Thus, Congress may amend RFRA's scope of application generally or may provide specific exemptions from RFRA in future legislation.[16]

It may be noted that after the Supreme Court held that the federal RFRA did not constrain the states, many states enacted their own versions of RFRA to prevent burdens on religious exercise at the state and local levels.[17] Almost half of the states have enacted a version of RFRA, many of which follow the federal model.[18] Some states have proposed broader protections than are available in the federal RFRA, with mixed results.[19] In one example of broader protection enacted by a state, Indiana's RFRA explicitly applies to individuals, organizations, and a broad range of businesses (not only closely held corporations), and can be invoked not only when religious exercise has been substantially burdened, but also when it "is likely to be substantially burdened."[20] It also permits eligible persons to assert a violation of the protection provided "as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding."[21] Notably, states that have not enacted heightened statutory protections may have constitutional provisions that the state has interpreted to provide heightened protection without additional legislation.[22]

Historical Analysis of Substantial Burdens on Exercise of Sincerely Held Religious Beliefs

The Supreme Court and other federal courts have considered issues related to the questions currently arising under RFRA in a number of cases historically. It is important to remember that these decisions were issued as a matter of free exercise rights under the First Amendment, not

[14] 42 U.S.C. §2000bb-3(a) ("This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act [enacted November 16, 1993].").

[15] 42 U.S.C. §2000bb-3(b) ("Federal statutory law adopted after the date of the enactment of this Act [enacted November 16, 1993] is subject to this Act unless such law explicitly excludes such application by reference to this Act.").

[16] Generally, under the legal principle of entrenchment, a legislative enactment cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See* Fletcher v. Peck, 10 U.S. 87, 135 (1810) (Chief Justice Marshall) ("The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."). The Supreme Court has noted the long history of this rule. *See* United States v. Winstar Corp., 518 U.S. 839, 872-74 (1996).

[17] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[18] National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (October 15, 2015), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[19] *See id.*

[20] Indiana Senate Enrolled Act No. 101, 119th Gen. Assembly, First Regular Session (2015).

[21] *Id.*

[22] *See, e.g.*, Wash. Const. art. I, §11; City of Woodinville v. Northshore United Church of Christ, 166 Wn. 2d 633 (2009) (explaining that Washington's constitution provides greater protection than the federal Constitution). See also Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASHINGTON POST (March 1, 2014), *available at* https://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom.

RFRA. However, the general understanding of the common terms in the analysis of religious exercise claims, whether constitutional or statutory, may be illuminating of the parameters of protection from substantial burdens on the exercise of sincerely held religious beliefs.

Notably, at least as a matter of constitutional interpretation of free exercise rights, the Court has long recognized a distinction between religious belief and religious conduct. It has stated that free exercise of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[23] The Court has explained that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[24] As such, the government cannot regulate the belief itself, but it may regulate the exercise of that belief, subject to any protections provided by the First Amendment or RFRA. Under the First Amendment, any law not targeting the exercise of religious beliefs would be subject to rational basis review, while under RFRA, federal laws that substantially burden the exercise of religious beliefs would be subject to strict scrutiny.

Thus, there are essentially two threshold questions to any religious exercise claim—whether a belief is sincerely held and whether exercise of that belief has been substantially burdened. These requirements, developed over the course of the Court's free exercise jurisprudence, were adopted by Congress through enactment of RFRA.

Sincerely Held Beliefs

In the Court's constitutional analysis of religious exercise claims, in order for an individual's religious beliefs to be protected, the beliefs must be sincerely held. An individual's beliefs are not required to conform with the beliefs of other members of his or her religious group; nor is the individual required to be a member of a religious group at all.[25] Furthermore, the accuracy of an individual's religious belief need not be verified by factual findings. The U.S. Supreme Court has held that courts are not to judge the truth or falsity of religious beliefs.[26] Instead, courts generally examine whether the individual applies the belief consistently in his or her own practices.[27] These limitations reflect the Court's prescription of avoidance of matters involving religious doctrine.[28] The Court has maintained an understanding that "courts should refrain from trolling through a person's or institution's religious beliefs."[29] Accordingly, courts are generally reluctant to inquire as to the nature of religious beliefs. As a result, the sincerity of religious beliefs often is not in question in various legal challenges.[30]

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[23] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[24] Reynolds v. United States 98 U.S. 145, 166 (1879).

[25] *See* Thomas v. Review Board, 450 U.S. 707 (1981) ("The guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect.").

[26] United States v. Ballard, 322 U.S. 78 (1944).

[27] *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121, 1125 (8th Cir. 1984); Dennis v. Charnes, 646 F. Supp. 158, 159-60 (D. Colo. 1986).

[28] For a discussion of the Court's avoidance of inquiry relating to matters of religious doctrine, see CRS Report R41824, *Application of Religious Law in U.S. Courts: Selected Legal Issues*.

[29] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) (stating that "courts should refrain from trolling through a person's or institution's religious beliefs").

[30] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2774 (2014). Although sincerity of belief is generally stipulated, courts may examine whether the belief is sincerely held or being used as a false claim to avoid compliance with governmental regulation. *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

Substantial Burdens on Exercise

The Court has defined a *substantial burden* on religious exercise as a constitutional matter as one that puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[31] It has required evidence that the legal requirement in question violates the individual's sincerely held belief.[32] That is, if the legal requirement that the individual opposes does not actually interfere with the individual's exercise of his or her religious belief, the government may still require the individual to comply with the requirement. For example, a religious organization challenged the imposition of a sales tax on religious products that it sold, claiming the tax burdened the organization's religious exercise.[33] The organization's religious doctrine did not include a belief that payment of taxes was forbidden, but rather claimed that the government was taking part of the money the organization raised as a part of its religious practice.[34] The Supreme Court held that a sales tax applied generally to products distributed by religious and non-religious entities did not constitute a significant burden on religious exercise because the tax itself did not violate the religious entity's sincerely held beliefs.[35] Therefore, in the case of a religious organization's objections to paying sales tax on products it sells, the organization would be substantially burdened by the tax if its sincerely held beliefs prohibited the payment of taxes, because the tax requirement forces the organization to act in violation of its beliefs. However, because the action being regulated by the government was not one that directly affected the organization's sincerely held beliefs, the Court held that the burden did not implicate the organization's religious exercise.[36]

RFRA and the Scope of Statutory Religious Freedom

Since its enactment, the Supreme Court has considered only a few cases under RFRA. Early on, the Court addressed the constitutionality of RFRA's application,[37] while later decisions in cases related to the Controlled Substances Act (CSA)[38] and the ACA[39] have clarified how RFRA applies in challenges to particular governmental actions that allegedly burden religious exercise and the scope of its protections.

RFRA Cases Historically

Shortly after its enactment, a constitutional challenge to RFRA reached the Supreme Court, regarding whether RFRA violated constitutional principles of federalism.[40] As originally enacted, RFRA applied the strict scrutiny standard for governmental action at the federal, state, and local levels.[41] Congress had justified applying strict scrutiny to the states as an exercise of power under

[31] *See* Thomas v. Review Board, 450 U.S. at 717-18.

[32] Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 391-92.

[36] *Id.*

[37] *City of Boerne*, 521 U.S. 507.

[38] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

[39] *Hobby Lobby*, 134 S.Ct. 2751.

[40] *See City of Boerne*, 521 U.S. 507.

[41] P.L. 103-141, 107 Stat. 1488.

Section 5 of the Fourteenth Amendment, which grants "Congress the power to enforce, by appropriate legislation, the provisions of this article [guaranteeing individuals equal protection and due process of law]."[42] The Supreme Court has explained Section 5 of the Fourteenth Amendment as follows:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[43]

The Court has described Congress's power under Section 5 as a "remedial" power because it extends only to "enforc[ing]" the provisions of the Fourteenth Amendment.[44]

In a 1997 case, *City of Boerne v. Flores*,[45] the Supreme Court held RFRA to be unconstitutional as it applied to states and localities because the statute exceeded Congress's remedial powers to enforce rights under the Fourteenth Amendment.[46] In *City of Boerne*, the Court considered whether RFRA could exempt a church from local zoning requirements in a historic district, holding that "by enacting RFRA, Congress had exceeded [its remedial authority under Section 5] by *defining* rights instead of simply enforcing them."[47] The Court explained that Congress's powers under Section 5 of the Fourteenth Amendment were limited to the extent that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end.[48] In order to satisfy the Court's "congruence and proportionality" test, Congress must limit the scope of the remedial measure to only those instances where the record clearly demonstrates a pervasive pattern of violations of the Fourteenth Amendment.[49] The Court was unable to find a pattern of the use of neutral laws of general applicability to disguise bigotry and animus against religion, and therefore struck down RFRA's application to state and local government as an overbroad response to a relatively nonexistent problem.[50]

In 2006, the Supreme Court considered the protection that RFRA provides to individuals with religious objections to generally applicable laws in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.[51] Members of the O Centro Espirita Beneficente Uniao Do Vegetal (UDV)

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[42] U.S. CONST. amend. XIV §5.

[43] Ex Parte Virginia, 100 U.S. 39, 345-346 (1880).

[44] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 325-327 (1966) (focusing on enforcement power under the Fifteenth Amendment, but also encompassing enforcement authority under Section 5 of the Fourteenth Amendment).

[45] 521 U.S. 507.

[46] The Supreme Court held RFRA unconstitutional as applied to states and localities, but upheld its application to federal actions. Thus, the strict scrutiny protections of RFRA remain in effect as applied to the federal government. *See* 42 U.S.C. §2000bb-1.

[47] *City of Boerne*, 521 U.S. at 532 (emphasis added).

[48] *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").

[49] *See, e.g., City of Boerne*, 521 U.S. 507; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (invalidating Congress's attempt to abrogate state sovereign immunity in federal intellectual property law under Section 5 of the Fourteenth Amendment).

[50] *City of Boerne*, 521 U.S. 507. Congress later responded to the *City of Boerne* decision by enacting the Religious Land Use and Institutionalized Persons Act of 2000. P.L. 106-274, 114 Stat. 803; codified at 42 U.S.C. §2000cc *et seq*. RLUIPA applies strict scrutiny to state and local government actions that place a substantial burden on religious exercise as a result of a land use regulation or on the religious exercise of institutionalized persons. 42 U.S.C. §§2000cc–2000cc-1.

[51] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

church claimed that the government had violated RFRA when U.S. Customs inspectors seized a shipment of hoasca—a sacramental tea containing a hallucinogen regulated under the CSA—that the church used to celebrate their faith.[52] The Court unanimously held (except Justice Alito, who did not participate in the case) that the government had not demonstrated the compelling interest that RFRA requires to justify barring the UDV's sacramental use of hoasca.[53] Although the government asserted three interests in completely banning hoasca, the Court did not believe that any of these interests satisfied the strict scrutiny standard that RFRA requires for laws that interfered with exercise of religious beliefs.[54] Although the government claimed that a complete ban was necessary and that any exceptions would be detrimental to its purposes for regulating the drugs, the Court noted that the CSA itself provides for possible exemptions and that there has been an exemption made for use of peyote by the Native American Church for 35 years.[55] The Court explained that, because the CSA appears to recognize that the restrictions it places on certain substances are not absolute, mere categorization of substances by the CSA "should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them."[56] Thus, the Court recognized "that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA," but the Court did not allow the government to apply broad prohibitions that affect individuals' free exercise of religion without a specific compelling interest in the particular case.[57]

RFRA Challenges to Contraceptive Coverage in Employers' Health Plans

Although RFRA litigation rarely reached the Supreme Court in the statute's first two decades, the Court has agreed to review RFRA challenges twice in two years since RFRA's 20th anniversary. *Burwell v. Hobby Lobby Stores, Inc*.[58] and *Zubik v. Burwell*[59] arose from religious objections to the contraceptive coverage requirement enacted under the Affordable Care Act (ACA)[60] and concern over the statutory interpretation of terms Congress left undefined when it enacted RFRA.

These cases are not direct challenges to the ACA, but instead challenge the regulatory implementation of the ACA as a violation of RFRA. As a matter of background, the ACA, enacted in 2010, requires that group health plans and health insurance issuers provide coverage for certain preventive health services, including a range of contraceptive services.[61] This requirement has been implemented through a series of regulations, aimed at addressing objections of employers with religious beliefs that oppose contraception.[62] The final rules address the religious objections of certain employers through two methods: an exemption and an

[52] *Id*. at 425-26.

[53] *Id.* at 422-23.

[54] *Id.* at 426.

[55] *Id*. at 432-33.

[56] *Id*.

[57] *Id*. at 436-37.

[58] 134 S.Ct. 2751.

[59] *See Zubik*, No. 14-1418, 136 S. Ct. 444.

[60] P.L. 111-148, 124 Stat. 119 (2010).

[61] *See* 42 U.S.C. §300gg-13.

[62] For a history of the various iterations of these regulations, see CRS In Focus IF10169, *The Affordable Care Act's Contraceptive Coverage Requirement: History of Regulations for Religious Objections*.

accommodation.[63] The *exemption* is available to religious employers qualifying under certain sections of the tax code (generally including churches, church auxiliaries, church associations, or other religious orders).[64] Under the exemption, employees of religious employers do not receive contraceptive coverage either from their employer or from the issuer directly. The *accommodation* is available to employers that (1) oppose providing coverage for required contraceptive services based on religious beliefs; (2) are either (a) a nonprofit religious organization or (b) a closely held for-profit entity whose governing body takes official action to establish its objection; and (3) self-certify its objection, either by use of a standard form or written notice to the relevant agency.[65] Under the accommodation, employees of eligible organizations would not receive contraceptive coverage from their employer, but would have coverage provided directly through the health plan issuer at no cost to the employee or employer.

Hobby Lobby: Who May Claim Protection Under RFRA?

The version of ACA regulations that was in effect during the litigation of *Hobby Lobby* required that organizations seeking the accommodation must be nonprofit entities.[66] As a result, a number of owners of for-profit businesses objected to the regulation's limitation of accommodation for their businesses, claiming that such entities qualified as "persons" under RFRA. Thus, the threshold question in *Hobby Lobby* was who may claim protection under RFRA, given that Congress did not define the term *person* in the statute.

In a 5-4 decision, issued over a highly critical dissent, the Supreme Court held that closely held corporations that hold religious objections to certain contraceptive coverage services are protected by RFRA and accordingly cannot be required to provide coverage of those services in employee health plans.[67] The Court's decision was limited to the statutory challenge—clarifying the meaning of the term *person* and applying RFRA's strict scrutiny restriction on the imposition of substantial burden.

Noting the absence of a statutory definition of *person* in RFRA, the Court relied upon the generally available Dictionary Act to define the term as a general matter in statutory language.[68] That definition includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[69] Although there was strong disagreement among the Justices related to the requisite ability to exercise religion, the majority noted that there were previous cases in which the Court had recognized claims involving exercise of religion of individuals who owned for-profit businesses as sole proprietorships[70] and nonprofit corporations.[71] The Court explained that the definition of *person* was not limited by for-profit status: "No known understanding of the term 'person' includes some but not all corporations. The

[63] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015).

[64] 45 C.F.R. §147.131(a).

[65] 45 C.F.R. §147.131(b).

[66] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013).

[67] 134 S.Ct. 2751.

[68] *Id*. at 2768-69.

[69] 1 U.S.C. §1.

[70] *See Hobby Lobby*, 134 S.Ct. at 2769-70 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

[71] *See id*. at 2768-69 (citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (Brennan, J., concurring in the judgment)).

term 'person' sometimes encompasses artificial persons ..., and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[72]

Responding to concerns that applying RFRA protections to for-profit corporations would raise challenges of ascertaining "the religious identity of large, publicly traded corporations," the Court emphasized that its decision applied only to such companies as the ones challenging the contraceptive coverage requirement in this case.[73] In effect, the decision was limited to "closely held corporations, each owned and controlled by members of a single family."[74] Although the majority noted that it was recognizing RFRA's applicability to closely held corporations only, it did not foreclose the possibility that, in a future case, a court may extend RFRA protection to other types of corporations such as those that are publicly traded. While the majority found that such expansion "seems unlikely," the dissent characterized the decision as one of "startling breadth," citing the possibility that the majority's logic could be extended if a new claimant presented itself.[75] Notably, the dissent's concerns about potential expansion in future interpretation of RFRA may reasonably give pause. As noted, the majority did not preclude future application of RFRA to a broader range of corporations using tentative language and noting a lack of obvious challenges. Furthermore, the majority's explanation that the Dictionary Act's definition of *person* could not be read to distinguish types of corporations related to the company's profit status suggests that it also may not be read to distinguish between types of corporations on other grounds (e.g., size or public trading status).

In addition to the Court's clarification of the scope of "persons" eligible for protection under RFRA as a matter of statutory interpretation, the Court's analysis of the substantive protections of RFRA has been cited to support interpretations of "substantial burdens" in later cases (discussed in the following section of this report).[76] The *Hobby Lobby* majority had "little trouble concluding that [the ACA regulations substantially burden the exercise of religion]."[77] Noting the sincerity of the religious beliefs underlying the claimants' objections to contraceptives, the Court acknowledged that the requirement to "arrange for such coverage ... demands that they engage in conduct that seriously violates their religious beliefs."[78] The majority relied upon the financial penalties imposed for non-compliance with coverage requirements, declaring the potential penalties as "sums [that] are surely substantial."[79]

The majority in *Hobby Lobby* also addressed the dissenting Justices' argument that the regulations did not impose a substantial burden because the connection between the required action and the action that they found to be objectionable was "simply too attenuated."[80] In response, the majority deferred to the claimants' characterization of the burden:

> This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question

[72] *Id*. at 2769 (citation omitted).

[73] *Id*. at 2774.

[74] *Id*.

[75] *Compare id*. at 2774 (Alito, J., opinion of the Court) *with id*. at 2787 (Ginsburg, J., dissenting).

[76] *See* Sharpe Holdings v. U.S. Department of Health and Human Services, 801 F.3d 927 (8th Cir. 2015).

[77] *Hobby Lobby*, 134 S.Ct. at 2775.

[78] *Id*.

[79] *Id*. at 2776.

[80] *Id*. at 2777.

> that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).[81]

The majority emphasized its interpretation that the claimants' sincere beliefs express the burden imposed, and reasoned that "it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does."[82]

Nonprofit Challenges: What Is a Substantial Burden Under RFRA?

Although the Justices debated the meaning of *substantial burden* in their application of RFRA in *Hobby Lobby*, the decision did not resolve the meaning of that term. *Hobby Lobby* only resolved RFRA challenges brought by for-profit entities owned by individuals with religious objections to the contraceptive coverage requirement, interpreting the meaning of RFRA regarding who or what qualified as a "person" eligible to raise a claim under the statute.[83] As noted in the previous section, the Court's subsequent application of RFRA foreshadowed the next questions of statutory interpretation under RFRA: What constitutes a substantial burden under RFRA, and who decides the significance of the burden? Just two years after the Court's decision in *Hobby Lobby*, the Court was poised to decide that question in the context of nonprofit religious employers objecting to the process under which the ACA regulations provide accommodation.[84] However, as discussed later in this section, the Court ultimately vacated the appellate decisions and remanded for further consideration, leaving the issue unresolved.[85]

The Court granted certiorari and consolidated seven challenges following a split among the federal appellate courts on the issue of whether the accommodation process imposes a substantial burden on nonprofit religious employers' religious exercise under RFRA.[86] Essentially, the nonprofit challenges allege that the certification requirement to qualify for the accommodation imposes a substantial burden on religious exercise. While the burden has been characterized in a number of different ways, it arguably is most simply stated as an objection to having an active role in the process of providing coverage for contraceptives to which the entities object. In other words, the objecting employers claim that notifying the government of their objections forces them to take part in (i.e., makes them complicit in, facilitates, or triggers) the provision of services to which they object by other entities.

Most of the federal circuit courts issued decisions addressing whether the certification requirement imposes a substantial burden on the nonprofit employers' religious exercise, and all but one of those to consider the merits upheld the accommodation, finding that the certification requirement did not impose a substantial burden on religious exercise.[87] Each of these courts

[81] *Id*. at 2778 (emphasis in original).

[82] *Id*. at 2779 (citations omitted).

[83] *Id*. at 2783.

[84] *See Zubik*, No. 14-1418, 136 S. Ct. 444.

[85] *Zubik*, 136 S.Ct. 1557.

[86] *Compare* Zubik v. Burwell, No. 14-1418, 136 S. Ct. 444 (November 6, 2015); Priests for Life v. U.S. Department of Health and Human Services, No. 14-1453, 136 S.Ct. 446 (November 6, 2015); Roman Catholic Archbishop v. Burwell, 136 S.Ct. 444 (November 6, 2015); East Texas Baptist University v. Burwell, No. 15-35, 136 S.Ct. 444 (November 6, 2015); Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105, 136 S.Ct. 446 (November 6, 2015); Southern Nazarene University v. Burwell, No. 15-119, 136 S.Ct. 445 (November 6, 2015); Geneva College v. Burwell, No. 15-191, 136 S.Ct. 445 (November 6, 2015) *with Sharpe Holdings*, 801 F.3d 927.

[87] *See* Catholic Health Care System v. Burwell, 796 F.3d 207 (2nd Cir. 2015); Geneva College v. Secretary of U.S. Department of Health and Human Services, 778 F.3d 422 (3rd Cir. 2015); East Texas Baptist University v. Burwell, 793 (continued...)

relied on similar reasoning, explaining that "federal law, rather than the religious organization's signing and mailing the [certification], ... requires healthcare issuers, along with third-party administrators of self-insured health plans, to cover contraceptive services."[88] Some courts characterized the burden as a de minimis one generally used in other historic cases of religious objection.[89]

One court, the U.S. Court of Appeals for the Eighth Circuit, reached a contrary conclusion, which created a split among the circuits and apparently led the U.S. Solicitor General to seek, and the Supreme Court to grant, review of these cases.[90] The Eighth Circuit granted injunctive relief to organizations with objections to the provision of contraceptive coverage and the eligibility requirements of the accommodation.[91] The court's standard for examining the nature of the burden gave significant deference to the organizations' assessment of the burden. It relied on Supreme Court precedent instructing courts to "accept a religious objector's description of his religious beliefs, regardless of whether [the court considers] those beliefs 'acceptable, logical, consistent, or comprehensible.'"[92] This deference generally has been applied when assessing the sincerity of an objector's belief, and the Eighth Circuit's decision appears to extend that analysis to the assessment of a substantial burden. The deference afforded by the Eighth Circuit was based in part on language from the majority opinion in *Hobby Lobby* (discussed above), although the focus of the burden analysis in that case was directed at the financial penalties of noncompliance with the coverage requirements.[93]

The Court's consideration of *Zubik* was highly anticipated both in the specific context of the protections available for religious objectors to the contraceptive coverage requirement and for guidance regarding the application of RFRA generally. Notably, after the Court's decision in *Hobby Lobby*, the Supreme Court remanded several pending cases that had upheld the accommodation, directing the lower courts to reconsider their decisions in light of the Court's decision in *Hobby Lobby*.[94] However, after rehearing, each of these circuits again upheld the accommodation in each of those cases.[95] When the cases ultimately reached the Supreme Court, the eight sitting Justices appeared to be evenly divided at oral arguments.[96] Within a week, the Court took the unusual step of ordering supplemental briefing on a possible compromise that could reconcile the parties' conflicting positions without further litigation.[97]

(...continued)

F.3d 449 (5th Cir. 2015); Michigan Catholic Conference v. Burwell, 755 F.3d 372 (6th Cir. 2014); University of Notre Dame v. Burwell, 743 F.3d 547 (7th Cir. 2014); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015); Eternal Word Television Network v. Burwell, 2016 U.S. App. LEXIS 2778 (11th Cir. February 18, 2016); Priests for Life v. U.S. Department of Health and Human Services, 772 F.3d 229 (D.C. Cir. 2014). *But see* Sharpe Holdings v. U.S. Department of Health and Human Services, 801 F.3d 927 (8th Cir. 2015).

[88] University of Notre Dame v. Burwell, 786 F.3d 606, 614 (7th Cir. 2015).

[89] *Catholic Health Care System*, 796 F.3d at 220.

[90] *See Sharpe Holdings*, 801 F.3d 927.

[91] *Id*.

[92] *Id*. at 939 (quoting *Thomas*, 450 U.S. at 714).

[93] *Hobby Lobby*, 134 S.Ct. at 2776.

[94] *See, e.g.*, Michigan Catholic Conference v. Burwell, 135 S.Ct. 1914 (2015).

[95] *See, e.g.*, Michigan Catholic Conference v. Burwell, 807 F.3d 738 (6th Cir. 2015).

[96] *See* Transcript of Oral Argument, Zubik v. Burwell, 136 S.Ct. 1557 (2016) (No. 14-1418), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1418_1bn2.pdf.

[97] Zubik v. Burwell, 84 U.S.L.W. 3544 (March 29, 2016). *See* CRS Legal Sidebar WSLG1534, *Supreme Court, Seemingly Divided at Oral Arguments, Requests Potential Compromises in Contraceptive Coverage Challenges*, by (continued...)

In May, the Court issued a unanimous per curiam opinion that declined to declare an answer on the merits of the cases, including whether the employers are substantially burdened, whether the government has a compelling interest, and whether the existing accommodation is the least restrictive means to achieve such an interest.[98] Instead, the Court remanded the cases to the respective circuits (including the Third, Fifth, Tenth, and D.C. Circuits) with instructions to reconsider the cases after giving the parties an opportunity to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women ... 'receive full and equal health coverage, including contraceptive coverage.'"[99] The Court's decision in *Zubik* announced that each party found a compromise "feasible."[100]

The Court's focus on reaching a compromise outside of a judicial decision on the merits would seem to reflect an effort to avoid an evenly split decision. While a 4-4 decision also would have had no precedential value, it would have foreclosed further litigation of the consolidated cases, effectively letting the circuit courts' decisions stand, each of which had upheld the accommodation. Because there is currently a split among the federal circuits, the controversy surrounding the requirement would remain unresolved, and further litigation would continue in other cases, with results differing depending on the jurisdiction of a particular challenge. If a compromise is reached among the parties, the issue may be moot for judicial resolution, at least in the context of the contraceptive coverage requirement. However, a number of cases presenting the same question across the federal judicial system are still pending, and it is possible that the Court may be presented with the same issue in a later term. Given the presumption that the current Justices are split, the outcome likely will depend on the Court's composition, specifically when a nominee to the current vacancy has been confirmed.[101]

Legislative Issues Potentially Affected by Interpretation of the Meaning of *Substantial Burden*

The religious organizations challenging the ACA accommodation in the nonprofit cases, like *Hobby Lobby*, are seeking statutory protection under RFRA, not constitutional protections under the First Amendment. As a matter of statutory law, Congress remains free to amend the language at its discretion of RFRA regardless of any judicial interpretation. In other words, Congress may respond to a decision on the merits by clarifying the meaning of the statutory language itself, providing an explicit definition of *substantial burden*, or identifying a standard by which such burdens should be measured. If Congress took any such action, its amendment would supersede a judicial interpretation to the extent it conflicted with the court's decision.

(...continued)

(name redacted)

[98] *Zubik*, 136 S.Ct. 1557. *See also id.* (Sotomayor, J., concurring) (emphasizing that the decision expresses no view on the merits).

[99] *Id.*

[100] *Id.*

[101] For further discussion about the impact of the nomination to fill the current vacancy, see CRS Legal Sidebar WSLG1579, *No Answer for Now: Supreme Court Remands Nonprofit Contraceptive Coverage Challenges*, by (name redacted). For a discussion related to the current nominee, including discussion of his role in religious freedom cases, see CRS Report R44479, *Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by (name redacted), (name redacted), and (name redacted).

Given Congress's primary authority in statutory law, there are a number of issues it may consider in the wake of a future decision on the meaning of *substantial burden*, including what impact the decision may have on a wide range of legislative issues. Because RFRA applies to all federal actions, and because state religious freedom laws may rely on related opinions for guidance in interpreting their own similar laws, both federal and state issues may be affected.

Potential Breadth of RFRA

RFRA is a so-called "super statute," one that establishes legal norms that perform constitutional functions.[102] As discussed earlier in this report, it was enacted to augment the protection offered by the First Amendment, and it consequently heightened the protection for religious objections beyond the protection of the Free Exercise Clause.[103] It applies to any federal action—including any law enacted by Congress, regulation promulgated by an agency, etc.—and can only be avoided if Congress chooses to exempt a particular law from the application of RFRA, which it has not done since RFRA was enacted.[104] Thus, an interpretation of the scope of applicability of RFRA has potentially far-reaching implications.

Impact on Related Statutory Protections for Religious Exercise

As noted earlier, the Court limited the application of RFRA to protect against substantial burdens on religious exercise imposed only by the federal government.[105] In the wake of the *City of Boerne* decision, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[106] RLUIPA conformed with the Court's decision in *City of Boerne*, limiting that protection to substantial burdens imposed by land-use provisions or on institutionalized persons.[107] Thus, RLUIPA did not directly amend RFRA, but instead is an analogous statute applied to a separate set of government actions. RLUIPA's protections mirror those enacted in RFRA. Although a separate statute, the context of RLUIPA's enactment in addition to its use of the same statutory scheme makes any interpretation of the meaning of RFRA's terms relevant to the interpretation of the same language in RLUIPA. Thus, a decision defining these terms may be influential in future RLUIPA litigation as well.

Impact on Federal Versus State Actions and Protections

Zubik and the consolidated cases involve challenges to a federal action by organizations seeking protection under the federal RFRA. Thus, any decision interpreting the meaning and scope of RFRA's protections will apply only to federal law and would not extend directly to state actions. However, as discussed earlier, a number of states have adopted state versions of RFRA, many of which include language similar to the federal RFRA that is at issue in the nonprofit challenges.[108] For any challenges asserted under state RFRAs, a court would not be bound to use whatever interpretation federal courts may adopt. However, it may consider federal courts' interpretation

[102] Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837 (2010).

[103] *See* P.L. 103-141.

[104] 42 U.S.C. §2000bb-3.

[105] *City of Boerne*, 521 U.S. 507.

[106] P.L. 106-274, 114 Stat. 803; codified at 42 U.S.C. §2000cc *et seq*.

[107] *Id*.

[108] *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (October 15, 2015), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

persuasive, particularly for state RFRAs including language identical or similar to the federal RFRA. Notably, a recent trend in state RFRA legislation following the Court's decision in *Hobby Lobby* has reflected a broader approach to religious freedom protections, though proposed laws have had mixed success.[109] A decision that broadens the recognition of substantial burdens under the federal RFRA may provide support for broad interpretation of existing state RFRAs or efforts to enact explicitly broad protection for religious freedom by states considering new legislation.

Selected Legislative Issues Involving Religious Objections and Potential Claims of Substantial Burdens

Because of the broad reach of RFRA as it applies to all federal actions and because of the influence that the interpretation of the federal RFRA may have on similar state protections, the potential impact of an ultimate decision may be far-reaching. Though not an exhaustive list, the following discussion highlights examples of legislative issues that frequently involve religious objections and could be affected by clarification of the meaning of *substantial burden*.

It should be noted that eligibility for RFRA protection and identification of a substantial burden are threshold issues of RFRA analysis. That is, even if a religious objector satisfies these standards, a court still must find that the government lacked a compelling interest or failed to use the least restrictive means to achieve that interest before the objector may lawfully avoid compliance with the law in question.

Abortion

Like the contraceptive coverage cases, another issue of reproductive health—abortion—also frequently involves a number of questions related to religious freedom. In one example of state regulation of abortion that has raised religious objections, California requires certain clinics that provide family planning or pregnancy-related services to notify its consumers of the availability of public programs providing abortion, contraception, and prenatal care for free or at low cost.[110] Operators of such centers with religious objections to abortion have challenged this law as a violation of their constitutional rights, but a federal court denied their request for a preliminary injunction.[111]

A broad ruling regarding recognition of burdens identified by claimants with religious objections to legal mandates may offer such centers the opportunity to challenge such requirements under RFRA (assuming the challenged mandate is subject to the federal RFRA or a state equivalent). For example, a crisis pregnancy center that is eligible for RFRA protection—presumably a nonprofit religious organization or a closely held for-profit entity owned by individuals who operate the center according to their religious beliefs—could allege that posting such notice violates their religious beliefs. Like the claimants in the nonprofit challenges, such entities may view the posting itself as a mode of facilitating access to a procedure or service to which they hold sincere religious objections.

[109] *Id.*

[110] Assembly Bill 775, California Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, codified at Cal. Health & Safety Code §123470 *et seq.* (2016).

[111] A Woman's Friend Pregnancy Resource Clinic v. Harris, 2015 U.S. Dist. LEXIS 170915 (E.D. Cal. 2015).

Civil Rights

In recent years, particularly in light of the Supreme Court's recognition of a constitutional right for same-sex couples to marry in *Obergefell v. Hodges*,[112] a number of individuals, organizations, and businesses with religious objections based on sexual orientation asserted RFRA claims alleging that compliance with various civil rights laws would substantially burden their religious exercise.[113] While the Court's decision in *Obergefell* did not dictate the behavior of private parties, civil rights legislation enacted by federal, state, and local governments may regulate the behavior of private entities that operate public accommodations (i.e., entities that provide goods and services to the general public) and those that provide housing, employment, or credit. Federal civil rights law does not provide express protection in these contexts based on sexual orientation, but some state and local governments have enacted such protection.[114] As a result, individuals, organizations, and businesses with religious objections to serving same-sex couples may seek legal protection under state religious freedom laws (whether statutory or constitutional), claiming that the nondiscrimination laws are a substantial burden on their religious exercise subject to the limitations of applicable religious freedom provisions.

Thus far, it is unclear how religious freedom protections and various civil rights provisions may be balanced or reconciled. Some of the most prominent challenges have been made in the context of business owners' religious objections to serving same-sex couples related to goods and services available for wedding celebrations.[115] These challenges generally have been unsuccessful, with administrative rulings and court decisions holding that goods and services must be offered on an equal basis to couples, regardless of sexual orientation.[116] The leading decisions have involved a case-specific range of circumstances (e.g., availability of heightened protection for religious freedom in the jurisdiction; availability of the applicable RFRA for actions of administrative agencies versus the legislature or courts), and thus do not indicate a conclusive analysis of potential claims of substantial burdens on religious exercise in the context of civil rights requirements.[117]

Notably, the Court's decision in *Hobby Lobby* raised a number of questions regarding the extent to which RFRA protections could be used to exempt businesses from statutory nondiscrimination mandates (e.g., employment). The majority and dissenting opinions in *Hobby Lobby* debated the potential scope of the decision's effect, with the dissent expressing concern that the decision may protect businesses that engage in discriminatory practices.[118] However, the majority specifically responded to the concern that RFRA might permit a business to engage in racially discriminatory hiring practices, writing that the "decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without

[112] 135 S.Ct. 2584 (2015).

[113] *See, e.g.*, North Coast Women's Care Medical Group, Inc. v. Superior Court of San Diego County, 44 Cal. 4th 1145 (Cal. 2008); Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S.Ct. 1787 (2014).

[114] For an overview of federal civil rights legislation, see CRS Report RL33386, *Federal Civil Rights Statutes: A Primer*.

[115] *See, e.g., Elane Photography*, 309 P.3d 53; Craig v. Masterpiece Cakeshop, Inc., 2015 Colo. App. LEXIS 1217 (Colo. Ct. App. 2015).

[116] *See id*.; Bernstein v. Ocean Grove Camp Meeting Association, Agency Dkt. No. PN34XB-03008 (Initial Decision, January 12, 2012); Bernstein v. Ocean Grove Camp Meeting Association, Finding of Probable Cause, DCR Dkt. No. PN34XB-03008 (December 29, 2008).

[117] *See, e.g., Elane Photography*, 309 P.3d 53.

[118] *Compare Hobby Lobby*, 134 S.Ct. at 2783 (Alito, J., opinion of the Court) *with id*. at 2804-05 (Ginsburg, J., dissenting).

regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[119] It may be noted that the Court's statement did not address sexual orientation specifically, and that the decision emphasized the case-by-case basis of evaluating application of the heightened protection provided by RFRA. Thus, although the decision implies that RFRA protections would not supersede at least some civil rights protections (e.g., employment rights in the context of race discrimination), it is not clear how the issue would be decided on the merits of a particular legal challenge.

It is important to note that Title VII of the Civil Rights Act, the federal law prohibiting discrimination based on race, color, national origin, religion, or sex—includes an exemption for religious organizations to permit such organizations to consider religion in employment decisions.[120] That exemption, available to "religious corporation[s], association[s], educational institution[s], or societ[ies]," generally has been interpreted to mean nonprofit entities.[121] *Hobby Lobby* arguably creates an opportunity for for-profit businesses to seek similar accommodation as a matter of protection afforded by RFRA, even though they would not otherwise qualify for the explicit exemption adopted by Congress. Furthermore, a broad interpretation of substantial burden may permit entities to seek broader protection under RFRA than is currently available under Title VII's exemption. That is, such entities arguably may assert RFRA to seek exemption from discrimination based on other categories, not only religion. In sum, a broad interpretation of the meaning of *substantial burden*, or one that provides significant deference to the claimants' identification of the burden, likely would strengthen the ability of entities with religious beliefs that may conflict with nondiscrimination requirements to assert successful RFRA claims for accommodation from those requirements.

Education

Recent reports about waivers granted by the U.S. Department of Education to religious colleges and universities to exempt the schools from Title IX of the Education Amendments of 1972 highlight concerns about the potential scope of protection for religious objectors from nondiscrimination requirements in education programs.[122] Title IX prohibits discrimination on the basis of sex in any education program or activity that receives federal assistance.[123] A number of religious colleges have applied for waivers under an exemption available to such institutions with religious tenets that conflict with the nondiscrimination requirements.[124] Concerns have been raised about the tension between public policy preventing discrimination (particularly based on sexual orientation and gender identity) and accommodating such institutions' religious beliefs.

A number of federal nondiscrimination laws include exemptions for religious objectors, and schools have typically been included as eligible for protection, whether under such exemptions or under RFRA.[125] Accordingly, while the Court's decision in *Hobby Lobby* likely would not impact the analysis in challenges to Title IX waivers, a decision on the nonprofit challenges may have

[119] *Id*. at 2783.

[120] 42 U.S.C. §2000e *et seq*.

[121] 42 U.S.C. §2000e-1(a).

[122] Liam Stack, *Religious Colleges Obtain Waivers to Law that Protects Transgender Students*, N.Y. Times (December 10, 2015), *available at* http://www.nytimes.com/2015/12/11/us/religious-colleges-obtain-waivers-to-anti-discrimination-law.html?_r=1.

[123] 20 U.S.C. §1681(a).

[124] *See* 20 U.S.C. §1681(a)(3).

[125] *See, e.g.*, 42 U.S.C. §2000e-1; 42 U.S.C. §12113(d).

implications. If a school's waiver request were to be denied, the school may consider a RFRA challenge, alleging that the prohibition on discrimination based on sex, including sexual orientation and gender identity, constituted a substantial burden on its operation.

Eligibility for Government Funding Programs

A number of federal funding programs, particularly grants for social service providers, have expanded to permit religious providers to participate under programs including rules known as "charitable choice provisions."[126] The religious organization receiving funding is permitted to "retain its independence" regarding its control over its religious exercise and beliefs.[127] Such an organization cannot be required to change its form of internal governance or remove religious symbols from its facilities.[128] Some programs also include explicit protections for beneficiaries who object to the religious character of a recipient organization.[129] The state must notify the beneficiary of an alternative provider that would be accessible to the beneficiary.[130] Furthermore, religious providers are prohibited from discriminating against beneficiaries "on the basis of religion, a religious belief, or refusal to actively participate in a religious practice."[131] Thus, current provisions in existing statutory programs protect both the religious identity of the organization and the religious freedom of beneficiaries.

The balance of the rights of participating religious providers and potential program beneficiaries likely would be a matter of congressional discretion. It may be noted that the parameters of the ban on discrimination against beneficiaries based on religion are unclear. In some contexts, for example, under employment nondiscrimination statutes, courts have indicated that discrimination based on religion may include other forms of discrimination as long as the action relates to a religious tenet.[132] Under this theory of interpretation, a religious organization that receives public funds may argue that extending its services to certain beneficiaries would infringe on its religious identity in violation of RFRA. In other words, for example, a religious organization that objects to certain sexual orientations may seek protection under RFRA in order to limit its service to same-sex beneficiaries by claiming that such service is a matter of religious doctrine, and a requirement

[126] Beginning in 1996, Congress enacted several laws that included so-called charitable choice rules to ensure faith-based organizations could participate in federally funded social service programs like other nongovernmental providers. *See, e.g.*, P.L. 104-193, Title I, §104 (August 22, 1996), 110 Stat. 2161, codified at 42 U.S.C. §604a; P.L. 105-33, Title V, Subtitle A (August 5, 1997), 111 Stat. 251, 577; P.L. 105-285, Title II, §201 (October 27, 1998), 112 Stat. 2749, codified at 42 U.S.C. §9920; P.L. 106-310, Title XXXIII, §3305 (October 17, 2000), codified at 42 U.S.C. §300x-65; P.L. 106-554, §1 (December 21, 2000), 114 Stat. 2763, codified at 42 U.S.C. §290kk.

[127] *See, e.g.*, 42 U.S.C. §604a(d)(1).

[128] *See, e.g.*, 42 U.S.C. §604a(d)(2).

[129] A number of federal agencies have issued notice of proposed rulemaking to clarify these rules in response to recommendations by the Advisory Council for Faith-Based and Neighborhood Partnerships. *See* Melissa Rogers, Promoting Common-Ground Reforms of Social Service Partnerships, August 5, 2015, *available at* https://www.whitehouse.gov/blog/2015/08/05/promoting-common-ground-reforms-social-service-partnerships.

[130] *See, e.g.*, 42 U.S.C. §604a(e)(1).

[131] *See, e.g.*, 42 U.S.C. §604a(g).

[132] For instance, religious employers are permitted to discriminate in employment decisions based on religion, but not on race, color, sex, or national origin. *See* EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982); EEOC Notice, N-915, September 23, 1987. If a religious school terminated a teacher's employment because she was pregnant, it likely would be deemed in violation of federal law because its decision was based on the teacher's sex. *See* Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996). However, if the decision to terminate the pregnant teacher's employment was because she was not married at the time she became pregnant and the school's religious doctrine forbade sex outside of marriage, the school's decision likely would be characterized discrimination based on religion. *Id.*

to serve such beneficiaries constitutes a substantial burden on religion that would require strict scrutiny under RFRA.

Health Care

In addition to the implications of the Court's latest interpretation of RFRA in the context of the ACA, likely the most prominent legislation ever passed to govern various issues in health care law and policy, there are a number of other issues in health care that involve religious objections. For example, all 50 states and the District of Columbia require children to be vaccinated for certain illnesses and diseases before entering schools.[133] Also as a matter of public health, individuals with highly contagious diseases have been subject to potential quarantine to avoid the spread of the illness.[134] Some religious denominations believe that certain health care measures would violate their religious beliefs, and individuals may object to such policies as a matter of religious belief. Accordingly, many states have adopted exceptions for religious objections.[135] However, under a broad definition of *substantial burden*, the class of recognized objections to such matters could be expanded significantly.

Photo Identification

Members of some religious groups may object to having their photograph taken, as many identification laws require. The teachings of several religious groups may prohibit their members from being photographed in general or from revealing some parts of the body.[136] Identification laws that require individuals to be photographed or require individuals to be photographed without head coverings may infringe upon these individuals' religious exercise, leading to potential challenges regarding whether the individuals' religious objections must be accommodated under religious freedom protections such as RFRA. While many of these requirements are state laws that would depend on state religious freedom protections (e.g., driver's license requirements, voter ID requirements), there are some federal requirements or related interests that could trigger a challenge under the federal RFRA (e.g., passport requirements).[137]

Notably, the Supreme Court has considered the validity of state voter identification laws, and acknowledged issues related to religious objections, though it did not rule definitively on such issues.[138] Some Justices have criticized certain methods of accommodation of religious objections

[133] "State Vaccination Requirements," Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html.

[134] "Specific Laws and Regulations Governing the Control of Communicable Diseases," Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/quarantine/SpecificLawsRegulations.html; "State Quarantine and Isolation Statutes," National Conference of State Legislatures (October 2014), *available at* http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx.

[135] "States with Religious and Philosophical Exemptions from School Immunization Requirements," National Conference of State Legislatures (January 2016), *available at* http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.

[136] For example, some Christians, including some Amish, believe photographs violate the Ten Commandments. Members of other religious groups may believe that members must wear head coverings or veils for religious reasons.

[137] For a discussion of litigation related to photo identification requirements, see CRS Report R40515, *Legal Analysis of Religious Exemptions for Photo Identification Requirements*.

[138] *See* Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

to photo identification requirements adopted at the state level as too great a burden on those individuals with objections.[139]

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[139] *See id.* at 200 n. 19 (2008) (Stevens, announcing judgment of the Court) (opinion joined by Chief Justice Roberts and Justice Kennedy); *id*. at 216-17 (Souter, J., dissenting) (opinion joined by Justice Ginsburg).